THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 13th October, 2018

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

Crl. A. No.36 of 2017

Appellant : Mangala Mishra @ Dawa Tamang @ Jack

versus

Respondent : State of Sikkim

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

Appearance

Ms. Puja Lamichaney, Advocate (Legal Aid Counsel).

Mr. Karma Thinlay, Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutors with Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutor.

J U D G M E N T

Meenakshi Madan Rai, ACJ

1. The Learned Special Judge, Protection of Children from Sexual Offences (POCSO) Act, 2012, East Sikkim, at Gangtok, convicted the Appellant under Section 5(l) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short the "POCSO Act"), vide its impugned Judgment dated 19-09-2017. The impugned Order on Sentence dated 20-09-2017 sentenced the Appellant to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.2,000/- (Rupees two

thousand) only, for the offence aforestated, with a default clause of imprisonment.

2. Aggrieved, the Appellant is before this Court, *inter alia,* on grounds that the seizure of Exhibit 7 the Birth Certificate of the Victim, remained unproved, the date of birth of the Victim has not been established as the contents of Exhibit 7 were not proved by any witness of the Prosecution. That, it is now settled law as to how the age of a Victim is to be assessed and none of the parameters as laid down in ***Mahadeo s/o Kerba Maske*** vs. ***State of Maharashtra and Another***[1] have been complied with although witnesses being P.W.7, P.W.8 and P.W.9 were examined with regard to the Birth Certificate. P.W.2, the mother of the Victim, from whose possession the Birth Certificate was allegedly seized has made no mention of such seizure neither has she testified about the age of the Victim to establish that she was a minor. The Register containing the entry, if at all, of the date of birth of the Victim was not furnished before the Learned Trial Court. That apart, it is also evident from Exhibit 8 the FIR, that the father of the Victim had in fact lodged a Complaint on 25-05-2016 (May 2016) informing the Police that his daughter, the Victim, aged 15, was missing since 24-04-2016 (April 2016) at 2.30 p.m. which, however, was not reduced in writing but merely entered as a Diary Report and the case taken up as one under "Missing Children" being Case No.17/2016 dated 25-05-2016. The Learned Trial Court failed to appreciate that the evidence furnished before it did not prove that the Victim was a child as defined under Section

[1] (2013) 14 SCC 637

2(d) of the POCSO Act. That, material discrepancies have occurred in the evidence of the Prosecution, as P.W.9 ASI Tek Bahadur Chettri and P.W.15 PI Ajay Rai were not able to prove the date of lodging of the FIR and the date when the Victim was alleged to have gone missing. The Section 164 Code of Criminal Procedure, 1973 (for short "Cr.P.C.") statement of the Victim was incorrectly considered as substantive evidence by the Learned Trial Court, while the Victim was unable to prove that her statement was recorded under the said provision. Exhibit 12 the Medical Report of the Victim and Exhibit 15 the Report of the Regional Forensic Science Laboratory (RFSL), Sikkim, have not supported the Prosecution case of penetrative sexual assault. This evidence nevertheless was relied on by the Prosecution and the embellished and uncorroborated testimony of the Victim was duly considered by the Learned Trial Court. That, reliance has been placed on the statements of P.W.9 and P.W.16 who are both Investigating Officers (I.O.) which is impermissible. That, the Learned Trial Court failed to consider the claim of juvenility raised by the Appellant before the Court and erred in ignoring the principles laid down by Section 114(g) of the Indian Evidence Act, 1872 (for short the "Evidence Act"), when material witnesses and evidence were not produced by the Prosecution such as the father of the Victim and the FIR lodged by him. Hence, in view of the aforesaid circumstances the impugned Judgment and Order on Sentence deserves to be set aside and the Appellant acquitted of the Charges.

3. Resisting the stand of learned Counsel for the Appellant, learned Assistant Public Prosecutor would contend that the Prosecution has without doubt proved the age of the Victim as Exhibit 7, the Birth Certificate of the Victim, being an official document is admissible in evidence. The date of birth of the Victim on the Exhibit is reflected as "14-09-2001" thereby making her 15 years at the time of the incident, i.e., 25-05-2016. That, the claim of juvenility by the Appellant deserves no consideration as Exhibit 5 his Ossification Test would clearly indicate that his approximate bone age as per the Radiologist is above 20 years of age. That, the Learned Trial Court has correctly considered the statement of the Victim recorded under Section 164 of the Cr.P.C. which corroborated the evidence given by her in the Court. Exhibit 12, the Medical Report of the Victim, is testimony to the fact that the hymen of the Victim was ruptured establishing the offence of rape and of penetrative sexual assault. That, there are no anomalies with regard to the facts emerging in Exhibit 8 the FIR lodged by P.W.9 hence, no error emanates in the Prosecution case as well as the impugned Judgment and Order on Sentence of the Learned Trial Court. The Appeal thereby warrants dismissal.

4. The rival submissions put forth by learned Counsel for the parties were heard *in extenso*. The evidence and documents on records have also been meticulously perused by us.

5. We may briefly traverse the facts of the case as per the Prosecution for clarity in the matter. P.W.9, Assistant Sub-Inspector (ASI) Tek Bahadur Chettri of Singtam Police Station, received a

Complaint from the father of the Victim on 25-05-2016, to the effect that his daughter, aged 15 years, was missing since 24-04-2016 from 2.30 p.m. This information was recorded as a "Diary Report" at the Singtam Police Station the same day, as can be drawn from the details at Exhibit 8 FIR lodged by P.W.9, ASI Tek Bahadur Chettri. The Complaint of the father was registered as MC (Missing Children) Case No.17/2016 dated 25-05-2016 at the Singtam Police Station and endorsed to P.W.9 for investigation. P.W.9 (I.O.) suspecting that the missing child could be with the Appellant, kept the mobile number of the Appellant on surveillance which traced him to a village 'Kawli', District Baksa, Assam. P.W.9 contacted the NGO (Impulse) at the said place, who traced the alleged Victim to the home of the Appellant. She was handed over to the Tamalpur Police Station. P.W.9 recorded the facts and submitted it before the Station House Officer, Singtam Police Station on 06-05-2016 which was registered as FIR, Exhibit 8, bearing No.21/2016 dated 06-05-2016. The missing case was converted into one under Sections 363/365 of the Indian Penal Code, 1860 (for short "IPC") and registered against the Appellant and endorsed to Sub-Inspector Sonam Thendup Bhutia, P.W.16 for investigation. The Appellant was arrested in Assam on 08-05-2016 on a Non-Bailable Warrant of Arrest issued by the Learned Chief Judicial Magistrate, East at Gangtok, and produced under transit warrant issued by the Learned Judicial Magistrate, Nalbari. The Victim was also brought from the same place and forwarded for medical examination to the Singtam District Hospital, while the Appellant was forwarded to the Juvenile Observation Home by the Principal Magistrate, Juvenile Justice

Board, North at Mangan, due to lack of proof of age. An Ossification Test of the Appellant was conducted which determined his age as twenty years following which he was remanded to judicial custody. Case Exhibits were forwarded to RFSL, Saramsa, for chemical analysis.

6. Investigation unravelled that the Appellant who was working as a plumber in Singtam met the Victim at her school there in February 2016 where they got acquainted with each other and fell in love. The Appellant thereafter sexually assaulted the minor Victim several times below the school jungle. The brother of the Victim, P.W.4 had seen her talking to the Appellant on one occasion and reprimanded her, two days later the Appellant and the Victim met again and the Appellant suggested that the Victim elope with him. The same night they eloped, left for Siliguri and reached Jaigaon, where they met the Appellant's mother. She expressed her displeasure at the Appellant bringing home a school going child fearing legal consequences. Consequently, the Appellant took the minor Victim to his brother's house in Baksa, Assam, where they stayed and allegedly had sexual intercourse twice. On completion of investigation, finding a *prima facie* case Charge-Sheet was submitted against the Appellant under Sections 363/365/376 of the IPC read with Section 4 of the POCSO Act.

7. The Learned Trial Court on consideration of the *prima facie* materials framed Charges against the Appellant under Sections 363, 366 and 376(2)(n) of the IPC read with Section 5(l) of the POCSO Act, punishable under Section 6 and directed trial on the

plea of "not guilty" by the Appellant. The Prosecution furnished sixteen witnesses including the I.O. of the case. On completion of evidence the Appellant was examined under Section 313 of the Cr.P.C., the final arguments heard and the impugned Judgment and the Order on Sentence pronounced.

8. The questions that now plague this Court and require determination are;

(i) Whether two First Information Reports can exist in one case?

(ii) Whether the Prosecution was able to establish that the Victim was a child, as defined under Section 2(d) of the POCSO Act?

(iii) Whether the Appellant was a "child in conflict with law" and had not completed eighteen years of age on the date of commission of the offence?

9. While answering the first question the provision of Section 154 of the Cr.P.C. is extracted hereinbelow for easy reference which we may briefly examine to assess what the provision entails. Section 154 of the Cr.P.C. pertains to information in cognizable cases and provides that;

> **"154. Information in cognizable cases.**–(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and can be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.
>
> ……..

> (2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.
>
> ……..**"**

10. The term "First Information" has not been defined in the Code nor is there any mention of such a term however it is now a settled position that information given to a police officer concerning an offence means something in the nature of a complaint or accusation. It may well be information of a crime which sets the criminal law justice system in motion. The provisions of Section 154 of the Cr.P.C. are mandatory and the concerned Police Officer is duty bound to register the case on the basis of information disclosing cognizable offence, this was held in ***Ramesh Kumari*** vs. ***State (N.C.T. of Delhi) and Others***[2]. Thus, the condition which is *sine qua non* for recording a First Information Report is that, there must be information, which must disclose a cognizable offence before the Officer-in-Charge of the Police Station. Upon receipt of such information, the law requires the police officer to reduce the information in writing if given orally which shall be read over to the informant. Where such information is a written complaint or one which has been reduced to writing it shall be signed by the person giving the information. The substance of the information is to be entered in a book to be kept by such Officer in terms of the rules prescribed by the Government. The Section also requires that a copy of the information so recorded under Sub-Section (1) shall be given free of cost to the informant. It is thus incumbent upon the Officer

[2] AIR 2006 SC 1322

at the Police Station to record a Complaint when a cognizable offence is reported and treat it as an FIR. This discussion puts into place the requirements of Section 154 of the Cr.P.C.

11. According to P.W.9, on 25-05-2016, the father of the Victim filed a Missing Child Report at the Singtam Police Station regarding his minor daughter who went missing from the afternoon of 24-05-2016. The Missing Child Report was registered at Singtam Police Station as MC Case No.17 of 2016, dated 25-05-2016. It is pertinent to point out that the records of the case are bereft of this Report. The father of the Victim who allegedly lodged the report is notably not a Prosecution witness for reasons best known to the Prosecution which leads this Court to draw an adverse inference under Section 114(g) of the Indian Evidence Act. On this aspect of the report filed by the Victim's father, we may also consider the evidence of P.W.2 the Victim's mother. Her evidence to the contrary is that the Victim child went missing since 24-04-2016, thereafter, she tried to locate her and informed the Singtam Police Station that her daughter was missing. Her cross-examination would reveal that she had lodged a written missing report at the Singtam Police Station. This written report also finds no place in the records of the Prosecution case. P.W.2 has further specified in her evidence that on 05-05-2016 that her son received a telephone call on his mobile from the Appellant who informed him that his name was Jack Tamang and that the Victim was with him in Gangtok. When the Police recorded her statement she informed the Police about the information received by her son on his cell phone from the said

Jack. Now, when we revisit Exhibit 8 the report of P.W.9 *inter alia* reads as follows;

> **"**…….
>
> *B. B. …….. East Sikkim had lodged a diary report on **25/05/2016**, to the effect that his daughter H……. aged 15 was missing since **24.04.2016** at 2.30 p.m. ……**"**.*

This is contrary to his evidence where he states that the Victim's father had told him that the child was missing from the afternoon of **24-05-2016**. At the same time it is relevant to notice that Exhibit 8 corroborates the evidence of P.W.2 who has stated that the Victim was missing from the afternoon of 24-04-2016.

12. Exhibit 8 is said to be recorded on 06-05-2016 but if the Victim's father lodged a Diary Report only on 25-05-2016 as reflected in Exhibit 8 then how was it possible for P.W.9 to make a GD Entry on 06-05-2016, viz.; prior in time. This is indeed baffling and mind boggling. What can thus be culled out from the records is that the child went missing on 24-04-2016, P.W.2 as per her lodged a report at the Singtam Police Station. This was not recorded. P.W.16 the I.O. of the instant case would admit that the Victim's mother filed a missing report in connection with the Victim going missing. He also admitted that he has not filed the records of the enquiry into the missing report along with the Charge-Sheet or the missing report filed by the Victim's mother. Apparently the Police lost track of who was the Complainant or the date when the Victim went missing. P.W.15, the SHO Singtam P.S. also in tandem with the evidence of P.W.9 states that the Victim's father lodged a missing report on 25-05-2016 to the effect that his daughter was

missing from 24-05-2016 but strangely enough goes on to state that based on such missing report an enquiry was made by P.W.9 on 06-05-2016. The Prosecution would indeed have us believe in the limerick of the young lady named Bright, whose speed was faster than light, she set out one day in a relative way and returned on the previous night. In view of the anomalies arising in the Prosecution case it is evident that efforts are being made by P.W.9, P.W.15 and P.W.16 to suppress their follies in the instant matter resulting in a preposterous situation.

13. The Hon'ble Supreme Court in ***Amitbhari Anilchandra Shah*** vs. ***Central Bureau of Investigation and Another***[3] was dealing with the question of two FIRs lodged in the matter and would hold as follows;

> **"58.5.** The first information report is a report which gives first information with regard to any offence. There cannot be second FIR in respect of the same offence/event because whenever any further information is received by the investigating agency, it is always in furtherance of the first FIR.
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> **58.6.** In the case on hand, as explained in the earlier paragraphs, in our opinion, the second FIR was nothing but a consequence of the event which had taken place on 25-11-2005/26-11-2005. We have already concluded that this Court having reposed faith in CBI accepted their contention that Tulsiram Prajapati encounter is a part of the same chain of events in which Sohrabuddin and Kausarbi were killed and directed CBI to "take up" the investigation.
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> ……..
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> **60.** In view of the above discussion and conclusion, the second FIR dated 29-4-2011 being RC No. 3(S)/2011/Mumbai filed by CBI is contrary to the directions issued in judgment and order dated 8-4-2011 by this Court in *Narmada Bai* v. *State of Gujarat* [(2011) 5 SCC 79 : (2011) 2 SCC (Cri) 526] and accordingly the same is quashed. As a consequence, the charge-sheet filed on 4-9-2012, in

[3] (2013) 6 SCC 348

> pursuance of the second FIR, be treated as a supplementary charge-sheet in the first FIR. It is made clear that we have not gone into the merits of the claim of both the parties and it is for the trial court to decide the same in accordance with law. Consequently, Writ Petition (Crl.) No. 149 of 2012 is allowed. Since the said relief is applicable to all the persons arrayed as accused in the second FIR, no further direction is required in Writ Petition (Crl.) No. 5 of 2013.**"**

14. In ***Anju Chaudhary*** vs. ***State of Uttar Pradesh and Another***[4] the Supreme Court would again consider the question of a second FIR in respect of the same offence or incident forming part of the same transaction as contained in the first FIR and discuss its permissibility.

> **"14.** On the plain construction of the language and scheme of Sections 154, 156 and 190 of the Code, it cannot be construed or suggested that there can be more than one FIR about an occurrence. However, the opening words of Section 154 suggest that every information relating to commission of a cognizable offence shall be reduced into writing by the officer-in-charge of a police station. This implies that there has to be the first information report about an incident which constitutes a cognizable offence. The purpose of registering an FIR is to set the machinery of criminal investigation into motion, which culminates with filing of the police report in terms of Section 173(2) of the Code. It will, thus, be appropriate to follow the settled principle that there cannot be two FIRs registered for the same offence. However, where the incident is separate; offences are similar or different, or even where the subsequent crime is of such magnitude that it does not fall within the ambit and scope of the FIR recorded first, then a second FIR could be registered. The most important aspect is to examine the inbuilt safeguards provided by the legislature in the very language of Section 154 of the Code. These safeguards can be safely deduced from the principle akin to double jeopardy, rule of fair investigation and further to prevent abuse of power by the investigating authority of the police. Therefore, second FIR for the same incident cannot be registered. Of course, the investigating agency has no determinative right. It is only a right to investigate in accordance with the provisions of the Code. The filing of report upon completion of investigation, either for cancellation or alleging commission of an offence, is a matter which

[4] (2013) 6 SCC 384

> once filed before the court of competent jurisdiction attains a kind of finality as far as police is concerned, may be in a given case, subject to the right of further investigation but wherever the investigation has been completed and a person is found to be prima facie guilty of committing an offence or otherwise, re-examination by the investigating agency on its own should not be permitted merely by registering another FIR with regard to the same offence. If such protection is not given to a suspect, then possibility of abuse of investigating powers by the police cannot be ruled out. It is with this intention in mind that such interpretation should be given to Section 154 of the Code, as it would not only further the object of law but even that of just and fair investigation. More so, in the backdrop of the settled canons of criminal jurisprudence, reinvestigation or de novo investigation is beyond the competence of not only the investigating agency but even that of the learned Magistrate. The courts have taken this view primarily for the reason that it would be opposed to the scheme of the Code and more particularly Section 167(2) of the Code. (Ref. *Reeta Nag* v. *State of W.B.* [(2009) 9 SCC 129 : (2009) 3 SCC (Cri) 1051] and *Vinay Tyagi* v. *Irshad Ali* [(2013) 5 SCC 762] of the same date.)**"**

The above ratio make it crystal clear that there cannot be two FIRs for the same offence. Although two FIRs have not been exhibited herein the evidence on record indeed leads one to such conclusion. The Missing Report is actually the FIR being prior in time to Exhibit 8 which in sum and substance is a report of steps taken by P.W.9 pursuant to the Missing Report. Exhibit 8 surely does not classify as an FIR. The matter being riddled with anomalies, lacking clarity about the lodging of an FIR is therefore untenable in the eyes of law.

15. The next question which is indeed the core issue at hand is taken up for consideration. Exhibit 7 the Birth Certificate of the Victim is said to have been issued from the District Hospital, Singtam, recorded as the place of birth of the Victim. Has this document been established in terms of the required legal

parameters? In our considered opinion, the answer would be in the negative. Learned Counsel for the State-Respondent would contend that the document is a public document requiring no proof. In this context, we may refer to Section 35 of the Evidence Act, which reads as follows;

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

16. Section 35 requires the following conditions to be fulfilled before a document can be held to be admissible under this Section;

(i) The document must be in the nature of an entry in any public or other official book, register or record;

(ii) It must state a fact in issue or a relevant fact; and

(iii) The entry must be made by a public servant in the discharge of his official duties, or in performance of his duties.

[***State of Bihar*** vs. ***Radha Krishna Singh and Others***[5]]

Such entries however must be established by necessary evidence. In addition to which the entries must be made by or under the direction of the person whose duty it is to make them at the relevant time. It is essential to show that the document was prepared by the public servant in the discharge of his official duty.

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[5] (1983) 3 SCC 118

17. Section 74 of the Evidence Act defines what public documents are and reads as follows;

> **"74. Public documents**.—The following documents are public documents:-
>
> (1) Documents forming the acts, or records of the acts—
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> (i) of the sovereign authority,
>
> (ii) of official bodies and tribunals, and
>
> (iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;
>
> (2) Public records kept in any State of private documents.**"**

18. In ***Madan Mohan Singh and Others*** vs. ***Rajni Kant and Another***[6] distinguishing between the admissibility of a document and its probative value, the Hon'ble Supreme Court would explain as follows;

> **"18.** Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in *Ram Prasad Sharma* v. *State of Bihar* [(1969) 2 SCC 359 : AIR 1970 SC 326], *Ram Murti* v. *State of Haryana* [(1970) 3 SCC 21 : 1970 SCC (Cri) 371 : AIR 1970 SC 1029], *Dayaram* v. *Dawalatshah* [(1971) 1 SCC 358 : AIR 1971 SC 681], *Harpal Singh* v. *State of H.P.* [(1981) 1 SCC 560 : 1981 SCC (Cri) 208 : AIR 1981 SC 361], *Ravinder Singh Gorkhi* v. *State of U.P.* [(2006) 5 SCC 584 : (2006) 2 SCC (Cri) 632], *Babloo Pasi* v. *State of Jharkhand* [(2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266], *Desh Raj* v. *Bodh Raj* [(2008) 2 SCC 186 : AIR 2008 SC 632] and *Ram Suresh Singh* v. *Prabhat* Singh [(2009) 6 SCC 681 : (2010) 2 SCC (Cri) 1194]. In these cases, it has been held that even if the entry was made in an official record by the official concerned in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.

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[6] (2010) 9 SCC 209

> **19.** Such entries may be in any public document i.e. school register, voters' list or family register prepared under the Rules and Regulations, etc. in force, and may be admissible under Section 35 of the Evidence Act as held in *Mohd. Ikram Hussain* v. *State of U.P.* [AIR 1964 SC 1625 : (1964) 2 Cri LJ 590] and *Santenu Mitra* v. *State of W.B.* [(1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587].
>
> **20.** So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, **they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value.** The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in school register/school leaving certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.
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> **21.** For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, government hospital/nursing home, etc., the entry in the school register is to be discarded. (Vide *Brij Mohan Singh* v. *Priya Brat Narain Sinha* [AIR 1965 SC 282], *Birad Mal Singhvi* v. *Anand Purohit* [1988 Supp SCC 604 : AIR 1988 SC 1796], *Vishnu* v. *State of Maharashtra* [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217] and *Satpal Singh* v. *State of Haryana* [(2010) 8 SCC 714 : JT (2010) 7 SC 500] .)
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> **22.** If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60 and 61, etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time, etc. mentioned therein. (Vide *Updesh Kumar* v. *Prithvi Singh* [(2001) 2 SCC 524 : 2001 SCC (Cri) 1300 : 2001 SCC (L&S) 1063] and *State of Punjab* v. *Mohinder Singh* [(2005) 3 SCC 702 : AIR 2005 SC 1868] .)" **[emphasis supplied]**

19. In the case at hand, the Prosecution furnished Exhibit 7 as the Birth Certificate of the Victim. P.W.7 and P.W.8 were produced by the Prosecution as witnesses to the seizure of the document. P.W.7 testified that the Police prepared a Property

Seizure Memo and seized the Birth Certificate from the Victim's mother, who had produced it at the Singtam Police Station. P.W.8 the second witness for the Seizure of Exhibit 7 would however state that he was called by the Victim's mother, P.W.2 to the Police Station in connection with the case relating to the Victim. According to him, the Police prepared Seizure Memo, Exhibit 6 and requested him to sign on the said document which he complied with. His specific testimony is that he did not see the Birth Certificate, Exhibit 7, which was shown to him in the Court on the day his evidence was recorded, although he identified Exhibit 6 and his signature thereon as Exhibit 6(b). He however deposed that the contents of Exhibit 6 were not read over and explained to him. The evidence of P.W.9 ASI Tek Bahadur Chettri reveals that he had seized the Birth Certificate from the "legal guardian" of the Victim at the Singtam Police Station. The witness reveals the said "legal guardian" to be the father of the Victim. The anomaly that arises in the evidence of P.W.7 and P.W.9 is that, according to P.W.9, Exhibit 6(d) and 6(e) are the signatures of the father of the Victim from whom he had seized the Birth Certificate, Exhibit 7. This is in contradiction to the evidence of P.W.7 according to whom it was seized from the mother of the Victim. In this context when we examine the evidence of P.W.2, the Victim's mother she has made no claim that Exhibit 7 was seized from her or that she had furnished Exhibit 7 at the Police Station. Infact her evidence is silent with regard to Exhibit 7 or on the aspect of the Victim's age. Although P.W.9 has identified Exhibit 6(c) as his signature on Exhibit 6 and the signatures purportedly of the Victim's father, but no explanation was furnished as to why the

father was not produced as a witness when besides being a seizure witness he was also the original Complainant as per P.W.9. Exhibit 7 no doubt records the date of birth of the Victim as "14-09-2001" but the origin of this document has remained an enigma. No Register of the Chief Registrar of Births and Deaths, Health & Family Welfare Department, Government of Sikkim, was furnished to substantiate that the entries made in Exhibit 7 drew strength from the entries in the Register. No witness was forthcoming as the person who made the entries in either any Register or Exhibit 7. Confounding the above confusion is Exhibit 6 the Property Seizure Memo which at Sl. No.4 recorded that property (Exhibit 7) was seized on 25-04-2016 at 11.50 hours. The dates which appear below the signatures of the witnesses and P.W.9 all are reflected the date as "25-04-2016". The perpetual anomalies in the dates of the Prosecution case leads to doubts regarding its veracity and strikes at the root of the Prosecution case. Merely because Exhibit 7 is a document furnished by the Prosecution in support of their case it cannot be accepted as gospel truth without fortification by way of supporting evidence, sans examination of its probative value.

20. It is also to be mentioned here that the matter at hand was registered on 06-05-2016, the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short "Juvenile Justice Act"), came into force on 15-01-2016, before the registration of the instant case. Section 94 of the Juvenile Justice Act provides for presumption and determination of age and reads as follows;

> **"94. Presumption and determination of age**.—(1) Where, it is obvious to the Committee or the Board,

based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.**”**

21. Although the said provision for is to gauge the age of a child in need of care and protection or a child in conflict with law and consequently for the use of the Child Welfare Committee constituted under Section 27 of the Juvenile Justice Act or the Juvenile Justice Board constituted under Section 4 of the Juvenile Justice Act, nevertheless this does not debar any Court from taking assistance of

the provisions of this Section to assess the age of the Victim by the methods prescribed therein. In ***Mahadeo*** *(supra)*, the Hon'ble Supreme Court has held that;

> **"12.** ..... Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rules 12(3)(a)(i) to (iii), the medical option can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well." **[emphasis supplied]**

22. Hence, if in the first instance the date of birth from the school or Matriculation Certificate of the child is unavailable then resort can be taken to a Birth Certificate given by a Corporation or a Municipal authority. It is only thereafter that the Prosecution can rely on the Ossification Test. As Exhibit 7 the Birth Certificate is of no assistance to the Prosecution and the Victim being a student of Class 7 did not possess a Matriculation Certificate the Ossification Test of the child could have been conducted. The provisions of the Section have not been complied with hence the Prosecution has failed to establish the first requirement of the case under POCSO Act, viz.; to establish that the Victim was below the age of 18 years as is the requisite provided under Section 2(d) of the POCSO Act. Thus, it is but apposite for this Court to reject Exhibit 7 as proof of age of the Victim which thereby remains unproved.

23. That having been said, we may next address the question which pertains to the age of the Appellant and is of equal importance. P.W.16, the I.O. of the instant case revealed that in the course of his investigation, he filed a requisition Exhibit 24

before the Principal Magistrate, Juvenile Justice Board, North Sikkim at Mangan seeking permission to conduct Ossification Test in respect of the Appellant for determination of his age. The I.O. identified Exhibit 4 as the requisition of Dr. O. T. Lepcha for the Ossification Test and Exhibit 5 as the Ossification Test Report. Dr. O. T. Lepcha is not a witness herein. Pending the enquiry regarding the age of the Appellant, he was forwarded to the Juvenile Observation Home. Upon receipt of the Report he was remanded to Judicial Custody in connection with the Case vide Exhibit 26, his age having been indicated as above 20 years.

24. P.W.6 Dr. K. Giri, the Principal Chief Consultant, Radiology, STNM Hospital, on receiving the requisition Exhibit 4 from Dr. O. T. Lepcha, the Medicolegal Specialist at STNM Hospital conducted Ossification Test of the Appellant. P.W.6 would give the following opinion after examining the Appellant;

> **"**The following X-rays of Mangala Mishra were taken:
>
> 1. Right wrist AP
> 2. Right elbow AP
> 3. Right knee AP
> 4. Right shoulder AP
> 5. Right hip with crest AP
>
> The above x-rays were studied by me and I came to the conclusion that the approximate bone age of Mangala Mishra was above 20 years.
>
> Accordingly, I prepared the Bone Age Estimation Report, Exbt. 5, shown to me in the Court today under my signature Exbt.5(a).**"**

25. Exhibit 5 referred to by the Expert reads as follows;

> **"**<u>Bone age estimation</u>
>
> Rt wrist AP – lower ends of radius & ulna fused.

> Rt elbow AP – all centres fused.
> Rt knee AP – lower end of jemur fused.
> Rt shoulder AP – acromion & coracoids fused.
> Rt hip and crest AP – iliac crest fused.
> Impr. Approx bone age above 20 years**"**

26. Pausing here for a minute, when we embark upon an examination of the evidence of this witness, it is clear in the first instance that his evidence would be covered by the provisions of Section 45 of the Evidence Act which deals with opinions of Experts. Medical evidence as is well settled is an opinion given by an Expert and deserves respect by the Court, however, this does not necessarily conclude as always being binding upon the Court. The Expert's evidence may be an opinion on facts such as a doctor giving his opinion as to the cause of a person's death or injury. But when calling an Expert's evidence the Prosecution must first establish the expertise of the witness by furnishing evidence to convince the Court that the witness is a competent witness. In ***State of Haryana*** vs. ***Bhagirath and others***[7] the Supreme Court would hold as follows;

> **"15.** The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject.**"**

[7] (1999) 5 SCC 96

27. On the bedrock of the principle so enunciated, the evidence of P.W.6 reveals that his expertise has not been established, the number of years he has put in as a Radiologist has not been alluded to raising a doubt about the competence of the witness. Added to that is the fact that the X-rays of the Appellant do not explain any circumstance pertaining to his age inasmuch as P.W.6 has failed to reveal what **"***Right wrist AP, Right elbow AP, Right knee AP, Right shoulder AP and Right hip with Crest AP***"** mean. It may be accepted medical terms but the Expert is without a doubt expected to clarify and elucidate the same to the understanding of the parties and the Court. This patently has been overlooked. Therefore, there is no basis for the Court to reach a finding as to the ground on which the Expert has reached his finding about the age of the Appellant and the satisfaction of the Court on this count is but nil. This evidence consequently cannot be taken into consideration. Undoubtedly the appearance of the Appellant was that of a minor prompting, the I.O. to file Exhibit 24 before the concerned Magistrate of the Juvenile Justice Board for age verification. The I.O. has failed to comply with the provisions of Section 94 of the Juvenile Justice Act. In such a circumstance, it is not possible to reach a final conclusion that the Appellant was indeed 20 years or above. In this aspect of the matter, useful reference may be made to the ratiocination of the Hon'ble Supreme Court in ***Arnit Das*** vs. ***State of Bihar***[8] in which while discussing authorities being ***Santenu Mitra*** vs. ***State of W.B.***[9], ***Bhola***

[8] (2000) 5 SCC 488
[9] (1998) 5 SCC 697

Bhagat vs. ***State of Bihar***[10] and ***Gopinath Ghosh*** vs. ***State of W.B.***[11] and to a number of other decisions which we do not propose to catalogue separately would *inter alia* hold that generally speaking these cases are authorities for the propositions that;

> **"19.** …….
>
> (*i*) the technicality of the accused having not claimed the benefit of the provisions of the Juvenile Justice Act at the earliest opportunity or before any of the courts below should not, keeping in view the intendment of the legislation, come in the way of the benefit being extended to the accused-appellant even if the plea was raised for the first time before this Court;
>
> (*ii*) a hypertechnical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases; and
>
> (*iii*) the provisions of the Act are mandatory and while implementing the provisions of the Act, those charged with responsibilities of implementation should show sensitivity and concern for a juvenile.
>
> ……**"**

It may be added here that this pertains to the Juvenile Justice Act, 1986, but the same principles apply to the matter at hand.

28. In ***Rajinder Chandra*** vs. ***State of Chhattisgarh and Another***[12] the Supreme Court would reiterate the principle laid down in ***Arnit Das*** (*supra*) and hold that while dealing with the question of determination of the age of the accused for the purpose of finding out whether he is a juvenile or not, a hypertechnical approach

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[10] (1997) 8 SCC 720
[11] 1984 Supp SCC 228
[12] (2002) 2 SCC 287

should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile. That if two views may be possible on the said evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases.

29. In the case of the Appellant there is no evidence whatsoever at hand to gauge his age. Once a claim of juvenility or a doubt arose that the Appellant was a juvenile, the correct procedure to be adopted was the one detailed in Section 94 of the Juvenile Justice Act. P.W.7 under cross-examination has revealed that the Police seized the Voter I.D. Card of the Appellant, Exhibit 24 substantiates this evidence. No reason obtains as to why it was eschewed as evidence. In the absence of conclusion proof of the age of the Appellant we lean in favour of the accused being a juvenile.

30. No proof of the age of the Victim or the Appellant exists the Victim has admitted that she eloped with the Appellant of her own free will and consented to sexual intercourse. P.W.3 has stated that he saw the alleged Victim at the work site of the Appellant proving that she was there voluntarily. P.W.4 the Victim's brother had also seen the Victim talking to the Appellant behind a Masjid on account of which he gave her a beating at home. The Appellant in such circumstances cannot be saddled with the offence of penetrative sexual assault on the alleged Victim.

31. In conclusion, we find that the Prosecution has failed to prove its case beyond a reasonable doubt.

32. The Appellant is acquitted of the offence under Section 5(l) punishable under Section 6 of the POCSO Act. He be set at liberty forthwith, if not required in any other matter.

33. Consequently, the impugned Judgment and Order on Sentence of the Learned Trial Court is set aside.

34. Appeal is allowed.

35. Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence, be reimbursed to him.

36. No order as to costs.

37. Copy of this Judgment be forwarded to the Learned Trial Court for information, along with its records.

Sd/-
(Bhaskar Raj Pradhan)
Judge
13-10-2018

Sd/-
(Meenakshi Madan Rai)
Acting Chief Justice
13-10-2018

Approved for reporting : **Yes**

Internet : **Yes**

ds/bp