THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 1st December, 2017

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

Crl.A. No.32 of 2016

Appellant : Taraman Kami,
S/o Shri Parcha Bir Kami,
R/o Lower Kamling,
West Sikkim
[Presently in Central Prison,
Rongyek, East Sikkim].

versus

Respondent : State of Sikkim

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

Appearance

Mr. Jorgay Namka, Advocate (Legal Aid Counsel) with Ms. Panila Theengh, Advocate 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.

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and

Crl.A. No.13 of 2017

Appellant : State of Sikkim

versus

Respondent : Taraman Kami,
S/o Shri Parcha Bir Kami,
R/o Lower Kamling,
West Sikkim
[Presently in Central Prison,
Rongyek, East Sikkim].

Application under Sections 377 of the Code of Criminal Procedure, 1973

Appearance

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

Mr. Jorgay Namka, Advocate (Legal Aid Counsel) with Ms. Panila Theengh, Advocate for the Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. Crl.A. No.32 of 2016 (*Taraman Kami* vs. *State of Sikkim*) and Crl.A.13 of 2017 (*State of Sikkim* vs. *Taraman Kami*) are being disposed of by this common Judgment, being related matters.

2. In Crl.A. No.32 of 2016, the Learned Court of the Special Judge (POCSO), West Sikkim, at Gyalshing, in Sessions Trial (POCSO) Case No.05 of 2016, convicted the Appellant for incestuous sexual assault under Sections 5(l) and 5(n) of the Protection of Children from Sexual Offences Act, 2012 (for brevity "POCSO Act"), and under Section 506 of the Indian Penal Code (for short the "IPC"), vide the impugned Judgment dated 27-09-2016. He was sentenced to rigorous imprisonment of 10 (ten) years and fined Rs.5,000/- (Rupees five thousand) only, under Sections 5(l) and 5(n) of the POCSO Act, with a default stipulation, and simple imprisonment of one year under Section 506 of the IPC. The sentences were ordered to run concurrently, duly setting off the detention already undergone by the Appellant. The Judgment and Order on Sentence are being assailed in this Appeal.

3. In Crl.A. No.13 of 2017, the State-Appellant assailed the Order on Sentence detailed hereinabove, and prayed for imposition of the maximum sentence provided by law, *inter alia*, on grounds that the Learned Trial Court failed to consider the incestuous nature and gravity of the offence, the perpetrator being the father of the victim. This was vehemently resisted by Counsel for the Respondent on the premise that no such offence against the victim had been made out beyond a reasonable doubt by the Prosecution.

4. Advancing his arguments on behalf of the Appellant in Crl.A. No.32 of 2016, Learned Counsel put forth the contention that although the mother of the victim, P.W.9, is said to have lodged Exhibit 5, the First Information Report (FIR), her evidence to the contrary, would establish that she was an illiterate person and therefore, unaware of the contents of Exhibit 5, which thereby remained unproved. Secondly, Exhibit 5, pertains to sexual assault on the "Victim B", the younger daughter of the Appellant and the Complainant, and not "Victim A", their elder daughter, who was listed only as Prosecution Witness No.3 and deposed as such. Despite the absence of an FIR against the Appellant alleging offence by him on P.W.3, the Investigating Officer (I.O.) proceeded to file a Charge-Sheet against him for allegedly perpetrating rape on her as well, while the Learned Trial Court recorded the statement of P.W.3 as "Victim A", sans FIR. That, P.W.3 is already married and leading a family life. Besides, the offence of penetrative sexual assault by the Appellant against "Victim B", P.W.4, has also not been established, but the Court has relied on the evidence of P.W.3 to

establish the case of "Victim B". The Medical Report of P.W.4 fails to support the Prosecution case. That apart, P.W.4 had infact never claimed intimidation by the Appellant to make out a case under Section 506 of the IPC. Thus, from the anomalies that appear in the Prosecution case, the Appellant deserves an acquittal.

5. Rebutting the stance of the Appellant, Learned Public Prosecutor drew the attention of this Court to Section 29 of the POCSO Act and predicated that the Statute mandates that if the child has alleged the commission of an offence under any of the Sections detailed therein, the Court shall presume that such an offence has taken place. It was further contended that the statement of P.W.4 under Section 164 Code of Criminal Procedure, 1973 (for short "Cr.P.C.") is corroborated by her evidence in Court, which in turn is corroborated by her medical evidence, Exhibit 7. That, although the Appellant was afforded an opportunity under Section 313 Cr.P.C. to establish his innocence, he failed to take advantage of the said circumstance which establishes his guilt. It was next contended that minor discrepancies pointed out by the Appellant do not vitiate the Prosecution case, strength was drawn from the decisions in ***State represented by Inspector of Police*** vs. ***Saravanan and Another***[1] and ***State of Himachal Pradesh*** vs. ***Sanjay Kumar alias Sunny***[2]. That, it is settled law that absence of injuries on the person of the victim cannot lead to an inference of consensual sexual intercourse or that the offence of rape was not committed.

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[1] (2008) 17 SCC 587
[2] (2017) 2 SCC 51

The above submission were fortified with reliance on ***State of H.P.*** vs. ***Asha Ram***[3] and ***Krishan*** vs. ***State of Haryana***[4]. That, the Medical Report of the victim, Exhibit 7, clearly establishes that there was an old healed tear in the *fourchette* and since the offence was reported after about a month of the incident, it was likely that any injury in the *fourchette* had healed. In the circumstances, the Appeal be dismissed.

6. The arguments of Learned Counsel for the parties were heard at length and given due consideration. All documents on record were meticulously examined and considered, as also the citations made at the Bar.

7. It is the Prosecution case that, on 03-12-2015, at 1530 hours, the Naya Bazar Police Station, West Sikkim, received Exhibit 5, the FIR, from P.W.9, the victim's mother, stating that, P.W.4, the 14 year old victim, had revealed to her on 03-12-2015, that, around a month back, the Appellant had sexually assaulted her. It was further revealed that in the past also the Appellant had made such attempts. A case was registered under Section 376 of the IPC read with Section 4 of the POCSO Act, on 03-12-2015, against the Appellant, and endorsed to the I.O., P.W.11, for investigation. The Appellant who was alleged to have absconded from the area on 03-12-2015 was apprehended on 09-02-2016 from a quarry site near the river Ringyang, below Singla Bridge, West Bengal and brought to Naya Bazar P.S. During the course of investigation, it came to light

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[3] (2005) 13 SCC
[4] (2014) 13 SCC 574

that P.W.3 the Appellant's elder daughter had also been subjected to sexual assault by the Appellant, therefore, her statement under Section 161 Cr.P.C. was recorded. On completion of investigation, Charge-sheet was submitted against the Appellant for the offences under Sections 376/377/354/506 of the IPC read with Sections 6/10/12 of the POCSO Act, for perpetuating these offences against his minor daughters, allegedly 17 and 14 years old at the time of offence.

8. Upon hearing Learned Counsel for the opposing parties, the Learned Trial Court framed Charge against the Appellant under Section 5(l) of the POCSO Act, for repeated penetrative sexual assault and Section 5(n) of the POCSO Act for incestuous penetrative sexual assault, on the minor "Victim A" and for the self-same offences against the minor "Victim B" and under Section 506 of the IPC. Having understood the Charges, the Appellant entered a plea of "not guilty", trial thus commenced. The Prosecution examined 11 (eleven) witnesses, including the I.O. of the case, on closure of which the Appellant was examined under Section 313 of the Cr.P.C. and the arguments of opposing parties heard. An analysis of the evidence on record resulted in the impugned judgment and Order on Sentence.

9. What falls for determination before this Court is;

(i) *Whether the Appellant can be convicted and sentenced for an alleged offence against "Victim A", P.W.3, sans FIR, based on her statement under Section 161 of the Cr.P.C.?*

(ii) Whether there was any perversity in the impugned Judgment of the Learned Trial Court?

10. Addressing the first question *supra*, under the Scheme of the Code of Criminal Procedure, the Criminal Justice System is set into motion by the lodging of the information relating to the commission of the offence, in other words, by the lodging of a Complaint as envisaged in Section 154 of the Cr.P.C. If the Police Officer is satisfied that a cognizable offence has been committed, he is bound to record the information and launch an investigation into the matter. It is, of course, not necessary that he has to be satisfied about the veracity of the information, which will emerge only on a complete investigation. Shortcomings, if any, in the FIR will not absolve him of his duty to collate the information. In ***State of Haryana and Others*** vs. ***Bhajan Lal and Others***[5], the Hon'ble Supreme Court dealing with an offence under the Prevention of Corruption Act, while discussing Section 154(1) of the Cr.P.C., observed, *inter alia*, held that;

> **"32.** ……. An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence.
>
> **33.** It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.
>
> ……..

[5] 1992 Supp (1) SCC 335

> **36.** Section 157(1) requires an officer in charge of a police station who 'from information received or otherwise' *has reason to suspect* the commission of an offence — that is a cognizable offence — which he is empowered to investigate under Section 156, to forthwith send a report to a Magistrate empowered to take cognizance of such offence upon a police report and to either proceed in person or depute any one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed to the spot, to investigate the facts and circumstances of the case and if necessary, to take measures for the discovery and arrest of the offender. ……. Section 156(1) which is to be read in conjunction with Section 157(1) states that any officer in charge of a police station may without an order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of the concerned police station would have power to enquire into or try under provisions of Chapter XIII. Section 156(3) vests a discretionary power in a Magistrate empowered under Section 190 to order an investigation by a police officer as contemplated in Section 156(1). ……..**"**
>
> [emphasis supplied]

11. In ***Prakash Singh Badal and Others*** vs. ***State of Punjab and Others***[6] the Hon'ble Supreme Court while discussing the same provision held that;

> **"65.** The legal mandate enshrined in Section 154(1) is that every information relating to the commission of a "cognizable offence" [as defined under Section 2(*c*) of the Code] if given orally (in which case it is to be reduced into writing) or in writing to "an officer in charge of a police station" [within the meaning of Section 2(*o*) of the Code] and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as "first information report" and which act of entering the information in the said form is known as registration of a crime or a case.
>
> **66.** At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the police officer concerned cannot embark upon an enquiry as to whether the information laid by the informant is

[6] (2007) 1 SCC 1

reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157 thereof. In case an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by sub-section (3) of Section 154 of the Code.

…….

68. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.**"**

12. In ***Lalita Kumari*** vs. ***Government of Uttar Pradesh and Others***[7] the Hon'ble Supreme Court once again held that;

"93. The object sought to be achieved by registering the earliest information as FIR is inter alia twofold: one, that the criminal process is set into motion and is well documented from the very start; and second, that the earliest information received in relation to the commission of a cognizable offence is recorded so that there cannot be any embellishment, etc. later.

120. …….

120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

120.2. If the information received does not disclose a cognizable offence but indicates the

[7] (2014) 2 SCC 1

> necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.
>
> **120.3.** If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.
>
> **120.4.** The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.
>
> ……."

13. On a reading of the above rationale, it is indeed explicit that when an offence is committed it is imperative that a complaint under Section 154 of the Cr.P.C. is lodged at the Police Station, and the Police shall take steps as enumerated hereinabove. Thus, in the instant case, if the I.O. had during investigation stumbled upon an offence of like nature committed by the Appellant, against P.W.3, it was his bounden duty to record the facts stated by the person, treat it as a Complaint under Section 154 of the Cr.P.C., register a fresh Complaint and carry out investigation into the matter, the alleged offence against P.W.3 being independent of the offence perpetrated on P.W.4. Under no circumstances can he adopt a short cut route, foregoing legal provisions and file a Charge-Sheet on the basis of a Section 161 Cr.P.C. statement of a witness. At best, Section 161 Cr.P.C. statement of a witness can be used by either party for contradictions or omissions when the witness adduces evidence before a Court and is never to be considered as substantive evidence. In such a situation also, when the person makes

contradictory statements either before different fora or at different stages of a matter, if his statement is sought to be contradicted his attention should be called to those parts which are to be used for contradicting him as provided in Section 145 of the Evidence Act, 1872. The provisions of law have to be comprehended by the I.O., who is then to proceed in terms perspicuously set out thereof. The accused for his part is entitled to know the contents of an FIR which connect him with the offence to enable him to protect his interest.

14. In ***Youth Bar Association of India*** vs. ***Union of India and Others***[8] the Hon'ble Supreme Court while issuing directions to the States to upload each and every FIR registered in all the Police Stations within the territory of India in their official website, observed, *inter alia*, that;

> **"12.** .....
>
> (a) An accused is entitled to get a copy of the First Information Report at an earlier stage than as prescribed under Section 207 of the Cr.P.C.
>
> (b) An accused who has reasons to suspect that he has been roped in a criminal case and his name may be finding place in a First Information Report can submit an application through his representative/agent/ parokar for grant of a certified copy before the concerned police officer or to the Superintendent of Police on payment of such fee which is payable for obtaining such a copy from the Court. On such application being made, the copy shall be supplied within twenty-four hours.
>
> (c) Once the First Information Report is forwarded by the police station to the concerned Magistrate or any Special Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the Court concerned within two working days. The aforesaid direction has nothing to do with

[8] MANU/SCOR/18594/2016

> the statutory mandate inhered under Section 207 of the Cr.P.C.
>
> .....
>
> (h) In case a copy of the FIR is not provided on the ground of sensitive nature of the case, a person grieved by the said action, after disclosing his identity, can submit a representation to the Superintendent of Police or any person holding the equivalent post in the State. The Superintendent of Police shall constitute a committee of three officers which shall deal with the said grievance. As far as the Metropolitan cities are concerned, where Commissioner is there, if a representation is submitted to the Commissioner of Police who shall constitute a committee of three officers. The committee so constituted shall deal with the grievance within three days from the date of receipt of the representation and communicate it to the grieved person.
>
> ....."

The above ratio emphasises the importance of an FIR in a criminal offence, in the absence of which an individual cannot be roped in for an offence, based on the statement of a witness, derived during the investigation of a case. Thus, in view of the gamut of discussions which have taken place hereinabove, it concludes that the answer to the first question is in the negative.

15. Addressing the next question flagged hereinabove, after traversing the Prosecution evidence in its entirety, there is no gainsaying that contradictions do not stare one on the face which are being enumerated as follows;

(i) According to P.W.9, the Police came to her home on 03-12-2015 at around 12 noon making enquires about charcoal, after which, she along with the Appellant and P.W.4 were led to the Naya Bazar Police Station where en route the Appellant allegedly

fled. P.W.4, as borne out by the cross-examination of P.W.9, for the first time revealed to her at the Police Station that the Appellant used to sexually assault her, the revelation was also made before two Police personnel leading to preparation of Exhibit 5 scribed by **"***one sir of Nayabazar police station***"**.

(ii) P.W.11 the I.O. would have us believe that on 03-12-2015 he received Exhibit 5 from P.W.9 at 1530 hours, the incident having been revealed to her by P.W.4 that same morning. No revelations of enquiries on charcoal make way into his evidence.

(iii) P.W.5 would depose that she along with P.W.1 and P.W.6 had gone to the "Reshi Out Post" after the victim on 03-12-2017 at around 7.30 p.m. came to her and told her that the Appellant had exposed his genital to her in the cowshed, no information having been given of any other sexual assault by the Appellant on her. No documentary evidence substantiates the visit to the Police Out Post.

(iv) This evidence has to be considered in conjunction with the evidence of P.W.10, the doctor, according to whom, the victim was being medically examined by her on 03-12-2015 at 7.05 p.m. at Gyalshing District Hospital.

(v) Why this is startling is that the distance between Gyalshing and Naya Bazar is 40 kms. approximately

entailing a journey of not less than an hour by road. Could the victim possibly be at two places at almost the same time? No clarification on this aspect has been attempted by the Prosecution.

16. Be that as it may, the object and reasons of the POCSO Act and the mandate of Section 29 of the POCSO Act, are being borne in mind as we proceed further.

17. P.W.9 being illiterate did not scribe Exhibit 5, which according to her, was scribed (apparently) by a Police personnel at the Police Station, nevertheless a voluntary statement under cross-examination to the effect that **"***one sir scribed Exhibit-5 in my presence and read over the contents of Exhibit-5***"** acknowledging truth of the contents, assumes importance, as it establishes proof of the existence of Exhibit 5. The contents having been set out at the commencement of the facts above, need not be reiterated,.

18. That, having been said, it is only the "Victim B" who is a witness to the offence perpetrated by the Appellant. The Hon'ble Supreme Court in ***Rajinder @ Raju*** vs. ***State of H.P.***[9] observed that;

> **"21.** In the context of Indian Culture, a woman — victim of sexual aggression — would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration

[9] AIR 2009 SC 3022

> of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent. ....." [emphasis supplied]

19. The evidence of the victim is to be tested on the aforesaid principle. We deem it essential to reproduce the evidence given by the witness, which is stated as follows;

> **"**……
>
> *I do not remember the exact date, month and year but about six months ago my father used to keep calling me whenever my mother used to go for a work. One night I woke up with a feeling of something on my face, and I found my accused father rubbing his penis all over my face. I did not know what to do so I pinched my younger sister. When my sister woke up my accused father went upstairs. Thereafter my accused father used to often call me for the same act. One morning when I got up from my bed I felt severe pain on my private part and I went to the toilet and checked my private part and I was bleeding from my private part and there was a tear. Thereafter, I thought that my accused father might had been responsible for the same. After 2-3 days of the incident I narrated about the incident to my aunty …….***"**

It is admitted by her under cross-examination that she did not know what caused the alleged severe pain on her private part and how she had bled or how the tear had occurred. The other evidence remained uncontroverted.

20. In **"**A Textbook of Medical Jurisprudence and Toxicology**"** by Jaising P. Modi, Twenty-fifth Edition 2016, at Page 813, discussed Medico-Legal questions oft asked of which one such question is as follows;

> **"*(i) Can a Woman be Violated during Natural Sleep?*** *— It is impossible for complete sexual intercourse to be accomplished on a virgin during her natural sleep without her knowledge, as the pain caused by the first act of coitus would certainly awaken her from sleep. It is, however, possible, though indeed rare, for partial penetration, to occur in a virgin, within the terms of the law, without awakening her from sleep. It is also possible, though highly improbable for a woman to allow coitus during profound sleep without her being conscious of it, if the genital parts are large and accustomed to the intromission of the penis.***"**

21. Bearing this in mind, we may now turn to Exhibit 7, Medical Report of the victim. According to Exhibit 7, P.W.10 found the following;

> **"***……..*
>
> *Local examination —No bleeding/discharge seen.*
>
> *Hymen — Intact.*
>
> *Hygiene – Maintained.*
>
> *Fourchette — Old healed tear.*
>
> *……..*
>
> *Final Opinion — Clinical findings shows intact Hymen with old healed tear over the fourchette. Urine for Pregnancy Test is found Negative and vaginal swabs shows absence of spermatozoa.***"**

22. Consequently, considering the evidence of the victim together with Medical Report and the opinion given in **"**A Textbook of Medical Jurisprudence and Toxicology**",** it cannot be assumed, without proof thereof, that the Appellant had indeed committed the offence of penetrative sexual assault. It is well-settled by a catena of judicial pronouncements that, in a case of rape, a victim's evidence does not require corroboration, but at the same time her evidence should instil and inspire confidence. The Hon'ble Supreme Court in ***Asha Ram*** (*supra*) observed that;

> **"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 meance 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.**"**

23. While considering the matter at hand, we are alive to the aforesaid observation. The victim has admitted that she woke up from bed with severe pain on her private part and she 'assumed' that her father might be responsible. While keeping in mind the specific mandate of Section 29 of the POCSO Act, one cannot help but remark that, although the rough sketch map drawn by the I.O. shows a one storied house with three rooms, it is not clear why the victim has stated that her father went "upstairs" when she woke up her sister. It is also be appropriate to remark that, there are three rooms in the house and P.W.9 has specifically stated that **"***It is true that one room used to be occupied by me and the accused and the room adjoining the same used to be occupied by alleged victim 'B'*

*and my another daughter (sic), who is aged about 13 years***"**. No reason furnishes as to why the I.O. assumed that the victim was sharing the room with her parents. The evidence of P.W.11 appears to be discordant with the evidence of P.W.4 with regard to the threats held out by the Appellant, as she has nowhere stated that she had been threatened by her father, as evident from the deposition extracted hereinabove, contrary to this the I.O. persists that the Appellant had told her not to reveal the incident of the previous night, threatening to kill her if she did so.

24. In view of the evidence that has been reproduced hereinabove, it emerges with clarity that there was indeed sexual assault on the victim, but the fact of penetrative sexual assault by the Appellant on the victim has not been asserted by the victim nor established. The *fourchette* appears to have an old healed tear, but would it be judicious for the Court to convict the Appellant for such a wound, when neither the age of the wound is stated by P.W.10, nor has the victim been able to confirm unequivocally that it was the Appellant who was responsible for the injury.

25. The Hon'ble Supreme Court in ***Sanjay Kumar alias Sunny*** (*supra*) has observed that;

> **"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. ....."

Thus, there has to be judicial application of mind to the evidence before a Court, which should be reticent about drawing conjectures and conclusions without evidence. Nothing can be based on surmises or assumptions and the evidence furnished has to be viewed with dispassionate judicial scrutiny. The response to the second question, therefore, has to be answered in the positive.

26. It is also essential to address the argument of Learned Public Prosecutor that although the Appellant was afforded an opportunity under Section 313 of the Cr.P.C. to establish his innocence, he failed to take advantage of the said circumstance, which thereby establishes his guilt. The logic of this argument is undoubtedly contrary to law and fails to convince us. It would be apposite to rely on the decision of ***Nagaraj*** vs. ***State, Rep. by Inspector of Police, Salem Town, Tamil Nadu***[10] where it has been specifically held that;

> **"15.** In the context of this aspect of the law it is been held by this Court in Parsuram Pandey v. State of Bihar (2004) 13 SCC 189 : *(AIR 2004 SC 5068)* that Section 313 CrPC is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the Court in reaching its final conclusion; its intention is not to nail the accused, but to comply with the most salutary and fundamental principle of natural justice i.e. audi alteram partem, as explained in Arsaf Ali v. State of Assam (2008) 16 SCC 328 *: (AIR 2009 SC (supp) 654)*. In Sher Singh v. State of Haryana (2015) 1 SCR 29*:(AIR 2015 SC (cri) 481)* this Court has recently clarified that because of the language employed in Section 304B of the IPC, which deals with dowry death, the burden of proving innocence shifts to

[10] 2015 CRI.L.J. 2377 (SC)

> the accused which is in stark contrast and dissonance to a person's right not to incriminate himself. It is only in the backdrop of Section 304B that an accused must furnish credible evidence which is indicative of his innocence, either Under Section 313, CrPC or by examining himself in the witness box or through defence witnesses, as he may be best advised. Having made this clarification, refusal to answer any question put to the accused by the Court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an evasive or unsatisfactory answer, would not justify the Court to return a finding of guilt on this score. Even if it is assumed that his statements do not inspire acceptance, it must not be lost sight of that the burden is cast on the prosecution to prove its case beyond reasonable doubt. Once this burden is met, the statements under Section 313 assume significance to the extent that the accused may cast some incredulity on the prosecution version. It is not the other way around; in our legal system the accused is not required to establish his innocence. We say this because we are unable to subscribe to the conclusion of the High Court that the substance of his examination Under Section 313 was indicative of his guilt. If no explanation is forthcoming, or is unsatisfactory in quality, the effect will be that the conclusion that may reasonably be arrived at would not be dislodged, and would, therefore, subject to the quality of the defence evidence, seal his guilt. Article 20(3) of the Constitution declares that no person accused of any offence shall be compelled to be a witness against himself. In the case in hand, the High Court was not correct in drawing an adverse inference against the Accused because of what he has stated or what he has failed to state in his examination Under Section 313, Cr PC.**"**

27. As has been explained above, under Section 304B of the IPC the burden of proving his innocence shifts to the accused, but when examined under Section 313 of the Cr.P.C. if he opts not to give any response or a satisfactory response the Court cannot return a finding of guilt on this score. That, having been said, in cases under the POCSO Act also the burden undoubtedly shifts to the accused to prove his innocence for which opportunity is afforded to him under Section 30 of the POCSO Act. At the same time, this

court is aware that Section 29 of the POCSO Act mandates as follows;

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

Nevertheless, unsatisfactory response under Section 313 of the Cr.P.C. does not empower the Court to find him guilty. Other things being equal, it is only the mandate of Section 29 of the POCSO Act that binds the Court. The lucid position of law having been laid down, we need say no further.

28. It was also contended by Learned Public Prosecutor that Section 164 Cr.P.C. statement of P.W.4 is corroborated by her deposition. That, in the Section 164 Cr.P.C. statement of the victim, she has clearly stated that one night she found the Appellant inserting his penis into her anus. Admittedly, this statement finds no place in her evidence before the Court. Hence, the exposition that it ought to supplement the evidence given before the Court, in our considered opinion, is also contrary to law and, therefore, unacceptable. In the first place, Section 164 Cr.P.C. statement is not substantive evidence and it is infact the evidence of the witness which is given in the Court which may be corroborated by her Section 164 Cr.P.C. statement and not the other way around as postulated by Learned Public Prosecutor. Section 164 Cr.P.C. statement comes into play when the statement of any witness is recorded by a Magistrate during the course of an investigation and

can be used to impeach the credit of the Prosecution witness. However, it is clear that such a statement cannot be treated as substantive evidence even if the evidence given by the witness in the Court falls short of the statement made by her under Section 164 Cr.P.C. The lacuna in the Prosecution case cannot be filled by resorting to the statement under Section 164 Cr.P.C. first, and treating it as substantive evidence, which the Prosecution in the instant case, is urging this Court to do. The statement under Section 164 of the Cr.P.C. is recorded "*res inter alias acta"* which term denotes a thing done between others, to which a given person is not a party. The Appellant is not a party to the Section 164 Cr.P.C. statement of the witness and thus deprived of an opportunity to cross-examine the witness, hence the above discussed position of law.

29. Therefore, it is clear that the offence committed by the Appellant on the victim was an offence under Section 9(n) of the POCSO Act, i.e., aggravated sexual assault, the Appellant being the father of the victim, for which penalty is prescribed under Section 10. Further, in view of the doubt expressed by the victim herself with regard to the offence of penetrative sexual assault, it has not been established that the offence of Section 5(n) of the POCSO Act was committed by the Appellant. Also, a threat may have been held out by the Appellant to the victim, but in the absence of any such evidence given by the minor victim to establish an offence under Section 506 of the IPC, the Court cannot arrive at such a conclusion on assumptions, as suspicion however strong cannot replace proof.

30. In the facts and circumstances, the conviction meted out to the Appellant by the Learned Trial Court is set aside as also the sentence. Consequently, Crl.A. No.32 of 2016 is partly allowed.

31. The Appellant is convicted under Section 9(n) punishable under Section 10 of the POCSO Act. He is sentenced to undergo 5 (five) years imprisonment under the said Section and to pay a fine of Rs.2,500/- (Rupees two thousand and five hundred) only, in default thereof, to undergo simple imprisonment for a further period of two months.

32. In the circumstances, Crl.A. No.13 of 2017 stands dismissed.

33. No order as to costs.

34. Copy of this Judgment be transmitted to the Learned Trial Court for information and to the convict-Appellant.

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

Sd/-
(Bhaskar Raj Pradhan)
Judge
01-12-2017

Sd/-
(Meenakshi Madan Rai)
Judge
01-12-2017

Approved for reporting : **Yes**

Internet : **Yes**

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