THE
SIKKIM LAW REPORTS

JULY AND AUGUST - 2020

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Sangam Rai and Another* v. *State of Sikkim ***511A***

Indian Evidence Act, 1872 – S. 35 – Entry in Public Record made in Performance of Duty – The Hon'ble Supreme Court has repeatedly held that to render a document admissible under S. 35 of the Evidence Act, 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 S. 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. A document may be admissible, but as to whether the entry contained therein has any probative value would be required to be examined. The correctness of the entries in the official record by an authorised person would depend on whose information such entries stood recorded and what was his source of information. The entry in School register requires to be proved in accordance with law.

D.K. xxx (name withheld)* v. *State of Sikkim ***502A***

Protection of Children from Sexual Offences Act, 2012 – S. 2 (d) – Proof of Age – The appellant was the stepfather of the victim. It is quite obvious that he would know her age or at least the fact that she was a minor. The victim was cross-examined by the defence. Had the victim been a major, the defence would have definitely questioned the victim regarding her assertion that she was 9 years old. They did not do so. The victim's deposition that she was 9 years old remained unquestioned. Although, we do agree that the victim's knowledge about her age may not be her primary knowledge, the conduct of the appellant of not questioning the victim's deposition that she was 9 years old would be relevant under S. 8 of the Indian Evidence Act, 1872. Physical appearance of a child of 9 years and an adult girl would be noticeably different and when the victim was in the witness box, a suggestion, at least, would have been given if the victim was or appeared to be a major – The victim was in fact 9 years old at the time of her deposition before the Court as stated by her.

D.K. xxx (name withheld)* v. *State of Sikkim ***502B***

SLR (2020) SIKKIM 491

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

Bail Application No. 08 of 2020

Pempa Rapgay Bhutia ….. PETITIONER

Versus

State of Sikkim ….. RESPONDENT

For the Petitioner: Mr. Jorgay Namka, Advocate.

For the Respondent: Mr. S.K. Chettri, Additional Public Prosecutor.

Date of decision: 8th July 2020

A. Code of Criminal Procedure, 1973 – S. 439 – Bail – The petitioner has been booked under the stringent provisions of the Protection of Children from Sexual Offences Act, 2012, and it is trite to reiterate that the victim is 11 years old, while the petitioner is 38 years old. In such a circumstance, the nature and gravity of the accusation, the penalty for which extends to seven years, cannot be overlooked – Likelihood of absconsion of the petitioner or his tampering with and influencing witnesses cannot be ruled out. At the same time, the interest of the society at large is also to be given due consideration which could be jeopardised by enlarging the petitioner, who has at this stage been accused of sexual assault against a minor child.

(Para 5)

Petition dismissed.

Chronology of cases cited:

1. Neeru Yadav v. State of Uttar Pradesh, AIR 2015 SC 3703.

2. Nikesh Tarachand Shah v. Union of India, 2018 Cri.L.J.721 (SC).

3. Ram Govind Upadhyay v. Sudarshan Singh and Others, (2002) 3 SCC 598.

4. Prasanta KumarSarkar v. AshisChatterjee Another, (2010) 14 SCC 525.

ORDER

Meenakshi Madan Rai, J

1. The Petitioner herein has been booked under Section 10 of the Protection of Children from Sexual Offences Act, 2012, for having committed sexual assault on a minor victim, aged about 11 years. Learned Counsel for the Petitioner submits that the allegation against the Petitioner is false as the objective of the victim herein and two other minor girls, aged about 13 years and 15 years, all housed in the Drishya Child Care Centre, Aho, East Sikkim, was to run away from the Centre. In pursuance thereof, the victim and the two other girls falsely informed their teacher that they had been molested at the Centre by the Petitioner. The teacher reported the incident to the Ranipool Police Station. Following such report, all three girls were counselled by a Counsellor from the Child Welfare Centre. During the counselling, the other two girls admitted that their allegations against the Petitioner were false. That, the instant FIR has lodged on 27-02-2020 by two Members of the Child Welfare Committee alleging assault on the 11 year old minor victim by the Petitioner. Learned Counsel further canvassed the contention, that, on 28-02-2020 when the alleged victim was taken to the place of occurrence by the Investigating Officer accompanied by three Child Line staff under the Child Welfare Committee, she specifically stated that the allegations made by her against the petitioner was untrue. The allegation is evidently false as the Petitioner is not even the In-Charge of the Centre, where the alleged victim is housed, but is the In-Charge of Drishya Rehabilitation Centre and lends a helping hand to the Drishya Child Care Centre in managing its accounts. On the basis of the FIR, the Petitioner was arrested on the same date from where he was remanded to judicial custody and has been in custody for 132 days. That, the Petitioner is innocent and his detention in custody will tantamount to punishment before conviction and

thereby in violation of his fundamental rights. Besides, he is the only earning member in his family comprising of two aged parents who are Senior Citizens and require his constant attention. His incarceration would therefore prejudice his parents. To fortify his submissions, Learned Counsel placed reliance on ***Neeru Yadav*** vs. ***State of Uttar Pradesh***[1] and ***Nikesh Tarachand Shah*** vs. ***Union of India***[2]. It was urged that the offence allegedly committed by the Petitioner entails imprisonment of a maximum of seven years and not with death or imprisonment with life. That should the Petitioner be enlarged on bail he undertakes not to tamper with evidence which in any event is not possible since the children are now lodged in the Freedom Open Shelter Home, Tathangchen, which is being run by a Non-Governmental Organisation to which the Petitioner has no access. That, on similar grounds the question of threatening the victim or influencing the other witnesses does not arise. Learned Counsel also submits that the Petitioner has no criminal antecedents and he will not abscond since he is a permanent resident of Sikkim. That, if he is enlarged on bail he is willing to abide by any stringent conditions imposed by this Court.

2. Learned Additional Public Prosecutor *per contra* submitted that the offence committed on the minor victim is a heinous. That, contrary to the submission of Learned Counsel for the Petitioner that the victim had stated at the place of occurrence, on 28-02-2020, that she had made a false allegation against the Petitioner, the investigation reveals no such circumstance and infact the Charge-Sheet clearly reveals that it was only the other two alleged victims who denied having been sexually assaulted by the Petitioner, while the minor victim consistently reiterated that she was infact sexually assaulted by the Petitioner not on one, but infact on three different occasions. That, there is every likelihood of the Petitioner tampering and threatening witnesses inasmuch as even if he is not in a position to threaten the victim directly the parents of the victim may be subjected to such ordeal as also other witnesses. That, the gravity of the offence and the penalty may also be considered by this Court. That, the Charge-Sheet has already been submitted and trial is to commence shortly, in such a circumstance, enlarging the Petitioner on bail at this stage would seriously prejudice the Prosecution case. That, in consideration of all the grounds put forth the Petition be rejected.

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[1] AIR 2015 SC 3703
[2] 2018 CRI.L.J. 721 (SC)

3. I have heard at length the rival submissions of Learned Counsel and carefully perused all documents placed before me.

4. From the records and admittedly the Petitioner is aged about 38 years, while the minor victim is aged about 11 years. The victim has alleged sexual assault by the Petitioner on three separate occasions in the Drishya Shelter Home where she was lodged and the Petitioner was the In-Charge. Although the specific argument forwarded by Learned Counsel for the Petitioner was that the Petitioner was not the In-Charge of the Drishya Child Care Centre, investigation indicates otherwise. He was working as an Accountant in the Drishya Rehabilation Centre, but was the In-Charge of the Drishya Child Care Centre since 2018. Vehement arguments were made on the point that the victim had also stated that she had lied about the allegation against the Petitioner, but the Prosecution case is to the effect that the other two children had admitted this position but not the victim. This Court is aware of the principles laid down in the ratio of the Hon'ble Supreme Court in ***Ram Govind Upadhyay*** vs. ***Sudarshan Singh and Others***[3] relied on by Learned Counsel while considering an application for bail. At the same time it is worth noticing that the Court is also required to consider not only the gravity of the offence, but the interest of the society at large. In ***Prasanta Kumar Sarkar*** vs. ***Ashis Chatterjee and Another***[4] the points factored in by the Hon'ble Supreme Court at the time of considering bail application is the necessity of examining whether there is any *prima facie* case or reasonable ground to believe that the accused had committed the offence and the likelihood of its repetition as also reasonable apprehension of the witnesses being influenced.

5. The Petitioner has been booked under the stringent provisions of the Protection of Children from Sexual Offences Act, 2012, and it is trite to reiterate that the victim is 11 years old, while the Petitioner is 38 years old. In such a circumstance, the nature and gravity of the accusation, the penalty for which extends to seven years, cannot be overlooked. Consequently, the likelihood of absconsion of the Petitioner or his tampering with and influencing witnesses cannot be ruled out. At the same time, the interest of the society at large is also to be given due consideration which could be

[3] (2002) 3 SCC 598
[4] (2010) 14 SCC 525

jeopardised by enlarging the Petitioner, who has at this stage been accused of sexual assault against a minor child.

6. Hence, in the light of the facts, circumstances and materials placed before this Court at this juncture and in view of the *prima facie* satisfaction of this Court concerning the offence based on such materials, I am of the considered opinion that the instant matter is not one where the discretion of this Court can be exercised in favour of the Petitioner.

7. Consequently, the Bail Appln. stands rejected and disposed of.

SLR (2020) SIKKIM 496

(Before Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. MC No. 02 of 2020

Dorjee Tamang and Others ….. PETITIONERS

Versus

State of Sikkim ….. RESPONDENT

For the Petitioners: Mr. J.B. Pradhan, Senior Advocate with Mr. D.K. Siwakoti, Mr. Bhusan Nepal and Ms. Ranjeeta Kumari, Advocates.

For the Respondent: Mr. S.K. Chettri, Additional Public Prosecutor with Mr. Sujan Sunwar, Assistant Public Prosecutor.

Date of decision: 13th August 2020

A. Code of Criminal Procedure, 1973 – S. 482 – Considering the nature and gravity of the allegations made in the F.I.R and the fact that the allegations were made against each other by the petitioners in the heat of election campaigning coupled with the fact that they have considered and decided to forgive and forget, this Court is of the view that this is a fit case to exercise the inherent powers of this Court under S. 482, Cr.P.C and quash the criminal proceedings to secure the ends of justice. This will allow the co-villagers to co-exist in a peaceful atmosphere which may have been disturbed by heightened passions during the peak of elections due to their political leanings. The nature of the allegations may not bring them to the category of heinous and serious offences so as to be treated as crime against society.

(Para 10)

Petition allowed.

Chronology of cases cited:

1. Gian Singh v. The State of Punjab, (2012) 10 SCC 303.
2. Narinder Singh and Others v. State of Punjab and Another, (2014) 6 SCC 466.

JUDGMENT AND ORDER

Bhaskar Raj Pradhan, J

1. The petitioner no. 26 had lodged a first information report (FIR) against petitioners no. 1 to 25 before the Sadar Police Station, Gangtok, East Sikkim which was registered as Sadar P.S Case No.52/2019 dated 05.04.2019 under sections 447/143/149/506 and 500 of the Indian Penal Code, 1860 (for short 'IPC').

2. The petitioner no. 26 alleged that on 04.04.2019 around 7 p.m. while returning home after attending a party meeting with candidate of the SDF party, he received a call from his wife regarding some problem at home. On reaching home, the petitioner no.26 learnt that one Manoj Subba along with his friend had come to his house in a vehicle and a group of boys who were all supporters of SKM party had followed them shouting and abusing and making allegation that Manoj Subba and his friend were bringing anti social elements to the village and distributing money. Whereas, actually Manoj Subba had come to the house of the petitioner no. 26 to collect his motorbike which he had left few weeks ago. The FIR further alleged that a group of boys illegally entered his house and abused and threatened his wife and children. After he reached home, he was also threatened and abused for bringing anti social people into the village and distributing money. The investigation resulted in filing of a charge-sheet against petitioners no. 1 to 25 under sections 447/143/149/506 and 509 IPC.

3. On 11.09.2019, the Court of the learned Chief Judicial Magistrate, Gangtok, East Sikkim, took cognizance of the offences under sections 447/ 143/149 and 506 IPC. The substance of accusation is yet to be framed. On 1.10.2019, the learned Chief Judicial Magistrate granted bail to the petitioners no.1 to 25 as the offence was bailable and fixed the next date for substance of accusation.

4. On 27.11.2019, the learned counsel for the petitioners no.1 to 25, submitted that the matter was likely to be settled. The learned Chief Judicial Magistrate recorded in the order dated 27.11.2019 that section 143 of the IPC is non-compoundable and therefore, the matter cannot be compounded. However, if the parties were willing to settle the matter then they could take recourse to appropriate provision of law.

5. On 10.12.2019, the counsel for the petitioner no. 26 submitted before the learned Chief Judicial Magistrate that he and his family had amicably settled the matter. It is in these circumstances that the petitioners who are the complainant on the one side and the accused persons on the other have jointly approached this court with a prayer to exercise its inherent powers under section 482 of the Code of Criminal Procedure, 1973 (for short „Cr.P.C.) to quash the criminal proceedings in G.R. Case No. 236 of 2019 (*State of Sikkim vs. Dorjee Tamang and 24 Others*) pending before the court of the learned Chief Judicial Magistrate under sections 447/143/149 and 506 IPC. The petitioners have also annexed the original "Milapatra" dated 15.12.2019 which records that on 15.12.2019 in the presence of the Ward Panchayat Members and village elders they had amicably settled the matter, the petitioner no. 26 and his family members having forgiven the youths involved in the incident of 04.04.2019.

6. Heard Mr. J.B. Pradhan, learned Senior Advocate on behalf of the petitioners and Mr. S.K. Chettri, learned Additional Public Prosecutor for the state respondent. Mr. Pradhan submitted that the incident relates to the peak period of campaigning during the Sikkim Legislative Election 2019. He submitted that the petitioners no.1 to 22, 24 and 26 are co-villagers being residents of Syari, Gangtok, East Sikkim and petitioners no. 23 and 25 are residents of adjacent neighbouring village Nandok, East Sikkim, falling under the same Syari Assembly Constituency. It is further submitted that except for the instant incident and criminal proceedings, there were no other disputes between the petitioners and that after the election, all the petitioners were living in cordial and good relations in the village. It is averred in the petition that the incident occurred at the height of election campaigning and it was neither pre-planned nor on account of any hostility, hatred or ill will between the petitioners. That, there is no enmity between the parties thereof. The petitioner no. 1 to 25 had already expressed their regret about the incident to their co-villager - petitioner no. 26, who in turn had also decided to

forgive and forget the incident. In the circumstances, it is submitted that in the interest of justice the criminal case pending may be quashed.

7. Mr. S.K. Chettri also submits that the State has considered the allegations in the FIR and the fact that the parties are willing to compromise the matter and therefore, they have no objection if all pending disputes between them are settled amicably.

8. Mr. J.B. Pradhan had relied upon various judgments of the Supreme Court as well as this court. In ***Gian Singh vs. The State of Punjab***[1], the Supreme Court laid down guidelines for and limitations on exercise of quashment power of the High Court. It was held as follows:-

> ***"61.*** *The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.: (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any*

[1] (2012) 10 SCC 303

compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

9. In ***Narinder Singh and Others vs State of Punjab and Another***[2], the principles laid down in ***Gian Singh*** (supra) regarding quashment of non-compoundable offences in view of compromise arrived at between the parties were reiterated.

10. Sections 447 and 506 IPC are compoundable offences, compoundable by the petitioner no. 26 in the present case. Section 143 IPC is punishment provided for an unlawful assembly. Section 149 IPC mandates every member of an unlawful assembly guilty of offence committed in prosecution of common object. Considering the nature and the gravity of the allegations made in the FIR and the fact that the allegations were made against each other by the petitioners in the heat of election campaigning coupled with the fact that they have considered and decided to forgive and forget, this court is of the view that this is a fit case to exercise the inherent powers of this court under section 482 Cr.P.C. and quash the criminal proceedings pending before the Court of the learned Chief Judicial Magistrate, Gangtok, East Sikkim to secure the ends of justice. This will allow the co-villagers to co-exist in a peaceful atmosphere which may have been disturbed by heightened passions during the peak of elections due to their political leanings. The nature of the allegations may not bring them to the category of heinous and serious offences so as to be treated as crime against society.

11. Accordingly, G.R. Case No. 236 of 2019 (*State of Sikkim vs. Dorjee Tamang and 24 Others*) pending before the Court of the learned Chief Judicial Magistrate, Gangtok, East Sikkim, under section 447/143/149/ 506 of the IPC arising out of FIR No. 52/2019 registered on 05.04.2019 before the Sadar Police Station, is quashed.

12. The petition is allowed.

13. Parties to bear their own costs.

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

[2] (2014) 6 SCC 466

SLR (2020) SIKKIM 502

(Before Hon'ble the Chief Justice and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. A. No. 20 of 2019

D. K. xxx (name withheld) ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. Umesh Ranpal, Legal Aid Counsel.

For the Respondent: Dr. Doma T. Bhutia, Public Prosecutor with Mr. S.K. Chettri, Additional Public Prosecutor.

Date of decision: 19th August 2020

A. Indian Evidence Act, 1872 – S. 35 – Entry in Public Record made in Performance of Duty – The Hon'ble Supreme Court has repeatedly held that to render a document admissible under S. 35 of the Evidence Act, 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 S. 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. A document may be admissible, but as to whether the entry contained therein has any probative value would be required to be examined. The correctness of the entries in the official record by an authorised person would depend on whose information such entries stood recorded and what was his source of information. The entry in School register requires to be proved in accordance with law.

(Para 7)

B. Protection of Children from Sexual Offences Act, 2012 – S. 2 (d) – Proof of Age – The appellant was the step father of the victim. It is quite obvious that he would know her age or at least the fact that she was a minor. The victim was cross-examined by the defence. Had the victim been a major, the defence would have definitely questioned the victim regarding her assertion that she was 9 years old. They did not do so. The victim's deposition that she was 9 years old remained unquestioned. Although, we do agree that the victim's knowledge about her age may not be her primary knowledge, the conduct of the appellant of not questioning the victim's deposition that she was 9 years old would be relevant under S. 8 of the Indian Evidence Act, 1872. Physical appearance of a child of 9 years and an adult girl would be noticeably different and when the victim was in the witness box, a suggestion, at least, would have been given if the victim was or appeared to be a major – The victim was in fact 9 years old at the time of her deposition before the Court as stated by her.

(Para 8)

Appeal partly allowed.

JUDGMENT

The judgment of the Court was delivered by ***Bhaskar Raj Pradhan, J***

1. The appellant seeks to assail the judgment and order on sentence, both dated 25.07.2019, passed by the learned Special Judge (POCSO), Gyalshing, West Sikkim, in S.T. (POCSO) Case No. 20 of 2018 (*State of Sikkim vs. D.Kxxx (name withheld) & Others*), convicting him under sections 5(l), 5(m) and 5(n) of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and sentencing him for thirty years of rigorous imprisonment and payment of fine of Rs.10,000/- for each of the offences with a direction that sentences shall run concurrently. The victim was his step daughter.

2. The learned Special Judge while considering the evidence led during the trial posed three questions to be answered. Two of those questions - whether the appellant, step father of the victim, repeatedly committed penetrative sexual assault on her and whether she was below the age of 12 years, are relevant for deciding the present appeal. Both the questions were answered in the affirmative. Mr. Umesh Ranpal, learned counsel for the appellant, challenges both these findings.

3. The learned Special Judge held that the explicit statements of the victim left no doubt whatsoever that the appellant committed penetrative sexual assault on the victim repeatedly. The learned Special Judge found corroboration from the evidence of Dr. Tukki Dolma Bhutia (PW-8), the Gynaecologist, who, while examining the victim noted that she had given history of her father rubbing his private part on her private part. Although, there were no injuries on the victim and her hymen was found intact when examined by Dr. Tukki Dolma Bhutia (PW-8), the learned Special Judge opined that this was not surprising since the victim was medically examined only in the month of August 2018, whereas the alleged assaults occurred between December 2017 to January 2018, by which time any evidence of injuries sustained would have long disappeared or healed. The learned Special Judge found further corroboration from the testimony of Sub Inspector Ankita Pradhan (PW-7) as she deposed about receiving the first information report from one doctor K.C. (name withheld). Further corroboration was found in the evidence of the learned Chief Judicial Magistrate (PW-3) who recorded the victim's statement under section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.). The learned Special Judge examined the provisions of sections 29 and 30 of the POCSO Act and held that although an opportunity was granted to the appellant, he did not put up any defence and thus, the charge stood proved.

4. The learned Special Judge also opined that the victim was in fact a child below 12 years when she was sexually victimised by the appellant. While holding so, the learned Special Judge noted that the defence counsel had not agitated the issue of the age of the victim; the birth certificate (Exhibit-11) is found to have been issued on 22.02.2015 by the Registrar, Births & Deaths, in which the date of birth of the victim was recorded as 28.02.2010; the authenticity of the birth certificate (Exhibit-11) was confirmed by Hemant Khati (PW-5), the Acting Registrar, Births & Death Cell. Although, the original register was not brought or exhibited, the learned Special Judge was of the opinion that there was no motive for him to authenticate a false document or commit perjury and therefore, found no reason to disbelieve him and that the Head Master (PW-4) of the victim's school had also corroborated that the victim's date of birth was in fact 28.02.2010.

5. Mr. Umesh Ranpal vehemently argued that the finding of the learned Special Judge regarding the proof of age of the victim was incorrect. He

submitted that the victim's statement due to her tender age could not be relied upon and that the medical certificate had, in fact, not been proved.

6. The victim deposed that she was attending school, reading in class-III and was 9 years old. The defence did not cross-examine the victim on this aspect. Besides the victim, no one who could have any special knowledge regarding the age of the victim was examined by the prosecution. The birth certificate (Exhibit-11) was not proved by the maker of the certificate. The custodian of the birth certificate (Exhibit-11) was also not examined. The victim was not asked to identify her birth certificate. PW-2 and PW-6 are the two witnesses who had signed on the seizure memo (Exhibit-3) during the seizure of the birth certificate (Exhibit-11) from one R.B. (name withheld). Both PW-2 and PW-3 did not have any idea what Exhibit-3 was. PW-6 went on to further state during cross-examination that he was not sure whether it was the same birth certificate seen by him on the relevant day. Hemant Khati (PW-5), the Acting Registrar, Births & Deaths Cell, Government of Sikkim, was examined by the prosecution. However, he did not depose anything about the birth certificate (Exhibit-11). He only deposed that he was asked by the Investigating Officer (IO) to authenticate the birth certificate and after having verified the Births & Deaths register, found the victim's date of birth recorded as 28.02.2010. During cross-examination, however, he admitted that he had been working only for the previous six months and that the letter (Exhibit-9) which he had issued to the IO regarding the date of birth of the victim was not prepared by him and further that he had not verified from the register of Births & Deaths. He also admitted that neither the relevant extract of the register nor the copy thereof was enclosed by him with the letter (Exhibit-9) to show the existence of such register and the details therein. He further admitted that he had also not produced the original register before the court. Hemant Khati (PW-5) was not deposing from his personal knowledge. Date of birth of a person is a question of fact which is required to be proved by cogent evidence. The prosecution ought to have placed the Births & Deaths register to prove the entry therein. The proof of correctness of what was recorded therein was to be proved by placing the material on which the age was recorded.

7. Besides the aforesaid witnesses, the prosecution also examined the Head Master (PW-4) of the school of the victim. He also did not have any special knowledge about the age of the victim save what may have been

recorded in the school admission register. He deposed that on 29.08.2018, the IO had filed a requisition (Exhibit-7) for authentication of the age of the victim after which he had gone through the school admission register and found her date of birth recorded in the said register as 28.02.2010 and accordingly, he had issued a letter (Exhibit-8) to the IO certifying the date of birth of the victim. During cross-examination, he admitted that in the letter (Exhibit-8) he had only mentioned that the victim was studying in class-III and apart from the above details he had not stated anything else in the said certificate. He also admitted that he had not enclosed the extract of the school admission register or a copy thereof. He further admitted he had not brought the school register before the court. Although, the Head Master admitted in cross-examination that he had not given any further details besides the fact that the victim was studying in class-III, a perusal of the letter (Exhibit-8) reflects that the admission was not true as in the said letter (Exhibit-8), it is clearly mentioned that her date of birth as recorded in the school admission register is 28.02.2020. The Hon'ble Supreme Court has repeatedly 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. A document may be admissible, but as to whether the entry contained therein has any probative value would be required to be examined. The correctness of the entries in the official record by an authorised person would depend on whose information such entries stood recorded and what was his source of information. The entry in school register requires to be proved in accordance with law. The school register was not produced leave alone the material from which those entries were made. Examining the present facts in view of settled law, we must, without hesitation, hold that the birth certificate was in fact not proved nor was the date of birth of the victim as purportedly recorded in the school register of the victim's school.

8. That leaves the sole testimony of the victim about her age being 9 years old. The appellant was the step father of the victim. It is quite obvious

that he would know her age or at least the fact that she was a minor. The victim was cross-examined by the defence. Had the victim been a major, the defence would have definitely questioned the victim regarding her assertion that she was 9 years old. They did not do so. The victim's deposition that she was 9 years old remained unquestioned. Although, we do agree that the victim's knowledge about her age may not be her primary knowledge, the conduct of the appellant of not questioning the victim's deposition that she was 9 years old would be relevant under section 8 of the Indian Evidence Act, 1872. Physical appearance of a child of 9 years and an adult girl would be noticeably different and when the victim was in the witness box, a suggestion, at least, would have been given if the victim was or appeared to be a major. We are, therefore, of the considered view that the victim was in fact 9 years old at the time of her deposition before the court as stated by her.

9. The victim identified the appellant in court. The victim deposed, "*..... I do not remember the exact date and month but one Thursday, my appa (father) while I was sleeping with my sister took me to his room and committed "chara" (penetrative sexual assault) on me. This continued one month, i.e., from the month of December to January.....*" The recording of the deposition does not make it clear whether the words in brackets after the word "chara", i.e., (penetrative sexual assault) was the statement of the victim or if it was the translation by the learned Special Judge. The word "chara" in Nepali may be used to describe a number of things, vulgar including, but not limited to penetrative sexual assault. If the victim had explained the word "chara" in Nepali it would have been advisable to record the depositions of the victim in her own words and then supply the translation. During cross-examination, the victim admitted that her "Appa" used to love her and never raised his hands on her. She also admitted that she used to sleep with her sister. She agreed to the suggestion that when her "Appa" used to allegedly take her to his room continuously for a month, neither her sister sleeping next to her nor anyone in the house, i.e., her grandparents and brothers came to know about the same. She admitted that she did not shout or made any hue and cry or sought help during the time of alleged incident or thereafter. She admitted that her movements were neither restricted by the appellant nor had he covered her mouth during the time of the alleged incidents or thereafter to refrain her from shouting or seeking help. She admitted that they lived in a kutcha house and if one shouts or talks loudly in one room it

can easily be overheard in the next room. She also admitted that she did not sustain any injury either in her genital area or in the body as a result of the alleged sexual assault. When the defence put it to her that in fact the appellant had not committed penetrative sexual assault on her, she denied the same. Although, during her examination-in-chief, she had exhibited her statement recorded under section 164 Cr.P.C. during cross-examination, she admitted that she did not know the contents of the document and that she had merely affixed her thumb impression. She also admitted that she was not read over and explained the contents thereof. She denied the suggestion that she was a tutored witness.

10. Subarna Rai (PW-3), the learned Chief Judicial Magistrate, deposed that she had recorded the statement of the victim under section 164 Cr.P.C. after ascertaining that it was being voluntarily made. She identified the statement (Exhibit-1). During her cross-examination, she admitted that the victim did not state before her that while she was sleeping, she was allegedly taken by the appellant to his room.

11. The first informant, who lodged the first information report (FIR) (Exhibit-12), was not examined as she was also charge-sheeted by the police for having failed to report about the commission of the offence by the appellant to the police.

12. Sub Inspector Ankita Pradhan (PW-7) deposed that she had received the FIR (Exhibit-12) and registered a zero FIR at the police station. She also deposed about the contents of the FIR lodged by Dr. K.P. The learned Special Judge has relied upon this part of the statement as corroborative evidence. Since the statement is attributed to Dr. K.P. who was not examined, we are of the view that the statement will have to be discarded.

13. Dr. Tukki Doma Bhutia (PW-8), who examined the victim, prepared her medical report (Exhibit-15). She noted that the victim had given history of her father rubbing his private part on her private part and that there were no history of bleeding or pain after the incidents. She noted that the victim had no visible fresh or old injuries over her body; labia majora and minora were normal, hymen was intact, fourchette and posterior commissure was normal and no bleeding, discharge or redness was seen. During cross-examination, Dr. Tukki Dolma Bhutia (PW-8) admitted that there was

nothing on the body of the victim to suggest that she was subjected to sexual assault. She also admitted that she did not know if the victim's statement given to her about her father rubbing his private on her private part was voluntarily or not. The learned Special Judge was correct in holding that it was not surprising that since the victim was examined after several months, any evidence of injuries sustained could have long disappeared. However, this fact does not help the prosecution case.

14. Dr. Suman Gurung (PW-9), the Medical Officer at the District Hospital, examined the appellant on 27.08.2018. He noted that the prepuce was retracted over the glans and no smegma was seen, penile shaft and glans were normally developed and no abnormality was seen, testis and scrotum were normally developed, pubic hair was normally developed, no local injuries old or new were seen in the genital region. From the history and physical examination, he opined that there was nothing to suggest that he was not capable to perform sexual act.

15. Police Inspector Kinga T. Bhutia (PW-10) was the Station House Officer who received the zero FIR and registered PS case No. 29/2018 dated 26.08.2018 under section 376 IPC read with section 6 of the POCSO Act and endorsed the case to Sub Inspector Tsheda D. Bhutia (PW-11), the Investigating Officer, for investigation. During cross-examination, he admitted that the complainant did not appear before him to lodge the FIR (Exhibit-12) and that he had registered the case on the basis of what was forwarded to him by the police station.

16. Sub Inspector Tsheda D. Bhutia (PW-11) admitted that the complaint was lodged after almost ten months of the alleged incident and that there are no witnesses to prove that the victim used to live with her grandparents. He agreed with the opinion of the Medical Officer with regard to the medical examination of the victim in the medical report (Exhibit-15).

17. A studied examination of the evidence brought forth by the prosecution leads us to hold that they have been able to prove that the appellant was the step father of the 9 years old victim and that he had in fact committed aggravated sexual assault on her more than once as described under sections 9(l), 9(m) and 9(n) liable for punishment under section 10 of the POCSO Act applying the presumption under section 29 of the POCSO Act.

18. We are unable to agree with the conclusion arrived at by the learned Special Judge that prosecution has been able to establish that the appellant had committed aggravated penetrative sexual assault although strong suspicion does arise that he did so. The cryptic evidence of the victim which was also not supported by medical evidence does not make us comfortable to uphold the conviction of the appellant.

19. Consequently, although the appellant was charged only under sections 5(l), 5(m) and 5(n) of the POCSO Act, we are of the considered view that justice would be served if the appellant was charged under 9(l), 9(m) and 9(n) of the POCSO Act, which are lesser but similar offences than what he was charged for. The appellant is thus convicted under section 9(l), 9(m) and 9(n) of the POCSO Act and sentenced to seven years of rigorous imprisonment for each of the offences. The sentences shall run concurrently. The period of detention already undergone by the appellant be set off.

20. The appeal is partly allowed and the impugned judgment and order on sentence, both dated 25.07.2019, are modified to the above extent. The award of victim compensation, consequently, is also modified. It is directed that the victim shall be awarded a compensation amount of rupees fifty thousand only, which amount shall be kept in a fixed deposit in her name payable on her attaining majority.

21. Criminal Appeal No. 20 of 2019 stands disposed of.

22. The registry may transmit a copy of this judgment to the learned trial court for information and compliance.

23. The original records of the learned trial court, if any, may be returned forthwith.

Sangam Rai & Anr. v. State of Sikkim

SLR (2020) SIKKIM 511

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

Crl. A. No. 15 of 2019

Sangam Rai and Another ….. APPELLANTS

Versus

State of Sikkim ….. RESPONDENT

For the Appellants: Mr. Jorgay Namka, Legal Aid Counsel.

For the Respondent: Mr. Yadev Sharma, Additional Public Prosecutor and Mr. Sujan Sunwar, Assistant Public Prosecutor.

Date of decision: 25th August 2020

A. Indian Evidence Act, 1872 – Evidence – As a general rule, Courts can act even on the testimony of a sole witness provided her evidence is wholly reliable, cogent and consistent – In the circumstances, after careful consideration of the entire evidence on record, contrary to the submissions of the Learned Additional Public Prosecutor that the anomalies in the Prosecution case are trivial and ought to be ignored, I find that it strikes at the root of the Prosecution case. PW-1 and PW-2 failed to return home on 07.12.2016 for reasons best known to them. It may be true that they encountered the appellants and the CICL at the place of incident which gave them an excuse to spin a yarn about an evidently non-existent incident – There is no evidence whatsoever against the appellants under the charges framed against them – Basing a conviction on the tremulous foundation of the inconsistent, uncorroborated and capricious evidence of PW-1 and PW-2 would deprive the appellants of one fruitful year each of their lives – Prosecution has failed by the evidence furnished, to establish its case beyond a reasonable doubt – Learned Trial Court was in error in convicting and sentencing the appellants.

(Paras 8 and 15)

Appeal allowed.

Case cited:

1. Lal Bahadur Kami v. State of Sikkim, 2017 SCC OnLine Sikk 173 : 2018 Cri.L.J. 439.
2. Binod Sanyasi v. State of Sikkim, 2019 SCC OnLine Sikk 111.
3. Deepan Darjee v. State of Sikkim, 2019 SCC OnLine Sikkim 130.
4. Vijay@ Chinee v. State of Madhya Pradesh, Criminal Appeal No. 660 of 2008 : (2010) 8 SCC 191.

JUDGMENT

Meenakshi Madan Rai, J

1. By the impugned Judgment, dated 29-06-2019, in Sessions Trial (POCSO) Case No.03 of 2017, both Appellants were convicted of the offence under Section 341/34 and Section 354/34 of the Indian Penal Code, 1860 (for short, "the IPC"). The impugned Order on Sentence directed each of the Appellants to undergo simple imprisonment for 15 (fifteen) days under Section 341/34 of the IPC and, simple imprisonment for one year each with a fine of Rs.3,000/- (Rupees three thousand) only, each, under Section 354/34 of the IPC. The sentence of fine bore a default clause of imprisonment. Aggrieved thereof, the Appellants seek the setting aside of the impugned Judgment and Order on Sentence.

2. Forwarding his arguments for the Appellants, Learned Counsel submitted that the occurrence of the incident is a far-fetched imaginary narrative of the Prosecution considering the improbabilities and the anomalies that are nestled in the Prosecution case. While walking this Court through the evidence of the Prosecution witnesses, it was submitted that there are apparent contradictions in the evidence of P.W.1 and P.W.2, as found in their statements under Section 164 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.") and their evidence before the Court. That, the consistent stand of the Prosecution has been that P.W.1 and P.W.2 after the incident on 07-12-2006 spent the night in the house of P.W.10 and on the next date, they left for Jorethang, where they spent the night in the Jorethang Car Parking Plaza area. Contrarily, the evidence of P.W.7, a driver and relative of P.W.2 is to the effect that on 08-12-2016 after his duty was over, he found P.W.1 and P.W.2 in the Parking area and took them to his home, thereby demolishing the Prosecution stand of the two girls

having spent the night at the parking lot, by their own witness. That apart, it is the evidence of P.W.1 and P.W.2 that P.W.3 their school friend had requested them to drop her home, which is in contradiction to the evidence of P.W.3 who stated that P.W.1 and P.W.2 desired to reach her to her home and she was unaware of their whereabouts after they reached her village. That, her evidence nowhere reveals that they reached her home. The next glaring anomaly that arises is that in Exhibit 7, the original FIR lodged by P.W.4 and P.W.5 the time of offence is mentioned at "1300 hours", the formal FIR, Exhibit 8, reveals that the incident occurred at around 2 p.m., while the girls by their evidence seek to convince the Court that the incident took place late in the evening when it was dark by stating that they managed to escape from the clutches of the Appellants when the headlights of passing vehicles focused on the place of incident. That, the falsity in their evidence is apparent as in their statements under Section 164 Cr.P.C. they have nowhere stated that the incident took place in the late evening or for that matter when it was dark, but that it was 3.30 p.m. It is pertinent to note that P.W.1 makes no mention of any vehicle lights in her statement under Section 164 Cr.P.C. and stated that the incident took place at 3.30 p.m. P.W.2 in her Section 164 Cr.P.C. statement lends support to the statement of P.W.1 that the incident took place at 3.30 p.m., but P.W.2 in Court stated that the incident pertained to 5.30 p.m. of the relevant day. The further evidence of P.W.1 and P.W.2 is to the effect that after the incident they wanted to report the matter at the Sumbuk Police Out Post (O.P.), but no Police personnel was present at the Sumbuk O.P. However, the Investigating Officer (I.O.) P.W.23 has deposed that every Police O.P. is manned by Police personnel at any given point of time, rendering false the statement of P.W.1 and P.W.2. That, P.W.4 and P.W.5 the fathers of the two girls have stated that they went missing from 07-12-2016, but P.W.1 and P.W.2 did not inform their respective fathers of their whereabouts after they were allegedly molested, which casts a doubt on the veracity of the two girls evidence. That, the contradictory evidence on record and the statement of the Appellants in their examinations under Section 313 Cr.P.C. reveals that the two girls were caught smoking at the place of the alleged incident by the Appellants and to ward off the consequences of their unexpected behaviour they have foisted a false case against the Appellants which is borne out by the contradictory and inconsistent evidence on record. That, there seemingly was a verbal altercation between P.W.1 and P.W.2 on one side and the two Appellants and a Child in conflict with Law (for short, "CICL") on the other, but there is no evidence whatsoever of any physical

scuffle that the Appellants resorted to nor is it borne out by the medical examination of P.W.1 and P.W.2 whereby no injuries were detected on them. That, the Learned Trial Court failed to take into consideration the crossexamination of the P.W.1 and P.W.2 or any of the Prosecution witnesses which in fact demolished the Prosecution case and hence the Learned Trial Court was in error in convicting and sentencing the Appellants, who thereby deserve an acquittal. To fortify his submissions, Learned Counsel placed reliance on ***Lal Bahadur Kami*** vs. ***The State of Sikkim***[1], ***Binod Sanyasi*** vs. ***State of Sikkim***[2] and ***Deepan Darjee*** vs. ***State of Sikkim***[3].

3. For his part Learned Additional Public Prosecutor while making strenuous efforts to support the Prosecution case fairly admitted that anomalies existed in the Prosecution case with regard to the time of the offence which was reflected in Exhibit 7, Exhibit 8 and the deposition of P.W.2 who stated that it was 5.30 p.m. That, these anomalies are trivial and deserve to be ignored. That, it is now settled law that undue importance should not be attached to the minor anomalies which exist in the Prosecution case, by the Court, if they do not substantially affect the Prosecution case. It is clear that the incident indeed occurred during the evening around 5.30 p.m., as per P.W.1 and P.W.2 and the vehicles passing by the place of incident had their head lights on which deterred the Appellants from continuing with their misdemeanour. That, the evidence of the Doctor also corroborates the evidence of P.W.1 and P.W.2 with regard to the molestation perpetrated on them by the Appellants, as during their medical examination they have informed the Doctor that they were sexually assaulted by the Appellants. That, mere absence of physical injuries on the two girls is no ground for disbelieving them. That, they were traumatized by the incident and being ashamed and afraid of narrating the incident to their parents instead of returning home they went to Jorethang. It was further contended that due to the trauma the two girls continued to remain out of their house till the morning of 10-12-2016. On being found by P.W.7 on 08-12-2016, they were able to tell him of the incident and call their parents to Jorethang on 10-12-2016. Hence, the Appellants are guilty as found by the Learned Trial Court and the Judgment and Order on Sentence suffers from no infirmities.

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[1] 2017 SCC OnLine Sikk 173 : 2018 Cri.L.J. 439
[2] 2019 SCc OnLine Sikk 111
[3] 2019 SCC OnLine Sikkim 130

4. I have considered the rival contentions of Learned Counsel, perused all documents on record as also the evidence and the impugned Judgment and Order on Sentence. I have also perused the citations made at the Bar.

5. The question for consideration before this Court is whether the evidence on record suffices to convict the Appellants of the offences charged with.

6. Before delving into the merits of the matter, I advert briefly to the facts of the Prosecution case.

(i) On 11-12-2016, at around 1310 hours, a written report was received from P.W.4 father of P.W.2 and P.W.5 father of the victim P.W.1, to the effect that in the afternoon of 07-12-2016 their children P.W.1 and P.W.2 had gone to reach P.W.3 to her residence. On their way home, they came across the two Appellants and a minor boy (CICL) near the View Point (place of occurrence). The trio obstructed the path of the minor girls and touched them inappropriately on various parts of their body including their genitals, while also attempting to undress them. The FIR, Exhibit 7 came to be lodged and registered on the same date. It was endorsed to the I.O. P.W.23 for investigation, on completion of which Charge-Sheet came to be filed against the Appellants and the CICL, under Sections 341, 354 and 34 of the IPC, read with Section 8 of the Protection of Children from Sexual Offences Act, 2012 (for short, POCSO Act, 2012).

(ii) For clarity, it is essential to mention here that in the instant matter P.W.1 is the victim having been allegedly molested by the two Appellants herein. P.W.2 was the victim of molestation by the CICL whose trial was segregated and taken up before the Juvenile Justice Board.

(iii) The Learned Trial Court framed Charge against the Appellants under Section 341/34, Section 354B/34 and Section 354/34 of the IPC, read with Section 8 of the POCSO Act, 2012. Both the Appellants entered a plea of "not guilty" and claimed trial, the Prosecution therefore examined 24 (twentyfour) witnesses in a bid to establish their

case, on closure of which both Appellants were examined under Section 313 of the Cr.P.C., followed by final arguments of the parties. The Learned Trial Court on consideration of the evidence on record pronounced the impugned Judgment and Order on Sentence.

7. Pausing here for a moment it is relevant to point out that the Prosecution case *inter alia* was that the victim P.W.1 was a minor, aged about 14 years at the time of the incident. The Learned Trial Court was not inclined to consider this ground as no original Birth Certificate of P.W.1 was furnished to buttress this contention. All that the Prosecution succeeded in offering was a photocopy of the document, which the Court disregarded as being inadequate evidence. On this count, the Court also disbelieved the evidence of P.W.18, the Doctor posted as the Chief Medical Officer, South Sikkim, at the relevant time, as he failed to produce the Birth Certificate Register allegedly containing entries of the date of birth of the victim. Consequently both Appellants were acquitted of the offence under Section 8 of the POCSO Act, 2012 read with Section 34 of the IPC. This finding of the Learned Trial Court is unassailed by the Prosecution, hence discussions thereof stand truncated here.

8. The conviction of the Appellants is based on the testimony of P.W.1 and P.W.2. As a general Rule Courts can act even on the testimony of a sole witness provided her evidence is wholly reliable, cogent and consistent. In the impugned Judgment the Learned Trial Court has summed up the Prosecution case in two short Paragraphs being Paragraph 67 and Paragraph 70 which reads as follows;

> **"**67. It is admitted fact that there are minor contradiction in the statements of PW-1 and PW-2 but it is settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, may not prompt the court to reject the evidence in its entirely. .....
>
> 70. The case in hand the evidence of PW-1*(victim)* and PW-2 clearly proved that both the accused persons with their common intention

> restrained the victim*(PW-1)* to go out of the said *chautara(resting shed)* by holding her hand and pulled down. Both the accused persons thereafter touched all over her body including her breast with sexual intent. They also pushed the victim on the ground and got on top of her and also fondled her body.**"**

9. From a reading of the above Paragraphs, it concludes that neither the cross-examination of P.W.1 and P.W.2 have been considered by the Learned Trial Court nor have the evidence of the other witnesses found place in the discussions which ensued in the impugned Judgment although the evidence of the Prosecution witnesses have been widely reproduced earlier on in the Judgment.

10. The Honble Supreme Court in ***Vijay @ Chinee*** vs.***State of Madhya Pradesh***[4] relied on by the Learned Trial Court has indeed held that minor contradictions and discrepancies are to be disregarded by the Courts for the reason that mental capabilities of a human being cannot be expected to be attuned to absorb all the details and that minor discrepancies are bound to occur. At the same time we must not lose sight of the caution spelled out in the same Judgment which requires the Courts to exercise care and caution and sift the truth from the untruth, examine whether there are exaggerations and improvements. On the anvil of this discretion vested on the Courts, I proceed to examine the evidence of the Prosecution witnesses.

11. On careful consideration of the evidence on record, it is indeed clear that there are anomalies in the evidence of the Prosecution witnesses. The FIR, Exhibit 7, lodged by P.W.4 and P.W.5, dated 11-12-2016, reveals that the incident alleged took place on 07-12-2016. As per the FIR, P.W.1 and P.W.2 reached the place of incident at around 1300 hours after dropping off their school friend to her house. When they reached the place of incident they found the Appellants and the CICL there, after which the alleged incident took place. While the Appellant No.1 and the CICL were known to both P.W.1 and P.W.2 being their co-villagers, the Appellant No.2 was not known to them. It is evident that, as per the FIR Exhibit 7, the time of occurrence of the incident is said to be "1300 hours", while Exhibit 8 the

[4] Criminal Appeal no.660 of 2008 : (2010) 8 SCC 191

formal FIR records the time of incident as "1400 hours". The evidence of P.W.1, under cross-examination, is to the effect that the incident occurred during the "day light" (*sic*), her deposition was recorded by the Court on 18-08-2017. P.W.2 came to be examined on 18-09-2017 and evidently made an effort to improve the Prosecution case by stating that it was around 5.30 p.m. when they reached the place of incident after dropping P.W.3 at her residence. P.W.23, the I.O. in his evidence has not revealed the time of the incident. Reverting back to the evidence of P.W.1 she has stated that **"***Due to the focus light (sic) of the second vehicle the two accused persons could not do any further indecent act upon me and I and my junior friend ran away from the chowtara.***"** and admitted under cross-examination that the meaning of the word "focus light" of the vehicle means the lights coming from the headlights of the vehicle. In the same breath, she admitted that the alleged incident occurred during the day time. P.W.2 has, as already stated, said that the incident took place around 5.30 p.m., but admits that the incident occurred during the day time. In other words, it emerges from their evidence that it was daytime when the incident occurred. If the evidence of P.W.1 that the vehicles which passed by had their headlights on is to be believed, then, it would appear that it was dark and the lights of the vehicles had been turned on, but the evidence of both the girls contrarily indicate that the incident took place during the daytime. It is pertinent to note that P.W.1 makes no mention of any vehicle lights in her statement under Section 164 Cr.P.C. and both P.W.1 and P.W.2 stated that the incident took place at 3.30 p.m., but digressing from this statement P.W.2 in Court stated that the incident pertained to 5.30 p.m. of the relevant day. P.W.1 speaks of two passing vehicles, P.W.2 refers to three. While it is necessary to bear in mind that a statement recorded under Section 164 Cr.P.C. can never be used as substantive evidence, but it can be used both for contradiction and corroboration of a witness who made it. Both P.W.1 and P.W.2 were confronted with their statements made under Section 164 Cr.P.C. during cross-examination and the contradictory evidence that emerged were none too flattering for the Prosecution case and did little to enhance the confidence of this Court in the witnesses persistent inconsistent stands. In the light of this anomalous evidence before the Court, it is not for the Court to draw assumptions of the time of the incident. It is the bounden duty of the Prosecution to convince the Court by leading unfaltering evidence of the time of the incident, which then has to be established beyond a reasonable doubt. These requirements are sadly lacking in the Prosecution case.

12. Both P.W.1 and P.W.2 in their evidence have stated that on the following day, i.e., 08-12-2016, after having spent the night of 07-12-2016 in the house of P.W.10, they went to Jorethang. Thereafter, on 09-12-2016 they verbally reported the incident to Jorethang Police Station. It is their unequivocal statement that P.W.7 accompanied them to the Police Station. Surprisingly their statements find no substantiation either in the evidence of P.W.7 or P.W.23. In fact, if their deposition is taken to be the truth, then it would cast an aspersion on the Police personnel manning the Jorethang Police Station on 09-12-2016 as it could be presumed that they had failed to comply with the provisions of Section 154 of the Cr.P.C., which mandates that every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant, and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. However, in my considered opinion, the evidence of P.W.1 and P.W.2 on this aspect is unbelievable and inspires no confidence as neither have they stated the time at which they went to the Police Station nor have they stated as to who they gave the information to. In contrast, P.W.7 states that the two girls after spending the night, i.e., on 08-12-2016, in his house, told him that they had come to Jorethang in connection with a School Project and spent the next night, i.e., 09-12-2016, also in his house informing him that their School Project was not yet completed. P.W.1 in her evidence stated that they did not inform P.W.7 of the incident. If that be so, the statement that P.W.7 accompanied them to the Police Station is incorrect and contradictory. The evidence of P.W.7 nowhere reveals that he had accompanied P.W.1 and P.W.2 to the Jorethang Police Station on 09-12-2016 and is evidently a false statement made by the two girls. At no point of time between 08-12-2016 and the morning of 10-12-2016, when P.W.7 took them to the taxi stand in order to send them to their village, did they ever inform him of the alleged incident nor did they inform him that on 09-12-2016, they had verbally reported the incident at the Jorethang Police Station. It is admitted by both P.W.1 and P.W.2 under cross-examination that they did not inform P.W.7 of the incident during their stay in his house. It may relevantly be remarked here that, as per P.W.10, P.W.1 and P.W.2 informed her of the incident of molestation, but described the place of occurrence as near a ‘Mandir’, while P.W.1 under crossexamination

admitted having narrated to P.W.10 about the incident, however P.W.2 denied having told P.W.10 of the incident. P.W.23 for his part supported the evidence of P.W.10 and P.W.1 pertaining to narration of the incident. This also points to the inconsistencies in the Prosecution case. P.W.10 has stated that the two girls arrived at her house at about 09.30 p.m. on 07-12-2016 after the alleged incident. P.W.1 and P.W.2 have not thrown any light on their whereabouts in the intervening hours between 2 p.m. and 09.30 p.m. Even assuming that the incident took place at 5.30 p.m., their whereabouts between 5.30 p.m. and 9.30 p.m. has neither been divulged by P.W.1 and P.W.2 nor does investigation shed any light on this aspect nor has P.W.23 made any statement in this regard.

13. The next point that rears its head for consideration is the stand taken by the I.O. that the two girls had spent the night of 08-12-2016 at the Jorethang Parking Plaza. However, P.W.1 and P.W.2 have not stated in their evidence in Court that they spent the night at the Parking Plaza. Hence, it emerges that there is no evidence to establish that they had spent the night at Jorethang Car Plaza as sought to be made out by P.W.23. P.W.1 herself has stated that at Jorethang they first went to the Plaza where P.W.2 met her brother P.W.7, who took them to his house. P.W.2 has also denied having stated anything in her Section 164 Cr.P.C. statement about having spent a night in the Jorethang Car Plaza as, according to her, it would be a false statement.

14. Now, the question of which of the Appellants assaulted which of the two girls also appears rather nebulous since it is in the evidence of P.W.1 that both the Appellants herein assaulted her, while P.W.2 was assaulted by the CICL. The evidence of P.W.15, the Medical Officer who examined them contrarily states that both P.W.1 and P.W.2 alleged molestation on each of them, by the two Appellants and the CICL, thereby leading to doubts about the perpetrators of the alleged offence. That apart, the other contradictory evidence on record is that while P.W.1 and P.W.2 insist that P.W.3 had requested them to drop her home after school, P.W.3 denies this circumstance and has stated that they volunteered to reach her home. That, they are not even her friends, but only her schoolmates. The evidence on P.W.3 also reveals that she parted ways with P.W.1 and P.W.2 on reaching her village, therefore their claim of reaching P.W.3 to her house is evidently a false statement. The evidence of P.W.6, P.W.7 and P.W.10 reveals that both the alleged girls showed no inclination of contacting their parents

between 07-12-2016 and 09-12-2016. P.W.6 had met both the alleged girls in Jorethang but, according to him, they did not make any effort to communicate anything to him. P.W.7 the cousin of P.W.2 testified that even after P.W.1 and P.W.2 spent two nights in his home they did not express any desire to contact their family members either over telephone or cell phones. P.W.10 would depose that she and her parents own mobile phones but both P.W.1 and P.W.2 did not express any desire to contact their parents or inform them of the incident. The evidence of P.W.10 leads one to wonder why the two alleged girls opted to spend the night at her house as she has stated that the houses of the two girls were closer to their school than her house. P.W.23 has also lent credence to this evidence by stating that the houses of the alleged girls is about fifteen minutes walking distance from their school, while that of P.W.10 is about 40 to 50 minutes. According to the I.O., they did not go home as they were traumatised by the incident. The evidence of both PW 1 and 2 nowhere reveals that they were traumatised by the incident. It appears to be a figment of the imagination of the I.O. considering that P.W.11 the mother of P.W.1 has deposed that her daughter confides in her. The question of P.W.1 being unable to confide in her mother about the incident due to fear and shame is demolished by the statement of P.W.11. P.W.11 has also brought to light before this Court the conduct of the two girls by stating that after the instant incident both of them had been kept in the custody of an NGO from where they made good their escape. In the light of the evidence that the Prosecution has furnished I find that the statement of P.W.1 and P.W.2 pertaining to their intention of lodging a complaint before the Sumbuk O.P. on 07-12-2016 is completely unreliable. Besides, the I.O. P.W.23 has testified that the Police O.P. is manned round the clock by Police personnel.

15. In the circumstances, after careful consideration of the entire evidence on record, contrary to the submissions of the Learned Additional Public Prosecutor that the anomalies in the Prosecution case are trivial and ought to be ignored, I find that it strikes at the root of the Prosecution case. P.W.1 and P.W.2 failed to return home on 07-12-2016 for reasons best known to them. It may be true that they encountered the Appellants and the CICL at the place of incident which gave them an excuse to spin a yarn about an evidently non-existent incident. I am of the considered opinion that there is no evidence whatsoever against the Appellants under the charges framed against them. The Learned Trial Court for its part failed to take into consideration the cross-examination of P.W.1 and P.W.2 which demolishes

the Prosecution case. The evidence of P.W.3, P.W.6, P.W.7, P.W.10, P.W.11, P.W.15, have also not been considered at all by the Learned Trial Court as appears from the discussions which have ensued in the impugned Judgment, although their evidence, as already noticed, has been reproduced extensively earlier on in the impugned Judgment. Hence, basing a conviction on the tremulous foundation of the inconsistent, uncorroborated and capricious evidence of P.W.1 and P.W.2 would deprive the Appellants of one fruitful year each of their lives. The Prosecution has failed by the evidence furnished, to establish its case beyond a reasonable doubt against the Appellants and the Learned Trial Court was in error in convicting and sentencing the Appellants.

16. Consequently, Appeal is allowed.

17. The conviction and sentence imposed on the Appellants vide the impugned Judgment and Order on Sentence of the Learned Trial Court are set aside.

18. The Appellants No.1 and 2 are acquitted of the offence charged with, i.e., under Section 341/34 and Section 354/34 of the IPC.

19. Both Appellants No.1 and 2 are on bail vide Order of this Court, dated 27-08-2019, in I.A. No.01 of 2019. They are discharged from their bail bonds.

20. Fine, if any, deposited by the Appellants in terms of the impugned Order on Sentence, be reimbursed to them.

21. No order as to costs.

22. Copy of this Judgment be forwarded forthwith to the Learned Trial Court for information and compliance.

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