THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DIVISION BENCH: THE HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CHIEF JUSTICE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. A. No. 01 of 2018

1. Chandra Bahadur Rai,
   Son of Late Jaslal Rai,
   Resident of Sakyong, Upper Onglop,
   Gyalshing, West Sikkim.
   Presently lodged at Central Prison,
   Rongyek, East Sikkim.

2. Arun Rai,
   Son of Bhim Raj Rai,
   Resident of Sakyong, Upper Onglop,
   Gyalshing, West Sikkim.

..... Appellants

versus

State of Sikkim ..... Respondent

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

Appearance:

Mr. N. Rai, Senior Advocate for the Appellant.
Mr. S.K. Chettri, Additional Public Prosecutor for the Respondent.

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with

Crl. A. No. 06 of 2018

Arun Rai, aged about 30 years,
Son of Bhim Raj Rai,
Resident of Sakyong, Upper Onglop,
Gyalshing, West Sikkim.

..... Appellant

versus

State of Sikkim ..... Respondent

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

Appearance:

Ms Gita Bista, Legal Aid Counsel for the Appellant.

Mr. S.K. Chettri, Additional Public Prosecutor for the Respondent.

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with

Crl. A. No. 07 of 2018

Tshering Thendup Bhutia,
aged about 68 years,
Son of Late Kalu Bhutia,
Resident of Sakyong, Upper Onglop,
Gyalshing, West Sikkim.

Presently lodged at Central Prison,
Rongyek, East Sikkim. ..... Appellant

versus

State of Sikkim ..... Respondent

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

Appearance:

Ms Puja Lamichaney, Legal Aid Counsel for the Appellant.

Mr. S.K. Chettri, Additional Public Prosecutor for the Respondent.

Date of hearing : 15.06.2020 & 16.06.2020
Date of judgment : 26.06.2020

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. This judgment shall dispose the above three appeals preferred by the respective appellants against the common judgment of conviction dated 09.11.2017 and order on sentence dated 13.11.2017 in Sessions Trial (POCSO) Case No. 02 of 2017 (*State of Sikkim vs. Chandra Bahadur Rai, Tshering Thendup Bhutia and Arun Rai*) passed by the learned Special Judge (POCSO), West Sikkim at Gyalshing. At the outset, we notice that Arun Rai had, besides filing a separate appeal, i.e., Criminal Appeal No. 06 of 2018, also jointly filed Criminal Appeal No. 1 of 2018 along with Chandra Bahadur Rai, both of which have been admitted for hearing. In view of the same, we deem it

appropriate to consider Criminal Appeal No.1 of 2018 for Chandra Bahadur Rai and Criminal Appeal No. 06 of 2018 for Arun Rai.

2. A brief narration of facts common to the three appeals would be imperative at this stage. On 23.01.2017, a written complaint (Exhibit-3) was filed by the victim's father (PW-2) alleging that his daughter, the victim (PW-1), aged about 13 years was being raped by Chandra Bahadur Rai and Tshering Thendup Bhutia, appellants in Criminal Appeal No. 1 of 2018 and Criminal Appeal No. 7 of 2018, respectively. The first information report (FIR) (Exhibit-4) was lodged on the same date against the said two appellants and investigation taken up by Sub Inspector Naresh Chettri (PW-13). During the investigation, it is submitted, the statement (Exhibit-1) of the victim (PW-1) was recorded by the learned Judicial Magistrate on 10.02.2017 under section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.), in which the victim (PW-1) alleged that Arun Rai, appellant in Criminal Appeal No. 6 of 2018, had also tried committing sexual abuse on her several times. The Investigating Officer (IO) filed the charge-sheet dated 17.04.2017 against all the three appellants. The learned Special Judge framed charges against the appellants on 09.05.2017. Chandra Bahadur Rai was charged for commission of offences under section 5(l) of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), section 383 of the Indian Penal Code, 1860 (IPC), section 307 IPC and section 506 IPC. Tshering Thendup Bhutia was charged for commission of offence under section 4 of the POCSO Act. Arun Rai was charged for commission of offences under section 7 of the POCSO Act and under section 506 IPC. During the trial, 13 witnesses were examined by the prosecution including the IO. The appellants were,

thereafter, examined under section 313 Cr.P.C. on 21.09.2017. The appellants did not desire to produce any witnesses for their defence. The learned Special Judge convicted Chandra Bahadur Rai for commission of offence under section 5(l) of the POCSO Act and under section 506 IPC. He was acquitted of the charges under sections 383 and 307 IPC. Tshering Thendup Bhutia was convicted under section 18 of the POCSO Act for attempting to commit the offence of penetrative sexual assault. Arun Rai was convicted under section 7 of the POCSO Act and under section 506 IPC. By the order on sentence dated 13.11.2017, the learned Special Judge sentenced Chandra Bahadur Rai to undergo rigorous imprisonment for a term of twenty-five years and to pay a fine of Rs.50,000/- (Rupees fifty thousand). In default thereof, he was to undergo further imprisonment for a term of five years. He was also sentenced to undergo rigorous imprisonment for a term of two years for the offence under section 506 IPC. Both sentences were directed to run concurrently. Tshering Thendup Bhutia was sentenced to undergo rigorous imprisonment for a term of ten years and to pay a fine of Rs.25,000/- (Rupees twenty-five thousand). In default thereof, he was sentenced to undergo further imprisonment for a term of three years. Arun Rai was sentenced to undergo rigorous imprisonment for a term of three years and six months and to pay a fine of Rs.10,000/- (Rupees ten thousand). In default thereof, he was to undergo further imprisonment for a term of one year. For the offence under section 506 IPC, he was sentenced to undergo imprisonment for a term of one year. Both the sentences were directed to run concurrently. The period of detention already undergone by the appellants was directed to be set off. Compensation of Rs.3,00,000/-

(Rupees three lakhs) was directed to be awarded to the victim under the Sikkim Compensation to Victims or his Dependents (Amendment) Schemes, 2016.

3. We have heard Mr. N. Rai, learned Senior Advocate for Chandra Bahadur Rai, Ms Gita Bista, learned Advocate for Arun Rai and Ms Puja Lamichaney, learned Advocate for Tshering Thendup Bhutia. On behalf of Chandra Bahadur Rai and Tshering Thendup Bhutia, it was argued that the victim (PW-1) had failed to identify the appellants in court; there was a delay in lodging the FIR (Exhibit-4) which was significant as it was admitted that the FIR (Exhibit-4) was lodged after due deliberation by the family members; the age of the victim (PW-1) had not been proved by the prosecution; there was no medical report to show that the appellants were capable of commission of sexual act; although the allegation was for commission of rape, the medical report of the victim did not have any evidence suggesting the same and that considering the nature of evidence, without prejudice to their contention that the prosecution had failed to establish their case beyond all reasonable doubt, the sentences imposed against the appellants were too harsh. The learned Counsel relied upon the following judgments – ***Bansi Lal & Another vs. State of Jammu & Kashmir***[1]**,** ***Lall Bahadur Kami vs. The State of Sikkim***[2]**,** ***Anish Rai vs. State of Sikkim***[3]**,** ***Mangala Mishra @ Dawa Tamang @ Jack vs State of Sikkim***[4]***, State of Rajasthan vs Bhanwar Singh***[5]***, Birad Mal Singhvi vs. Anand Purohit***[6]**,**

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[1] 1999 Cri. L. J. 114
[2] SLR (2017) SIKKIK 585
[3] SLR (2018) SIKKIM 889
[4] SLR (2018) SIKKIM 1373
[5] (2004) 13 SCC 147
[6] AIR 1988 SC 1796

Mahadeo S/o Kerba Maske vs. State of Maharashtra and Another[7]**,** ***Madan Mohan Singh & Ors. vs. Rajni Kant & Anr.***[8]**,** ***Sunil vs. State of Haryana***[9] **and** ***Smt. Renu Meena vs State of Sikkim and Others***[10].

4. Ms Gita Bista while adopting the arguments made by Mr. N. Rai, also submitted that there was a fatal flaw in the prosecution against Arun Rai, in that, although not named in the FIR (Exhibit-4), he was prosecuted and tried in the same trial against Chandra Bahadur Rai and Tshering Thendup Bhutia on the basis of the statement of the victim (PW-1) recorded under section 164 Cr.P.C. without registering a separate prosecution. She relied upon the judgment of the division bench of this court in ***Taraman Kami vs. State of Sikkim***[11].

5. Mr. S.K. Chettri, learned Additional Public Prosecutor, submitted that the evidence of the victim (PW-1) was cogent and adequately corroborated by the depositions of PW-2, PW-4 and PW-7. It was submitted that the birth certificate (Exhibit-6) and transfer certificate (Exhibit-7) have not been disputed by the defence. He also submitted that although the victim (PW-1) had not pointed out and identified the appellants in court, the rest of the prosecution witnesses have all identified the appellants. The fact that the victim (PW-1) was in fact a child has been admitted by Arun Rai in answer to question no.2 during his examination under section 313 Cr.P.C. It was his submission that the sole testimony of the victim was enough to convict

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[7] (2013) 14 SCC 637
[8] AIR 2010 SC 2933
[9] (2010) 1 SCC 742
[10] SLR (2019) SIKKIM 622
[11] SLR 2017 SIKKIM 781

the appellants. He relied upon ***Naval Kishore Singh vs. State of Bihar***[12], ***State of Punjab vs. Gurmit Singh and Others***[13] and ***Hem Raj S/o Moti Ram vs State of Haryana***[14].

6. Out of 13 witnesses, PW-1 is the victim; PW-2 is the father of the victim; PW-3 and PW-7 are the victim's uncles; PW-4 is the brother-in-law of the victim's father (PW-2). PW-5 and PW-6 are witnesses to the preparation of the rough sketch map (Exhibit-8) by the police. PW-8 and PW-9 (para legal volunteer) are witnesses to the seizure of the birth certificate (Exhibit-6) and transfer certificate (Exhibit-7) at the police station. Dr. Srijana Subba (PW-10) examined Chandra Bahadur Rai and Tshering Thendup Bhutia on 23.01.2017 and prepared medical reports - Exhibit-9 and Exhibit-10, respectively. Dr. Srijana Subba (PW-10) examined Arun Rai on 11.02.2017 and prepared medical report (Exhibit-11). Dr. Tukki D. Bhutia (PW-11) had examined the victim (PW-1) on 23.01.2017 and prepared medical report (Exhibit-12). Dr. Anusha Lama (PW-12) was the District Medical Superintendent-cum-Birth and Deaths Registrar of the District Hospital, who issued a letter dated 02.02.2017 (Exhibit-14) in response to the IO's communication dated 25.01.2017 (Exhibit-13) seeking information regarding the exact date of birth of the victim (PW-1).

7. The victim (PW-1) gave a detail narration of what one "Khantarey Deba" had done to her including stripping her clothes, beating her up with a black belt and commission of rape on more than

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[12] (2004) 7 SCC 502
[13] (1996) 2 SCC 384
[14] (2014) 2 SCC 395

one occasion. She also named Tshering Thendup Bhutia and deposed that he had once taken her below his house, removed her clothes and tried to sexually abuse her. She further deposed that he had removed his trousers but she had managed to run away before he could penetrate and complete the act. The victim (PW-1) named Arun Rai and identified him as a driver who had tried to sexually molest her. The learned Special Judge has recorded in the victim's deposition that the victim (PW-1) broke down and began crying at the time of identification of the appellants. There is no dock identification of any of the appellants by the victim (PW-1). In ***Smt. Renu Meena*** (*supra*), a division bench of this court had held that the establishment of the identity of the accused persons in a criminal case is paramount to the prosecution and more so in a case of a heinous offence. This court held that it is well settled that the court must be absolutely certain that it was the accused persons and no other who are guilty of the offences alleged. The victim's father (PW-2) identified all the three appellants in court as they were his co-villagers who lived close to his house. He also deposed that his daughter, the victim (PW-1), used to call Chandra Bahadur Rai as "Khantarey". The cross-examination by the defence did not elicit any material evidence which could dislodge the assertion made by the victim's father. PW-3, PW-4, PW-5, P-7 and PW-9 identified the appellants as their co-villagers. The victim herself deposed about the appellants, naming them with great amount of certainty about their identification. It is evident that the appellants were residents of the same village and therefore were familiar persons. In the circumstances, we are of the considered view that failure of the victim alone to dock identify the appellants in court cannot be held to

be fatal as the prosecution has laid substantial evidence before the court to correctly identify the appellants as the one against whom the allegations have been made.

8. The next issue raised by the defence is the delay in lodging the FIR (Exhibit-4). In ***Bhanwar Singh*** (*supra*), the Hon'ble Supreme Court held that additionally, the unexplained delay of more than one day in lodging the FIR casts serious doubt on the truthfulness of the prosecution version. The mere delay in lodging the FIR may not be fatal in all cases but on the circumstances of the case it was one of the factors which corroded credibility of the prosecution version. A perusal of the deposition of the victim (PW-1) reflects that she was narrating about several incidents over a period of time and not a particular one. The victim's father (PW-2) deposed that on 18.01.2017 he came to learn from his mother that his daughter had told her that Chandra Bahadur Rai and Tshering Thendup Bhutia used to sexually assault her. He accordingly, lodged the FIR (Exhibit-4) on 23.01.2017. The defence has been able to extract a statement from the victim's father (PW-2) that after coming to know about the incident on 18.01.2017 he lodged the FIR (Exhbit-4) only on 22.01.2017 after consulting his brother and mother. This statement was highlighted by Mr. N. Rai to submit that there was delay in lodging of the FIR. The victim's father (PW-2) also volunteered to state that on 18.01.2017 the victim was crying and did not reveal the entire incident and it was only after they had asked her properly that she revealed the entire incident on 22.01.2017, after which he went to the police station. The explanation given by the victim's father (PW-2) was natural. We are of the view that the delay of four days in lodging of the FIR (Exhibit-4) has been

adequately explained by the prosecution and is not fatal to the prosecution case on its own.

9. In a prosecution under the POCSO Act, the establishment of the age of the victim is crucial. In ***Lall Bahadur Kami*** (*supra*), a division bench of this court had held that the prosecution is required to prove its case beyond reasonable doubt. It must be proved by cogent evidence that the victim was in fact a child as defined in section 2(d) of the POCSO Act. What type of evidence would adequately prove a person's age cannot be enumerated lest we restrict different forms of evidence which would prove beyond reasonable doubt that the victim was in fact a child. The court must examine the evidence produced and come to a firm conclusion whether the victim was a child or not. The victim (PW-1) deposed that she was 13 years old and a student of class-V. She also deposed that her birthday was on 7th of November. Save a denial, the defence could not extract any material from the victim (PW-1) to create even a doubt that what she deposed about her age was untrue. The victim's uncle (PW-3) also deposed that she was 13 years old. The victim's father (PW-2) categorically stated that she was born on 07.11.2003. He also stated that during the investigation, the police had seized the birth certificate (Exhibit-6) and transfer certificate (Exhibit-7) from him through seizure memo (Exhibit-5). The seizure of the birth certificate (Exhibit-6) and the transfer certificate (Exhibit-7) at the police station has been proved by PW-8 and PW-9. The IO has deposed that Exhibit-6 and Exhibit-7 were seized vide seizure memo (Exhibit-5) prepared by him. The submission of the learned counsel for the appellants that the birth certificate (Exhibit-6) and transfer certificate (Exhibit-7) have not been proved in the

manner, however, requires deeper examination. In ***Birad Mal Singhvi*** (*supra*), the Hon'ble Supreme Court held that to render a document admissible under section 35 of the Evidence Act, 1872, three conditions must be satisfied; firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty or any other person in performance of a duty especially enjoying by law. An entry relating to date of birth made in the school register is relevant and admissible under section 35 but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of material on which the age was recorded. In ***Madan Mohan Singh*** (*supra*), the Hon'ble Supreme Court held that 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 authenticity of the entries in the official record by an official or person authorised in performance of official duties, would depend on whose information such entries stood recorded and what was his source of information. The entry in school register/school leaving certificate requires to be proved in accordance with law and the standard of proof required in such cases remain the same as in any other civil or criminal case. The birth certificate (Exhibit-6) issued by office of the Chief Registrar of Births & Deaths from the extract taken from the original record of birth in the register of Registration Centre of District Hospital, Gyalshing, records the name of the father of the victim as that of PW-2 and the place of birth as Sakyong, West Sikkim. The

victim's father (PW-2) deposed that the victim was his daughter and that she was born at Singtam Hospital, East Sikkim. PW-3, the victim's uncle, deposed that the victim was adopted by PW-2 and that she was born at Singtam Hospital. PW-9 during his cross-examination deposed that he was told by the parents of the victim that the victim was born in Singtam. Dr. Anusha Lama (PW-12) deposed that the victim's date of birth as recorded in the record of Births & Deaths Register was 07.11.2003. During her cross-examination, she admitted that normally the hospital where the child is born issues the birth certificate of the child within 21 days. She also deposed that in cases where a parent/guardian comes after 21 days, then the birth certificate is issued on the basis of verification done through the Block Development Officer (BDO) or the District Collectorate. She admitted that there are no documents pertaining to verification of the age of the victim in the courtroom and that she did not know whether she was adopted or she was the natural born child of her parents. It is settled that proof of a document and proof of the contents of the document are two different things. In ***Anish Rai*** (*supra*) relied upon by Mr. N. Rai, a division bench of this court had held that admissibility of document is one thing, while proof of its content is an altogether different aspect. We are of the view that Dr. Anusha Lama (PW-12) has proved the birth certificate (Exhibit-6). However, a doubt has been created by the prosecution's own evidence [deposition of the victim's father (PW-2) and her uncle (PW-3)]. Whereas, they assert that the victim was born in Singtam, East Sikkim, however, the birth certificate records that she was born in Sakyong, West Sikkim. In the circumstances, it would

not be possible to hold that the prosecution has been able to prove the contents of the birth certificate (Exhibit-6).

10. Besides the birth certificate (Exhibit-6), the prosecution has also exhibited the transfer certificate (Exhibit-7). The transfer certificate (Exhibit-7) was exhibited by the father of the victim (PW-2) who was the custodian of the said document. The transfer certificate (Exhibit-7) was, however, not proved by its maker, i.e., the Principal of the School who issued the transfer certificate (Exhibit-7). Without anything more, we are unable to accept the contention of Mr. S.K. Chettri that the transfer certificate (Exhibit-7) is a public document. A public document as per section 74 of the Indian Evidence Act, 1872 are documents forming the acts, or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country and public records kept in any state of private documents. No evidence has been laid before the court that the transfer certificate is a public document. The transfer certificate (Exhibit-7) has not been questioned by the defence in cross-examination and has also been exhibited without demure. The fact that in the said transfer certificate the date of the birth of the victim (PW-1) is recorded as 07.11.2003 has been proved. However, the correctness of the entry has not been proved. In ***Bansi Lal*** (*supra*) relied upon by Mr. N. Rai, the Jammu and Kashmir High Court noticed that the prosecution had not cared to bring any evidence of proof of age and accordingly held that in the absence of proof of age, it will not be safe to hold that the age of the prosecutrix was less than 18 years. The present case is different. Besides the victim (PW-1), there are

depositions of the victim's father (PW-2) and her uncle (PW-3), regarding the age of the victim. Their oral depositions stand unassailed. The learned counsel for the appellants vehemently argued that the victim's father (PW-2) was not the natural father of the victim and as such would not know her correct age. We are not inclined to accept the contention. There is no presumption that only the natural parents would know the correct age of the child. In ***Mangala Mishra*** (*supra*) relied upon by Mr. N. Rai, a division bench of this court was examining a case in which there were anomalies about its seizure. Further, although the victim's mother had been produced as a prosecution witness, she had not deposed either about the victim's age or the birth certificate. The facts were different. In the present case, the victim's father has categorically asserted that the victim was born on 07.11.2003. The defence has not cross-examined the victim's father on this assertion or even suggested that she was a major. Merely because he was not the victim's natural father does give rise to any doubt that he would not know the correct age of the victim (PW-1) adopted by him as his child. In the circumstances, we are of the view that the material placed by the prosecution does establish that the victim (PW-1) was in fact, a child.

11. It is next contended by the learned counsel for the appellants that the prosecution has failed to establish that they were capable of performing sexual act. In ***Bansi Lal*** (*supra*), the Jammu & Kashmir High Court noticed that the medical certificate issued by the doctor did not suggest what was the state of the genitals of the prosecutrix. Similarly, it was also noticed that there was no evidence to suggest that the appellants therein, who were the accused persons,

were either examined or found physically capable of having intercourse. Under the circumstances, the High Court held that in the absence of such evidence, it will not be safe to hold that the prosecutrix had been raped by any one of the appellants therein. In the present case, Dr. Srijana Subba (PW-10), who examined Chandra Bahadur Rai and Tshering Thendup Bhutia, prepared their medical reports (Exhibit-9 & Exhibit-10). It is pointed out by the learned counsel for the appellants that Chandra Bahadur Rai was aged 65 years and Tshering Thendup Bhutia was 67 years at the time of the alleged commission of offence and therefore, it was relevant for the prosecution to establish that they were capable of performing sexual act. When Chandra Bahadur Rai and Tshering Thendup Bhutia were sent for medical examination vide letter dated 23.01.2017 (Exhibit-9 and Exhibit-10) by the IO, a specific question was asked as to whether they were capable of having sex/sexual potency. Dr. Srijana Subba (PW-10), however, chose to record that there was no chronic disorder to Chandra Bahadur Rai's sex organ and that, Tshering Thendup Bhutia's sex organ was intact. In her medical report (Exhibit-11) of Arun Rai, she did not even record anything about his sexual organ. None of the medical reports reported that the appellants were capable of performing sexual act. It is obvious that one must be capable of performing sexual act to be able to commit rape. Mr. N. Rai's suggestion is, however, that in a case of rape if the prosecution fails to establish that the accused was capable of performing sexual act the allegation of rape must necessarily fail. We are not in agreement. In a given case even if there is no positive evidence about an accused person's capability to perform sexual act there could be enough

material evidence including medical and forensic evidence to establish that it was the accused and the accused alone who had committed the rape. In such cases it would not be improper to presume that the accused was capable of performing sexual act. In the present case, Dr. Srijana Subba (PW-10) has noted that there was no chronic disorder in Chandra Bahadur Rai's sex organ and that, Tshering Thendup Bhutia's sex organ was intact, as such it would be relevant to consider the other evidences before coming to a conclusion on this aspect.

12. The victim (PW-1) was examined on 23.01.2017 by Dr. Tukki D. Bhutia (PW-11), the Gynaecologist who prepared the medical report (Exhibit-12) dated 23.01.2017. Dr. Tukki D. Bhutia (PW-11) noted that the victim (PW-1) did not remember the time and date of the assault. According to Dr. Tukki D. Bhutia (PW-11), there was no injury on her breast; bright redness was seen on the left labia minora and an old healed tear present at 3 O'clock position of the hymen. The fourchette was normal and no bleeding or discharge was seen. The victim tested negative for urine pregnancy test and there was no visible fresh or old injuries over the body. She, thus, opined that the local redness seen over the left labia minora and old hymenal tear was suggestive of blunt injury due to blunt trauma. She also deposed that the laboratory report from the Pathology department dated 01.04.2017 showed absence of spermatozoa. During her cross-examination, she admitted that blunt injury mentioned in the victim's medical report (Exhibit-12) may occur if someone falls from a height and that hymenal tear may also occur due to stretching or rigorous exercise. She admitted that the redness in left labia minora may be caused due to itching/infection/allergies, which is common amongst girls. She

admitted that she did not find stains of semen, blood, foreign hair or saliva stain on the body of the victim (PW-1) including her private part and that the victim (PW-1) did not mention about any threat made to her by the appellants. She admitted that the victim (PW-1) did not tell her the exact time and date of assault. She also opined that it is not necessary that in every case of rape of a minor or an adult the victim must necessarily sustain injury. In fact, she volunteered to state that even when injuries are sustained by a victim, if the victim is medically examined after some days of the incident, there is a possibility that the bruises, abrasions and lacerations may not show depending upon the amount of time elapsed between the incidents and the medical examination. She fairly conceded that she could not say whether the victim (PW-1) who was medically examined by her was sexually assaulted or not.

13. Like in almost all cases of sexual assault on minors, the sole testimony of the victim is once again on test in the present case. Therefore, the deposition of the victim (PW-1) must be examined along with the other evidences produced by the prosecution. The filing of the FIR (Exhibit-4) by the victim's father (PW-2) has been proved. The FIR (Exhibit-4) reports that the victim (PW-1) had been raped by Chandra Bahadur Rai and Tshering Thendup Bhutia. The victim's father (PW-2) categorically deposed that he knew all three appellants as they were his co-villagers and lived close to his house. There was no suggestion from the defence that this assertion of the victim's father was not true.

14. The victim (PW-1) deposed that:

> *".....I cannot recall the exact date, but when I had come to Sxxx (name withheld) from Pxxx*

(name withheld) after a few days, when I was washing clothes at Aamai's (grandmothers) house, I met Khantarey Deba, who asked me how I was. He also used to visit our house, when ever my papa was out. I used to feel scared of him and used to stay away from the house if my father was out, as I was scared he would come to the house, since he used to threaten and beat me.

After I was admitted in school, he took me to his house and on two occasions, he opened my clothes and beat me with a black belt. He also banged my head against the wall. He also committed rape on me and when I cried out for help, he would play music, so that no one could hear. He then used to beat me.

Later, he told me that if I did as he instructed, he would stop abusing me sexually. He then gave me a small bottle of poison and told me to mix it with papa's food. I took the poison home and kept it in a corner of the window sill. I had told my sister it was poison but she later fed it to the chickens after which 5 of our chickens died.

Khantarey Deba also used to constantly pressurize me to kill my brother. Hence, one day, while playing outside, I stabbed my brother on the leg with a scissor. When the accused Khantarey Deba found my brother still alive, he was angry and took me to his house and removed all my clothes, beat me and thereafter sexually abused me again.

Unable to bear the torture and out of sheer fear, I tried to commit suicide by hanging from a Guava tree in our bari but as I saw my father coming down, I hid the rope.

Thereafter, in order to avoid Khantarey, I started taking a different route while returning home from school but one day, I was caught by Tshering who took me below his house, removed by clothes and also tried to sexually abuse me. He had also removed his trousers but I managed to run away before he could penetrate and complete the act. Thereafter, I was scared to go to school, I was also scared to tell my father in case he got angry with me.

I confided in my younger sister, who told me, if we go to school together, it would not happen again. However, the day I started going to school again, we met Khantarey on the way and when he saw me my sister told him she would inform papa, about him (last sentence objected to as beyond 161 statement.) Thereafter, I told my sister to run away. However, he beat both of us and he sexually assaulted me again.

I then told my grandmother, Amai, and my 'kaka' (uncle), who then confronted the accused persons and warned them not to repeat such acts. Finally I also informed my father after which kaka, Papa, I and my aunts went to the police station and reported the matter to the police.

Thereafter I have given my statement in the Court, here in Gyalshing, where I had also told the Madam about Arun Rai, a driver, who had also tried to sexually molest me. After I had reported the matter to the police about Khantarey and Tshering, Arun Rai had come and threatened me not to inform the police about him.

This is the statement recorded by madam marked Exhibit-1 (in two pages) bearing my signatures Exhibit-1(a), 1(b) and 1(c). These are the questions put to

> *me by the madam marked Exhibit-2 (in three pages) bearing my signatures marked Exhibits-2(a), 2(b) and 2(c).*
>
> *(Victim breaks down/began crying at the time of identification of the accused persons.)"*

15. The victim (PW-1) has given a detailed deposition about her interactions with the person she refers to as "Khantarey Deba". She has not only deposed that she was raped by him but also described the circumstances when she was raped. Her deposition reflects that on two occasions he had taken her to his house, opened her clothes, beat her with a black belt and also raped her. She deposed that when he committed rape she would cry out for help but he would play music so that no one could hear.

16. The deposition of the victim reflects that he not only raped her but also beat her up and gave a bottle of poison to mix it in her father's food. According to the victim, this poison was fed by her sister to the chickens after which five of their chickens died. She further deposed that "Khantarey Deba" used to constantly pressurize the victim (PW-1) to kill her own brother and in fact, one day she had stabbed her brother on the leg with a scissor. The victim (PW-1) deposed that when "Khantarey Deba" learnt about this, he was angry and took her to his house, removed all her clothes, beat her and thereafter, sexually abused her again. She deposed that unable to bear the torture she even tried to commit suicide. The victim (PW-1) deposed that she had confided about it with her younger sister who told her that if they went to school together it would not happen again. She further deposed that the day she started going to school again, they met "Khantarey" on the way and when he saw her, her sister told him that she would inform their father after which she asked her

sister to run away. The victim deposed that he beat both of them and sexually assaulted her again. There is no investigation at all to the truth and veracity of these allegations. If these statements were true, both oral and forensic evidence could have been available. No effort, whatsoever, seems to have been made to gather such evidence. The defence cross-examined the IO and he conceded that he could not find the "khukri", axe, belt, poison bottle and tape-recorder and that there are no witnesses who had seen the appellants and the victim together at any point of time. The defence, however, did not cross-examine the victim (PW-1), the victim's father (PW-2), the victim's uncle (PW-3) or any other witness on the above aspects deposed by the victim (PW-1). The failure of the defence to effectively cross-examine the witnesses on these aspects has resulted in the deposition of the victim (PW-1) remaining unquestioned and intact. At this juncture, we deem it necessary to clarify that a study of the various pronouncements of the Hon'ble Supreme Court on appreciation of statements of child victims reflects that the rule is not that corroboration is essential before conviction in every case but the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge. The Hon'ble Supreme Court in ***Rameshwar S/o Kalyan Singh vs. State of Rajasthan***[15] held that:

> "**19.** ..... The tender years of the child, coupled with other circumstances appearing in the case, such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be

[15] AIR (39) 1952 SC 54

> present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case be corroboration before a conviction can be allowed to stand.
> ....."

17. The salutary purpose of every investigation is to seek the truth without which justice is meaningless. It is the duty of the investigating officer to investigate the case in all its aspects and present the evidence collected to the court to enable it to come to a firm conclusion without the aid of presumptions. Permissible presumptions are for the courts to presume and not for the investigators. Unfortunately, we are constrained to remark that the investigation is wanting in this aspect.

18. We, however, cannot disagree with the learned Special Judge that failure to examine the grandmother and the sister would not be sufficient to throw out the prosecution case since the defence has failed to cross-examine the witnesses on these vital aspects and thus the deposition of the victim (PW-1) stands untarnished. However, we must unhesitantly state that examining these witnesses would have greatly helped the court to arrive at a firm conclusion.

19. The learned Special Judge concluded that the victim's deposition was lucid, detailed and without infirmity and therefore, reliable and credible. Although, the medical evidence, it was argued by the defence did not support the prosecution case, the learned Special Judge held that absence of grave injuries and spermatozoa would not affect the prosecution case. The learned Special Judge found corroboration of the victim's (PW-1) deposition from the testimony of

the victim's father (PW-2) when he deposed that after he found the victim (PW-1) absenting herself from school he had found that she was refusing to go to school as she was scared of Chandra Bahadur Rai and when he and his brother enquired from the victim (PW-1), she had disclosed about the incidents involving Chandra Bahadur Rai and Tshering Thendup Bhutia. The learned Special Judge held that the deposition of the victim's uncle (PW-3) corroborated the evidence of the victim's father (PW-2). Relying upon the judgment of the Hon'ble Supreme Court in ***Gurmit Singh*** (*supra*), it was held that the court should examine the broad probabilities of a case and not get swayed away by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. It was, thus, held that the prosecution had been successful in establishing its case against all the three appellants for which they were ultimately convicted.

20. When the deposition of the victim (PW-1) remained intact, section 29 of the POCSO Act did get attracted and in such event, it was necessary for the court to presume that Chandra Bahadur Rai and Tshering Thendup Bhutia had committed and attempted to commit the alleged offences, unless the contrary was proved. Chandra Bahadur Rai and Tshering Thendup Bhutia offered no such proof. The evidence produced does not disclose any strong motive to falsely involve Chandra Bahadur Rai and Tshering Thendup Bhutia. The victim's (PW-1) deposition which remained unassailed and

corroborated to some extent by the deposition of the victim's father (PW-2), her uncle (PW-3) and the medical evidence which found an old hymenal tear as well as redness in the labia minora of the victim (PW-1) provides sufficient evidence to satisfy the ingredients of section 5(l) of the POCSO Act and section 503 IPC against Chandra Bahadur Rai. The deposition of the victim (PW-1) also reflects that Tshering Thendup Bhutia had tried to commit penetrative sexual assault upon the victim (PW-1) but she ran away. Thus, the convictions of Chandra Bahadur Rai and Tshering Thendup Bhutia, are upheld.

21. At this juncture, it would be relevant to consider the submissions of Ms Gita Bista in so far as Arun Rai is concerned. It is evident that the FIR (Exhibit-4) was lodged against Chandra Bahadur Rai and Tshering Thendup Bhutia only, although, it was lodged four days after the victim's father (PW-2) came to learn about the sexual assault by the two of them. Inspite thereof, Arun Rai was not named in the FIR (Exhibit-4). When the victim (PW-1) disclosed about Arun Rai in her statement under section 164 Cr.P.C., she talked about a completely different incident than the one mentioned in the FIR (Exhibit-4). The IO, however, did not choose to launch a separate FIR and investigate the same although he had the knowledge. The IO continued with the same investigation and on completion thereof, filed a charge-sheet not only against Chandra Bahadur Rai and Tshering Thendup Bhutia but also against Arun Rai.

22. In ***Vijender vs. State of Delhi***[16], the Hon'ble Supreme Court held that:

> **"27.** That brings us to the conviction of Vijender under Section 25 of the Arms Act and Section 5 of TADA for illegal possession of the country-made pistol and a cartridge. The charge that was framed against Vijender in this regard was to the effect that on 30-6-1992 he was found in unlawful possession of a country-made pistol and a live cartridge in his house in Village Johripur — and not that he used that country-made pistol for kidnapping and/or murder of Khurshid. In other words, no charge was framed against him under Section 27 of the Arms Act on an allegation that he used it for the above offences. If such an allegation was made Vijender could have been tried for kidnapping and murder and for using the firearm under Section 27 of the Arms Act in the same trial as all the offences were a part of the same transaction. In the absence of such an accusation, he could not have been jointly tried for illegal possession of a firearm and ammunition on 30-6-1992 with the offences of kidnapping and murder that took place on 26-6-1992, in view of sub-section (1) of Section 218 CrPC and non-applicability of sub-section (2) thereof. The question then arises is whether such procedural irregularity caused any failure of justice. In the facts of the instant case this question must be answered in the affirmative for the statement made by PW 2 before the Investigating Officer has also been taken into consideration for this conviction also. To put it differently, the evidence led by prosecution relating to kidnapping and murder has been utilised for convicting the appellant for unauthorised possession of firearm. The conviction under Section 25 of the Arms Act must also fail for the simple reason that no previous sanction for such prosecution as required under Section 39 of the Arms Act was produced during trial. This aspect was also totally overlooked by the trial Judge. Since the convictions of Vijender for illegal possession of pistol and cartridge cannot be sustained on the above grounds we need not go into the question whether on facts it can be sustained."

23. In ***Taraman Kami*** (supra), a division bench of this court in a similar fact situation held that a person could not be convicted and sentenced for an offence disclosed during the recording of a statement in the investigation of another case without registration of an FIR. It was held:

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[16] (1997) 6 SCC 171

> "**13.** On a reading of the above rationale, it is indeed explicit that when an offence is committed it is imperative that a complaint under Section 154 of the Cr.P.C. is lodged at the Police Station, and the Police shall take steps as enumerated hereinabove. Thus, in the instant case, if the I.O. had during investigation stumbled upon an offence of like nature committed by the Appellant, against P.W.3, it was his bounden duty to record the facts stated by the person, treat it as a Complaint under Section 154 of the Cr.P.C., register a fresh Complaint and carry out investigation into the matter, the alleged offence against P.W.3 being independent of the offence perpetrated on P.W.4. Under no circumstances can he adopt a short cut route, foregoing legal provisions and file a Charge-Sheet on the basis of a Section 161 Cr.P.C. statement of a witness. At best, Section 161 Cr.P.C. statement of a witness can be used by either party for contradictions or omissions when the witness adduces evidence before a Court and is never to be considered as substantive evidence. In such a situation also, when the person makes contradictory statements either before different fora or at different stages of a matter, if his statement is sought to be contradicted his attention should be called to those parts which are to be used for contradicting him as provided in Section 145 of the Evidence Act, 1872. The provisions of law have to be comprehended by the I.O., who is then to proceed in terms perspicuously set out thereof. The accused for his part is entitled to know the contents of an FIR which connect him with the offence to enable him to protect his interest."

24. The victim deposed that "..... *Thereafter I have given my statement in the Court, here in Gyalshing, where I had also told the Madam about Arun Rai, a driver, who had also tried to sexually molest me. After I had reported the matter to the police about Khantarey and Tshering, Arun Rai had come and threatened me not to inform the police about him.* .....". In cross-examination, the victim (PW-1) deposed she could not remember exactly when Arun Rai came to her and threatened her. Besides the victim (PW-1), no other witnesses deposed anything against Arun Rai. Dr. Tukki D. Bhutia (PW-11) deposed that when she examined the victim (PW-1), she gave history of sexual assault by "Khantarey" and Tshering, only. The IO admitted during cross-examination that at the time of recording of the statement of the victim (PW-1) under section 161 Cr.P.C. she did not state anything

against Arun Rai. He also admitted that none of the witnesses deposed against Arun Rai and that he was unable to ascertain the exact place of occurrence with regard to commission of alleged offence by him, after examining the victim. We are of the considered view that it would not be safe to rely upon the uncorroborated cryptic testimony of the victim (PW-1) against Arun Rai when she did not make such allegation in the FIR (Exhibit-4) lodged after four days of knowledge as well as her statement recorded under section 161 Cr.P.C. during the investigation of the case. Thus, in view of the law laid down by the Hon'ble Supreme Court in ***Vijender*** (*supra*) and this court in ***Taraman Kami*** (*supra*) and on consideration of the evidence, we are of the considered view that the conviction of Arun Rai in the present case must be set aside as the prosecution has failed to establish beyond reasonable doubt that Arun Rai had committed the alleged offences. It is, accordingly, so ordered.

25. This leaves the last argument made by learned counsel for Chandra Bahadur Rai and Tshering Thendup Bhutia for consideration. It is their contention that the sentences imposed upon the said appellants are too harsh and if one were to consider their respective ages, the sentences would, in fact, mean spending the rest of their lives in prison.

26. The records reveal that Chandra Bahadur Rai at the time of filing the charge-sheet was 65 years and Tshering Thendup Bhutia was 67 years. Considering all relevant aspects of the matter including the age of the appellants, the nature of evidence, the gravity of the offences committed and the sentences prescribed, we are of the

considered view that justice would be served if Chandra Bahadur Rai and Tshering Thendup Bhutia were sentenced in the following manner:-

Chandra Bahadur Rai

(i) For the offence under section 5(l) of the POCSO Act, rigorous imprisonment of ten years and a fine of Rs.50,000/-. In default of payment of fine, he shall undergo further imprisonment for a term of two years.

(ii) For the offence under section 506 IPC, imprisonment of two years.

Both sentences shall run concurrently.

Tshering Thendup Bhutia

(i) For the offence under section 18 of the POCSO Act, rigorous imprisonment for a term of three and a half years and a fine of Rs.25,000/-. In default of payment of fine, he shall undergo further imprisonment of one year.

27. The period of detention already undergone by Chandra Bahadur Rai and Tshering Thendup Bhutia, be set off.

28. Resultantly:-

(i) **Criminal Appeal No. 01 of 2018** is partly allowed. Although, the conviction of Chandra Bahadur Rai is upheld, the sentences imposed by the learned Special Judge are modified to the above extent.

(ii) **Criminal Appeal No. 06 of 2018** is allowed. The impugned judgment convicting and sentencing Arun Rai, is set aside. Consequently, he be set at liberty forthwith, unless required in any other case. Fine, if any, deposited

by him as per the impugned order on sentence of the learned trial court, be refunded to him.

(iii) **Criminal Appeal No. 07 of 2018** is partly allowed. Although, the conviction of Tshering Thendup Bhutia is upheld, the sentence imposed by the learned Special Judge is modified to the above extent.

(iv) The learned Special Judge had awarded a composite amount of Rs.3,00,000/- to the victim (PW-1) as compensation under the Sikkim Compensation to Victims or his Dependents Schemes, 2011 as amended by Notification No. 66/HOME/2016 dated 18.11.2016. The said amount of compensation is confirmed. The amount shall be kept in a fixed deposit in the name of the victim payable on her attaining majority.

29. Criminal Appeal Nos. 01 of 2018, 06 of 2018 and 07 of 2018, stand disposed of.

30. Copy of this judgment be transmitted to the learned trial court for information and compliance.

31. The records of the learned Trial Court be returned forthwith.

(Bhaskar Raj Pradhan)
Judge

(Arup Kumar Goswami)
Chief Justice

Approved for reporting : **Yes/~~No~~**
Internet : **Yes/~~No~~**

bp