THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)
DATED: 28.03.2019

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

Crl. Appeal No. 15 of 2017

Appellant : Lakhi Ram Takbi

versus

Respondent : State of Sikkim

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

Appearance:

Mr. Udai P. Sharma, Advocate (Legal Aid Counsel) with Mr. Mahendra Thapa, Advocate for the Appellant.

Mr. S.K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors for the State.

J U D G M E N T

Meenakshi Madan Rai, J

1. The Appellant was convicted under Section 3(a) and Section 5(j)(ii) of the Protection of Children from Sexual Offences Act, 2012 *(for short "POCSO Act, 2012")* and Section 376(1) of the Indian Penal Code, 1860 *(for short "IPC, 1860")* in S.T. (POCSO) Case No. 07 of 2015 by judgment dated

29.04.2017. Vide the order on sentence also dated 29.04.2017, he was sentenced to undergo Rigorous Imprisonment of seven years under Sections 3(a)/4 of the POCSO Act, 2012 and Rigorous Imprisonment of ten years under Sections 5(j)(ii)/6 of the POCSO Act, 2012. No separate sentence was imposed on him under Section 376(1) of the IPC, 1860 in view of Section 42 of the POCSO Act, 2012. The sentences were ordered to run concurrently. No sentence of fine was imposed.

2. Assailing the judgment and order on sentence, learned Counsel for the Appellant contended that no explanation is forthcoming for the belated lodging of the First Information Report *(for short "FIR")* Exhibit 15 on 17.12.2014, six months from the alleged incident, being June 2014. Neither the prosecutrix nor her immediate family had initiated steps for prosecuting the Appellant regarding the offence allegedly committed by him and it was only her brother-in-law who belatedly took the step. That, although reliance had been placed by the prosecution on the alleged Birth Certificates Exhibit 2 and Exhibit 10, of the prosecutrix, issued by the Registrar of Births and Deaths and the School Principal respectively and also on a certified copy of the School Admission Register, the contents of the documents remained unproved in the absence of examination of any witness in proof thereof. Consequently the age of the alleged victim too

was not proved. The original entries in the Register of Births maintained by the Registrar of Births and Deaths and of the School Admission Register were not placed before the learned trial Court. Moreover the Birth Certificate, Exhibit 2, issued by the Registrar of Births and Deaths was prepared fifteen months from the date of birth of the prosecutrix rendering the document suspect, therefore the learned trial Court was in error in relying on the aforestated documents. Besides, considering that the age of the victim was seventeen years and six months at the time of the alleged incident and that of the Appellant twenty one years, assuming that the act was committed it was evidently consensual and hence not a ground for convicting the Appellant. To buttress his submissions, reliance was placed by learned Counsel for the Appellant on ***Biradmal Singhvi vs. Anand Purohit***[1], ***Alamelu vs. State***[2] and ***Murugan alias Settu vs. State of Tamil Nadu***[3]. A peripheral argument emerged that in ***Sancha Hang Limboo v. State of Sikkim***[4] reliance was placed on ***Sham Lal alias Kuldip vs. Sanjeev Kumar and Others***[5] with regard to objection to documents at the appellate stage which was in fact a civil suit and the parameters in proving a criminal case and a civil suit differ. That in view of

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[1]AIR 1988 SC 1796

[2]2011 2 SCC 385

[3]2011 6 SCC 111

[4]MANU/SI/0001/2018

[5](2009) 12 SCC 454

the facts and circumstances stated the impugned judgment and order on sentence deserves to be set aside.

3. Mr. S.K. Chettri, learned Assistant Public Prosecutor repelling the arguments of the Appellant would submit that although the victim was seventeen years and six months at the time of the incident, the POCSO Act, 2012 defines a child in Section 2(1)(d) as any person below the age of eighteen years. In such a circumstance, even if the victim was seventeen years and six months she is covered by the ambit of the definition. Although the Appellant may only be twenty one years of age and even assuming that the act was consensual, it does not vindicate the Appellant since law states with clarity that consent of a minor is no consent. It was further urged that the Birth Certificate issued by the Headmaster of the School where the victim was studying reveals her date of birth as 21.12.1996 and is recorded as such in the School Register. This is further fortified by the Birth Certificate issued by the Registrar of Births and Deaths which also reflects the victim's date of birth as 21.12.1996. It was the specific argument of learned Assistant Public Prosecutor that as the Birth Certificate of the victim, Exhibit 2 and the other public documents relied on by the prosecution were admitted unassailed by the Appellant at the stage of evidence, objections cannot be raised in the Appellate forum. On this aspect, reliance was placed on the ratio of ***Sancha Hang***

Limboo *(supra)*. That the date of registration shown as 24.03.1998 on Exhibit 2, the Birth Certificate, is of no consequence in the instant matter as the document was obtained in 1998 much before the occurrence of the incident and cannot be said to be suspect. The statement of the victim suffices to convict the Appellant under the POCSO Act, 2012 as Section 29 therein provides that the Special Court shall presume that a person prosecuted for committing offence under Sections 3, 5, 7 and 9 of the POCSO Act, 2012 had committed the offence, unless the contrary is proved. Nothing to the contrary was proved by the Appellant. In the facts and circumstances stated hereinabove the judgment of the learned trial Court does not require any interference.

4. We have heard the rival contentions of learned Counsel for the parties at length and have carefully considered all evidence and documents on record. The impugned judgment and the order on sentence have also been carefully perused.

5. This Court is to consider whether the learned trial Court was in error in convicting the Appellant for the offences charged, based on the prosecution evidence. It is also to be considered whether the learned trial Court was in error in concluding that the victim was a minor, based on Exhibit 2, the Birth Certificate of the victim, the School Admission Register of which Exhibit 9 are certified copies and on Exhibit 10 issued by the Headmaster, certifying the date of birth of

the victim as 21.12.1996. Whether the documents *(supra)* were proved by the prosecution and whether the delay in lodging the FIR has been adequately explained.

6. We may now take stock of the facts in the instant matter. On 17.12.2014 at around 12:00 Hrs the complainant P.W.11, the brother-in-law of the victim, lodged the FIR Exhibit 15 at the Namchi Police Station, stating that his sister-in-law, the victim, P.W.7, was found to be seven months pregnant. On enquiry from her, she had revealed *inter alia* that the Appellant had been physically intimate with her. Namchi Police Station Case dated 17.12.2014 was registered against the Appellant under Section 376 IPC, 1860 read with Section 4 of the POCSO Act, 2012 and the matter investigated into which revealed that the victim a School dropout had been living with her parents. The Appellant and the victim P.W.7 used to converse frequently over the phone after P.W.8 the victim's friend gave P.W.7 his number. Sometime in the month of June, 2014 P.W.7 met the Appellant during the day, in the house of P.W.8. The same evening the Appellant called her to the house of P.W.8 on the pretext of handing over sweets and money. They however met enroute to the house of P.W.8 and decided to go to a vacant house near the house of P.W.8 where they had sexual intercourse and thereafter returned to their respective homes. The following morning the Appellant told the victim that he was leaving for Assam after

which they did not talk to each other for about two-three weeks, however, he returned to Sikkim later and then again left for Assam. Over a period of time her parents learnt of her pregnancy but fearing ignominy did not lodge a complaint before the Police which thus came to be reported only on 17.12.2014, vide Exhibit 15. Charge-Sheet was accordingly filed against the Appellant under Section 376 IPC, 1860 read with Section 4 of the POCSO Act, 2012. A supplementary Charge-Sheet came to be filed after DNA profiling established that the Appellant was the father of the victim's child.

7. The learned trial Court on 22.04.2015 framed charges against the Appellant under Section 3(a) punishable under Section 4 of the POCSO Act, 2012 and under Section 376(2) of the IPC, 1860. The Appellant put forth a plea of "not guilty" and claimed trial. The prosecution sought to furnish sixteen witnesses and evidence of the witnesses thereafter commenced. Witnesses from P.W.1 upto P.W.15 including the Investigating Officer, as P.W.13, were examined till 23.05.2016. On 14.06.2016 when the matter was fixed for the evidence of Dr. Soma Roy (CFSL expert, Kolkata) who was present, the learned trial Court noted that;

> "... in view of the minor victim having become pregnant as a consequence of the alleged sexual assault on her by the accused the charge under Section 5(j)(ii) of the Protection of Children from Sexual Offences Act, 2012(In short, "the POCSO Act, 2012") is required to be added to the already framed charges under the POCSO Act, 2012. ..."

Parties were afforded an opportunity to put forward their submissions if any in this context. The witness (Dr. Soma Roy) was not examined on that day and directed to appear on receipt of fresh summons from the Court. On 21.06.2016 the parties submitted that charge under Section 5(j)(ii) of the POCSO Act, 2012 was required to be added. The Court further noted that the charge under Section 376(2) of the IPC, 1860 was to be altered so as to indicate the specific charge *viz.* Section 376(2)(i) of the IPC, 1860. The charges as mentioned above were accordingly added and altered respectively, to which the Appellant once again entered a plea of "not guilty." The Court then considered it appropriate to hold a *de novo* trial and ordered accordingly by issuing summons to the Prosecution witnesses, which now numbered seventeen, with the addition of the Headmaster of the School which the victim had attended. (The propriety of ordering a *de novo* trial shall be discussed subsequently). On closure of prosecution evidence the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 *(for short "Cr.P.C., 1973")* thereby extending an opportunity to him to explain the incriminating evidence appearing against him. Final arguments of the parties were then advanced and the learned trial Court on the basis of the evidence and materials placed before it convicted the Appellant and sentenced him as already detailed hereinabove.

8. While considering the evidence of the Prosecution witnesses it is established that the Appellant and the victim were known to each other. The evidence of P.W.7 reveals that sometime in June, 2014 she became friendly with the Appellant after getting his number from P.W.8, her friend, and conversed with him on the cell phone. A few days later she met with the Appellant in the house of P.W.8. Later, that same evening, the Appellant called her and they met in a vacant house near the house of P.W.8 where she stated unequivocally that they had sexual intercourse. P.W.8, a friend of the victim admitted that she gave the Appellant's phone number to the victim and was witness to the fact that the victim and the Appellant had met each other. That, the victim had revealed to her that she had spent a night with the Appellant in a vacant house located near the house of the witness. P.W.13 and P.W.12 both Doctors, examined the victim on 17.12.2014. P.W.13 Dr. Bishal Pradhan, Medical Officer at District Hospital, Namchi had examined the victim at around 1.50 p.m. on 17.12.2014 i.e. the same day the FIR was lodged. The victim had been brought with an alleged history of sexual assault by the Appellant but no fresh injury was detected on her person. He accordingly referred her to the concerned Gynaecologist P.W.12 Dr. Rajesh Kharel. On examining the victim on the same day, P.W.12 also found no external injuries on her person including her genital. According to this witness the ultrasonography of the victim previously done indicated that

she was 24 weeks pregnant. There was however no indication of recent sexual assault. Thereupon he prepared the Medical Report Exhibit 17. It would be trite to point out that since the offence was allegedly committed in June, 2014 and the victim examined in December, 2014, fresh injuries on her person would be out of the question in the absence of allegations of any recent sexual assault. P.W.11 the complainant, brother-in-law of the victim on coming to learn of the victim's pregnancy much later in time, lodged the FIR Exhibit 15.

9. That, the Appellant was the biological father of the victim's son is conclusive from the following evidence; the Pathologist, Dr. Tashi Ongmu Bhutia P.W.10, had drawn the blood samples of the Appellant, the victim and the new born baby on 21.05.2015, on the request of the Police. She was assisted by P.W.4 Man Singh Kalikotey and P.W.5 Ms. Prerna Rai, both Lab Technicians working under her. The blood samples were drawn on filter paper and cotton gauze which were identified by her as MO II the filter paper and cotton gauze piece containing the blood sample of the Appellant, MO III the identical articles pertaining to the victim and MO IV as that of the baby. P.W.4 and P.W.5 would by their evidence substantiate as much. The Investigating Officer P.W.17 supported this evidence and added that the blood samples were obtained pursuant to a Court order and forwarded to the Central Forensic Science Laboratory *(for short "CFSL")*,

Kolkata for DNA profiling/analysis. The CFSL Report revealed that the Appellant was the biological father of the victim's baby and thereupon he filed the supplementary Charge-Sheet. P.W.1 Dr. Rajiv Gurung medically examined the Appellant and concluded that the Appellant was capable of performing sexual intercourse. Dr. Soma Roy, P.W.3., was posted at the CFSL, Kolkata and had examined the Exhibits forwarded to her i.e. MO II, MO III and MO IV as delineated *supra*. On having analyzed the samples she concluded that the genetic profile of the Appellant was consistent as being the biological father of the victim's son. The prosecution evidence on this count therefore does not falter.

10. Now to address the first doubt raised by learned Counsel for the Appellant, that Exhibit 2, the Birth Certificate prepared by the Registrar of Births and Deaths, Health and Family Welfare Department, Government of Sikkim was prepared *ante litem motam* and was therefore suspicious. On perusing Exhibit 2 it is revealed that it is the original Birth Certificate issued in the name of the victim by the Registrar, Births and Deaths, Health and Family Welfare Department, Government of Sikkim where the victim's date of birth is entered as 21.12.1996. The date of registration has been recorded as 24.03.1998. It is undoubtedly prepared almost fifteen months after the birth of the victim. Would this fact by itself make the document unreliable? According to the Black's Law Dictionary,

"*ante litem motam"* means "before the law suit started." The principle would imply the meaning "before an action has been raised" or "before a legal dispute arose," at a time when the declarant had no motive to lie. The principle on which this restriction is based is succinctly stated in Halsbury's Laws of England, 3rd Edition, Volume 15 at page 308 in these words;

> "To obviate bias the declarations are required to have been made ante litem motam which means not merely before the commencement of legal proceedings but before even the existence of any actual controversy concerning the subject-matter of the declarations."

While discussing this principle, the Hon'ble Supreme Court in ***Murugan alias Settu v. State of Tamil Nadu*** *(supra)* held as follows;

> "**23**. In ***Mohd. Ikram Hussain v. State of U.P.*** this Court had an occasion to examine a similar issue and held as under: (AIR p. 1631, para 16)
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> "16. In the present case Kaniz Fatima was stated to be under the age of 18. There were two certified copies from school registers which showed that on 20-6-1960 she was under 17 years of age. There [was] also the affidavit of the father stating the date of her birth and the statement of Kaniz Fatima to the police with regard to her own age. These amounted to evidence under the Evidence Act and the entries in the school registers were made ante litem motam. As against this the learned Judges apparently held that Kaniz Fatima was over 18 years of age. They relied upon what was said to have been mentioned in a report of the doctor who examined Kaniz Fatima,…. The High Court thus reached the conclusion about the majority without any evidence before it in support of it and in the face of direct evidence against it."
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> **24**. **The documents made *ante litem motam* can be relied upon safely, when such documents are admissible under Section 35 of the Evidence Act, 1872. (Vide *Umesh Chandra v. State of Rajasthan* and *State of Bihar v. Radha Krishna Singh*.)**
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> **25**. This Court in *Madan Mohan Singh v. Rajni Kant* considered a large number of judgments including *Brij Mohan Singh v. Priya Brat Narain Sinha*, *Birad Mal Singhvi v. Anand Purohit, Updesh Kumar v. Prithvi Singh, State Of Punjab v. Mohinder Singh,* ***Vishnu v. State of Maharashtra*** **and** ***Satpal Singh v. State Of Haryana*** **and came to the**

> **conclusion that while considering such an issue and documents admissible under Section 35 of the Evidence Act, the court has a right to examine the probative value of the contents of the document**. The authenticity of entries may also depend on whose information such entry stood recorded and what was his source of information, meaning thereby, that such document may also require corroboration in some cases.
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> **(emphasis supplied)**

The ratio *(supra)* establishes two points (i) that documents made *ante litem motam* can be safely relied upon when such documents are admissible under Section 35 of the Indian Evidence Act, 1872 *(for short "Evidence Act")*, and (ii) that the Court has the right to examine the probative value of a document admissible even under Section 35 of the same Act if it so requires. Exhibit 2 was prepared in 1998 while the FIR came to be lodged in 2014, thus it cannot be said that Exhibit 2 was prepared with a prior motive to distort the truth, consideration being taken of the age of the document and the date when the FIR was filed.

11. The next contention flagged by learned Counsel for the Appellant was that the contents and signature on Exhibit 2 the Birth Certificate remained unproved in the absence of examination of witnesses by the prosecution. While addressing this issue it would be pertinent to recapitulate the provisions of Sections 35 and Section 74 of the Evidence Act which are furnished hereinbelow for easy reference;

> "**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 an electronic record], stating a fact in

> issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or [record or an electronic record] is kept, is itself a relevant fact."
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> "**74. Public documents.-The following documents are public documents**:-
> (1) Documents forming the acts, or records of the acts –
> (i) of the sovereign authority,
> (ii) of official bodies and tribunals, and
> (iii) of public officers, legislative, judicial and executive, [of any part of India or of the Commonwealth], or of a foreign country;
> (2) Public records kept [in any State] of private documents."

The seizure of the Birth Certificate Exhibit 2 has been established by P.W.2. Exhibit 2 fulfils the requirements of both Section 35 and Section 74 of the Evidence Act. No doubts were raised about the authenticity of Exhibit 2 by way of cross-examination of witnesses before the learned trial Court. Therefore, can this question be brought up before the Appellate Court. In ***Murugan alias Settu v. State of Tamil Nadu*** *(supra)* the Hon'ble Supreme Court further held as follows;

> "**26. In the instant case, in the birth certificate issued by the Municipality, the birth was shown to be as on 30-3-1984; registration was made on 5-4-1984; registration number has also been shown; and names of the parents and their address have correctly been mentioned. Thus, there is no reason to doubt the veracity of the said certificate. More so, the school certificate has been issued by the Headmaster on the basis of the entry made in the school register which corroborates the contents of the certificate of birth issued by the Municipality.** Both these entries in the school register as well as in the Municipality came much before the criminal prosecution started and those entries stand fully supported and corroborated by the evidence of Parimala (PW 15), the mother of the prosecutrix. She had been cross-examined at length but nothing could be elicited to doubt her testimony. The defence put a suggestion to her that she was talking about the age of her younger daughter and not of

> Shankari (PW 4), which she flatly denied. Her deposition remained unshaken and is fully reliable."
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> **(emphasis supplied)**

12. In the present appeal, as already pointed out, no objection was raised when the original Birth Certificate Exhibit 2 was admitted in evidence nor any issue raised on its probative value and objection to the document is being heard in the Appellate Court for the first time. Exhibit 2 for its part, a public document is admissible in evidence and in the absence of objection it is assumed that the Appellant has accepted its probative value. The learned trial Court had the option of seeking proof of its contents as held in ***Murugan alias Settu v. State of Tamil Nadu*** *(supra)* where reference was made to the ratio of ***Madan Mohan Singh***[6] but did not exercise the option. In ***Biradmal's*** case *(supra)* relied on by the Appellant, an Appeal before the Hon'ble Supreme Court was directed against the judgment and order of the High Court of Rajasthan, setting aside the election of the Appellant to the State Legislative Assembly of Rajasthan from Jodhpur City Assembly Constituency. The controversy in the Appeal related to the validity of the orders of the Returning Officer *inter alia* rejecting the nomination of one Hukmi Chand and Suraj Prakash Joshi. Neither the candidates nor their representatives were present before the Returning Officer at the time of scrutiny. In his nomination paper Exhibit 2, Hukmi Chand had given a "declaration" that

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[6]AIR 2010 SC 2933

he had completed twenty six years of age while Suraj Prakash Joshi had given a declaration in his nomination paper Exhibit 3, that he had completed twenty five years of age. The Returning Officer found that according to the entries in the "Electoral Roll" the age of Hukmi Chand was twenty three years while that of Suraj Prakash Joshi was twenty two years, thus it was held that the two candidates did not pass the requisite qualifications to contest the elections. The Counsel for the Appellant urged that the Returning Officer in the admitted facts and circumstances could not be held to have acted improperly. The Respondent for his part pleaded that the nomination papers were improperly rejected and produced oral and documentary evidence to support his contention. Even before the High Court neither of the candidates whose nomination papers were rejected appeared nor their parents were examined by the Respondent nor any person having special knowledge about the date of birth of the two candidates were examined by the Respondent. The Respondent produced Exhibit 8 (a copy of the entries contained in the Scholar's Register), Exhibit 9 (counterfoil of Certificate of Board of Secondary Education of Hukmi Chand), Exhibit 10 (tabulation record of marks obtained by Hukmi Chand), Exhibit 11 (a copy of counterfoil of Certificate of Board of Secondary Education relating to Suraj Prakash Joshi) and Exhibit 12 (tabulation record of marks obtained by Suraj Prakash Joshi). *Before the High Court the Appellant raised a*

contention that there was no evidence to prove that Exhibits 8, 9, 10, 11 and 12 related to Hukmi Chand and Suraj Prakash Joshi and therefore the documents could not be pressed into service. The contention therefore was that the Exhibits could not be proved to pertain to the two individuals named, in other words, the identity of the two individuals Hukmi Chand and Suraj Prakash Joshi were not established. In the instant case, there is no dispute with regard to the identification of the victim or that Exhibit 2, Exhibit 9 and Exhibit 10 pertained to her. It was also not disputed that Exhibit 2 and Exhibit 10 were public documents. The Hon'ble Supreme Court in ***Sham Lal alias Kuldip's*** case *(supra)* held as follows;

> "**21.** One of the documents relied upon by the learned District Judge in coming to the conclusion that the plaintiff is the son of the deceased Balak Ram is Ext. P-2, the school leaving certificate. The learned District Judge, while dealing with this document has observed:
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> > **"On the other hand, there is a public document in the shape of school leaving certificate, Ext. P-2 issued by Head Master, Government Primary School, Jabal Jamrot recording Kuldip Chand alias Sham Lal to be the son of Shri Balak Ram. In the said public document as such Kuldip Chand alias Sham Lal was recorded as son of Shri Balak Ram."**
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> **The findings of the learned District Judge holding Ext. P-2 to be a public document and admitting the same without formal proof cannot be questioned by the defendants in the present appeal since no objection was raised by them when such document was tendered and received in evidence.**
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> **22. It has been held in *Dasondha Singh* v. *Zalam Singh [16 (1997) 1 PLR 735 (P&H)]* that an objection as to the admissibility and mode of proof of a document must be taken at the trial before it is received in evidence and marked as an exhibit. Even otherwise such a document falls within the ambit of Section 74, Evidence Act, and is admissible per se without formal proof."**
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> **(emphasis supplied)**

Thus the above ratio clarifies that where a public document had been admitted without formal proof the same cannot be questioned by the defence at the stage of appeal since no objection was raised by them when such document was tendered and received in evidence.

13. With reference to the point raised by learned Counsel for the Appellant in ***Sham Lal's*** case *(supra)* and relied on in ***Sancha Hang's*** case *(supra),* it is pertinent to point that the standards of proof in a criminal case and a civil suit undoubtedly differ. A criminal case is to be proved "beyond a reasonable doubt" while a civil suit requires a "preponderance of probabilities," but it may be borne in mind that so far as proof of documents is concerned the Evidence Act makes no such demarcation and the same standards apply for proof therein.

14. While considering the argument of learned Counsel for the Appellant that the original School Register where the date of birth of the victim was entered was not produced before the learned trial Court is belied by the statement of P.W.6, the Headmaster of the School which the victim attended, who has clearly deposed as follows;

> *"... In connection with this case, I am to state that the minor victim was earlier a student of our school. She had been admitted in our school in the Pre-Primary Section meaning thereby that our school is the first school attended by her. Her date of birth recorded in the concerned School Admission Register is 21.12.1996. The details of her parents are also recorded in the said Register.* ***I have produced the original Register today and pray that it be returned to me after retaining the certified copies of the relevant portions/entries in this Court as the Register is required in the school almost on a daily***

> ***basis***. *Copies of the relevant portions/entries are made for retaining it in the case records. Copies thereof have also been made over to the accused."*
>
> **(emphasis supplied)**

The order dated 16.08.2016 of the learned trial Court also lends credence to the above statement which records that the Register was produced. Exhibit 9 is the certified copy of the entry in the concerned Register pertaining to the age of the victim on the basis of which the witness had issued Exhibit 10, the Certificate of date of birth of the victim, bearing his seal and signature. According to him the date of birth of P.W.7 as recorded in the concerned School Admission Register is 21.12.1996. The witness pointed out to the relevant entries in the Register pertaining to the victim. The details of her parents are also recorded in the said Register. The fact of entry of the date of birth of the victim and details regarding her parents went undecimated in cross-examination. No questions were raised in cross-examination about proof of the entries or on whose authority the entries had been made. For that matter the entries in Exhibit 10, the Certificate issued by P.W.6, based on the entries made in the Register, indicating the date of birth of the victim as 21.12.1996 remained undemolished. We may refer to the decision in ***Umesh Chandra vs. State of Rajasthan***[7] wherein the Hon'ble Supreme Court while

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[7](1982) 2 SCC 202

discussing the provisions of Section 35 of the Evidence Act *inter alia* held that;

> "... Under Section 35 of the Evidence Act, all that is necessary is that the document should be maintained regularly by a person whose duty it is to maintain the document and there is no legal requirement that the document should be maintained by a public officer only. The High Court seems to have confused the provisions of Sections 35, 73 and 74 of the Evidence Act in interpreting the documents which were admissible not as public documents or documents maintained by public servants under Sections 34, 73 or 74 but which were admissible under Section 35 of the Evidence Act which may be extracted as follows:
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> "35. Relevancy of entry in public record, made in performance of duty.-An entry in any public or other official book, register or 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 books, register or record is kept, is itself a relevant fact."
>
> (emphasis supplied)
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> A perusal of the provisions of Section 35 would clearly reveal that there is no legal requirement that the public or other official book should be kept only by a public officer but all that is required is that it should be regularly kept in discharge of her official duty. ..."

On the essence of the ratio *(supra)* and in light of the evidence on record furnished by P.W.6 Headmaster, there is no reason to doubt the entries in the School Admission Register and Exhibit 10. On this aspect we may beneficially garner support from the ratio in ***Mahadeo vs. State of Maharashtra***[8] wherein the Hon'ble Supreme Court held as follows;

> "**12**. We can also in this connection make reference to a statutory provision contained in the Juvenile Justice (Care and Protection of Children) Rules, 2007, where under Rule 12, the procedure to be followed in determining the age of a juvenile has been set out. We can usefully refer to the said

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[8](2013) 14 SCC 637

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

It may be relevant to note that the afore-extracted provision of Rule 12(3)(a)(i) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, now finds place in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The date of birth of the victim was produced from the School first attended by the victim and therefore can be relied upon. Hence, considering the evidence of the Headmaster P.W.6, there is no reason to doubt either Exhibit 10, or the original School Register where entries of date of birth of the victim were made, as extracted in Exhibit 9, or the age of the victim. Therefore, Exhibit 10 also stands the prosecution in good stead with regard to the age of the victim. Exhibit 10 and Exhibit 2 bear the same date of birth of the victim i.e. 21.12.1996, thereby indicating consistency and establishing the victim's minority at the time of offence.

15. Now the next question is with regard to the belated lodging of the FIR, Exhibit 15. This Court has oft referred to the ratio in ***State of Himachal Prasad vs. Prem Singh***[9] wherein the Hon'ble Supreme Court held as follows:

> "**6**. So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition-bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR."

In the instant matter it is evident that the victim did not confide in anyone about her pregnancy and only when the complainant, P.W.11, came to learn of it the FIR, Exhibit 15 came to be lodged. The mortification and the apprehension of ignominy in the minds of the parents and the fear of reprisal as well in the mind of the victim appear to have led to the situation and are all sufficient therefore to explain and condone the delay in the lodging of the FIR, on the anvil of the ratio *supra*.

16. Although the victim has not stated that the Appellant used force on her and committed the offence and in all probability the act was consensual however the fact remains that the victim was a minor at the relevant time and her consent would therefore be irrelevant. Section 375 of the IPC,

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[9](2009) 1 SCC 420

1860 which defines the offence of rape and can be extended to the matter at hand, which at clause six provides that a man is said to commit rape, with or without consent of the victim, if she is under eighteen years of age.

17. Besides, Section 30 of the POCSO Act, 2012 provides for presumption of culpable mental state and reads as follows;

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

It is evident from the provision delineated that the absence of culpable mental state has to be established beyond a reasonable doubt. It is also relevant to point out that in the reverse burden of proof as postulated in Section 30 *(supra),* it is not a preponderance of probability but "beyond reasonable doubt," thereby distinguishing it from rebuttable presumption such as required under Section 304B of the IPC, 1860, which is to the extent of existence of a preponderance of probability. In ***Hiten Dalal P. Dalal vs. Bratindranath Banerjee***[10] the Hon'ble Supreme Court while dealing with an appeal under Section 138 of the Negotiable Instruments Act, 1881 *(for short "N.I.*

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[10]AIR 2001 SC 3897

Act, 1881") and considering the words "shall presume" as appears in Sections 138 and 139 of the N.I. Act, 1881 held as follows;

> "**22**. Because both Sections 138 and 139 require that the Court "**shall presume**" the liability of the drawer of the cheques for the amounts for which the cheques are drawn,
> as noted in *State of Madras vs. A. Vaidvanatha Iyer MANU/SC/0108/1957MANU/SC/0108/1957 : 1958CriLJ232 : 1958CriLJ232*,
> it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. **"It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused"**
> (ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs.
> **Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.**
>
> **23**. **In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary**. .....
>
> **24**. .... In the case of a discretionary presumption the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand in the case of a mandatory presumption "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S. 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. **The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible**. **A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the**

> **presumption created by the provision cannot be said to be rebutted**..."
>
> **(emphasis supplied)**

The ratio clears the air on the burden resting on the accused and clarifies that where the statute so demands no discretion rests with the Court, save to draw the statutory conclusion, while at the same time allowing the accused to rebut the presumption, which under the POCSO Act, 2012 demands it to be beyond a reasonable doubt.

18. Turning our attention to the propriety of a *de novo* trial ordered by the learned trial Court the provisions of Section 216(4) of the Cr.P.C., 1973 undoubtedly clothes the Court with powers to add or alter charges and provides as follows;

> "**216. Court may alter charge**.-(1).....
> (2).....
> (3).....
> (4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court to prejudice the accused or the prosecutor as aforesaid, **the Court may either direct a new trial or adjourn the trial for such period as may be necessary**."
>
> **(emphasis supplied)**

A glance at the provision, would unearth that any direction given by the Court for further trial or directing fresh trial is to be judged on the touchstone of prejudice to the accused or the prosecution. In our considered opinion, if the charge is of the same species the Court ought to be circumspect in ordering a retrial. Once the charge is added or altered, evidence can be led for the limited purpose of the added and

altered charge. A *de novo* trial in the instant matter was obviously not necessitated as is apparent from the evidence of the fifteen witnesses examined prior to the added/altered charge that they have had nothing to add to their evidence recorded earlier. PW 3 and PW 6 were the only witnesses who were in fact required to be examined pursuant to the added/altered charge. It is another issue altogether that the pregnancy of the victim was not discovered during the course of the trial which thereby prompted the Court to add the charge under Section 5(j)(ii) of the POCSO Act, 2012 subsequently. It was clearly mentioned in the Charge-Sheet, thereby indicating that the Court failed to act diligently when the charges were framed in the first instance. The Hon'ble Supreme Court in ***State of Madhya Pradesh* vs. *Bhooraji and Others***[11] while dealing *inter alia* with the question of *de novo* trial held as follows;

> "*8*. …A de novo trial should be the last resort and that too only when such a course becomes so desperately indispensable. It should be limited to the extreme exigency to avert "a failure of justice". Observing that any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a de novo trial, ..."

In ***Ajay Kumar Ghoshal and others vs. State of Bihar and Another***[12] while explaining *de novo* trial, the Hon'ble Supreme Court observed;

> "**12.** "De novo" trial means a "new trial" ordered by an appellate court in exceptional cases when the original trial failed to make a determination in a manner dictated by law. The trial

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[11]AIR 2001 SC 3372

[12](2017) 12 SCC 699

> is conducted afresh by the court as if there had not been a trial in first instance. Undoubtedly, the appellate court has power to direct the lower court to hold "de novo" trial. But the question is when such power should be exercised. As stated in *Ukha Kolhe* v. *State of Maharashtra Ukha Kolhe v. State of Maharashtra,* the Court held that: *(AIR p. 1537, para 11)*
>
> > "*11*. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of retrial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons." ..."

More recently in ***Mallikarjun Kodagali vs. State of Karnataka & Ors.[13],*** the Hon'ble Supreme Court while rueing the rights of victims of crime held as follows;

> "**3**. The travails and tribulations of victims of crime begin with the trauma of the crime itself and, unfortunately, continue with the difficulties they face in something as simple as the registration of a First Information Report (FIR). The difficulties in registering an FIR have been noticed by a Constitution Bench of this Court in *Lalita Kumari v. Government of Uttar Pradesh.* The ordeal continues, quite frequently, in the investigation that may not necessarily be unbiased, particularly in respect of crimes against women and children. Access to justice in terms of affordability, effective legal aid and advice as well as adequate and equal representation are also problems that the victim has

[13]AIR 2018 SC 5206

> to contend with and which impact on society, the rule of law and justice delivery.
>
> **4.** What follows in a trial is often secondary victimisation through repeated appearances in Court in a hostile or semi-hostile environment in the courtroom. Till sometime back, secondary victimisation was in the form of aggressive and intimidating cross-examination, but a more humane interpretation of the provisions of the Indian Evidence Act, 1872 has made the trial a little less uncomfortable for the victim of an offence, particularly the victim of a sexual crime. In this regard, the judiciary has been proactive in ensuring that the rights of victims are addressed, but a lot more needs to be done. Today, the rights of an accused far outweigh the rights of the victim of an offence in many respects. There needs to be some balancing of the concerns and equalising their rights so that the criminal proceedings are fair to both. ..."

Thus the emphasis now is to prevent secondary victimisation through repeated appearances in Court, for the victim, who has to face hostile or semi-hostile environment in the Courtroom. Consequently we deem it appropriate to observe that where the offences were of the same species and charges altered, efforts should be made by the Court to assess the necessity of a *de novo* trial and to ensure that the victims do not face secondary victimisation.

19. That having been settled the learned trial Court while pointing out that an error in framing of charge had occurred, in paragraphs 30, 31 and 32 of the impugned judgment has observed as follows;

> "30. In the case in hand, charge against the accused has also been framed under section 376(2) (i) of IPC. However, from the wording of the charge it is evident that the charge was intended to be prepared under section 376(2) (j) of IPC. **It seems that there occurred clerical error while preparing charge and the charge is read and considered to have been prepared under section 376(2)(j) of IPC**.
>
> 31. On detail reading of the provision as laid down in section 376 of IPC it is noted that section 376(2)(j) deals with the situation where the victim is

> incapable of giving her consent due to some disability like intoxication, disease etc. But the section do not cover the person who is incapable of giving her consent being a minor. Therefore, I am of the view that the accused cannot be convicted under section 376(2)(j) of IPC but the evidence on record and in view of the discussion in the foregoing paragraphs it is clearly (sic) that there are sufficient evidence against the accused to prove the offence beyond doubt punishable under section 376 (1) of IPC, 1860.
>
> 32. In view of the above discussions and observation and upon careful consideration of the evidence on record I find that the prosecution has established the offence defined under section 3(a)/5(j)(ii) of POCSO Act punishable under section 4/6 of POCSO Act, 2012 and the offence punishable under section 376(1) of IPC, 1860 beyond reasonable doubt."
>
> **(emphasis supplied)**

It would be relevant to point out that charge was framed under Section 376(2)(i) of the IPC, 1860 on 21.06.2016. It is clear from a perusal of Section 376(2) of the IPC, 1860 that Clause (i) was omitted by Act 22 of 2018, sec. 4(b) (w.r.e.f. 21.04.2018). Clause (i), before omission, stood as under: "(i) commits rape on a woman when she is under sixteen years of age; or". The charge under Section 376(2)(i) of the IPC, 1860 was thus framed as per the then existing provision. Hence the question of a clerical error does not arise. However, the charge under Section 376(2)(i) of the IPC, 1860 is indeed irrelevant for the instant matter, inasmuch as the victim was seventeen years and six months at the time of the offence, thus it is not necessary to delve further into this issue. The charge under Section 3 (a) and Section 5(j)(ii) of the POCSO Act, 2012 suffices for the present purposes. We may however pertinently point out that so far as sentence is concerned

Sections 3(a)/4 and Sections 5(j)(ii)/6 of the POCSO Act, 2012 both provide for fine in addition to incarceration. No fine has been imposed by the learned trial Court and no explanation ensues thereof. Hence, the sentences meted out to the Appellant by the learned trial Court stands modified to the following extent;

(i) The Appellant is sentenced to undergo Rigorous Imprisonment of seven years under Section 3(a) punishable under Section 4 of the POCSO Act, 2012 and to pay a fine of Rs.2,000/- (Rupees two thousand) only, in default thereof to undergo Simple Imprisonment of one month.

(ii) He shall undergo Rigorous Imprisonment of ten years under Section 5(j)(ii) punishable under Section 6 of the POCSO Act, 2012 and shall pay a fine of Rs. 2,000/- (Rupees two thousand) only, in default thereof to undergo Simple Imprisonment of one month.

The sentences of imprisonment shall run concurrently as already ordered.

20. It is further noticed that the learned trial Court has failed to make any order for payment of compensation to the victim as is wont. We thus invoke the provisions of the Sikkim Compensation to Victims or his Dependents Schemes, 2011, as amended in 2016. In terms of the said Scheme, a sum of Rs.3,00,000/- (Rupees three lakhs) only, is awarded as

compensation to the victim and shall be made over to the victim by the Sikkim State Legal Services Authority, upon due verification.

21. In conclusion, save to the extent of the modification *supra* the impugned judgment and order on sentence brook no interference.

22. Appeal fails and is dismissed.

23. No order as to costs.

24. Copy each of this judgment be sent to the learned trial Court along with its records and to the Member Secretary, Sikkim State Legal Services Authority forthwith, for information and compliance.

(Bhaskar Raj Pradhan)
Judge
28.03.2019

(Meenakshi Madan Rai)
Judge
28.03.2019

Approved for reporting: **Yes**
Internet: **Yes**

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