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(Page 335 - 490)

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Contents	Pages

TABLE OF CASES REPORTED IN THIS PART

EQUIVALENT CITATION

Sl.No.	Case Title	Equivalent Citation	Page No.
1.	Dharmaan Rai v. State of Sikkim	2020 SCC OnLine Sikk 38	335-345
2.	Raj Kumar Gupta v. State of Sikkim	2020 SCC OnLine Sikk 39	346-357
3.	Kendrap Lepcha v. State of Sikkim **(DB)**	2020 SCC OnLine Sikk 40	358-365
4.	Kendrap Lepcha v. State of Sikkim **(DB)**	2020 SCC OnLine Sikk 41	366-373
5.	Shri Damber Singh Chettri v. Shri Lachuman Chettri	2020 SCC OnLine Sikk 43	374-388
6.	Bikky Agarwal v. State of Sikkim	2020 SCC OnLine Sikk 48	389-394
7.	Karmapa Charitable Trust and Others v. State of Sikkim and Others	2020 SCC OnLine Sikk 66	395-400
8.	In Re: Villages in Upper Dzongu Marooned Due to Collapse of a Bridge at Mantam Lake, North Sikkim **(DB)**	2020 SCC OnLine Sikk	401-411
9.	The Municipal Commissioner, Gangtok Municipal Corporation and Another v. Mrs. Pabitra Singh Kami and Others **(DB)**	2020 SCC OnLine Sikk	412-418
10.	Bimal Subba alias Bijay Subba v. State of Sikkim **(DB)**	2020 SCC OnLine Sikk	419-457
11.	Chandra Bahadur Rai and Another v. State of Sikkim **(DB)**	2020 SCC OnLine Sikk 63	458-481
12.	Smt. Shanti Subba and Others v. Shri Jashang Subba	2020 SCC OnLine Sikk 64	482-490

SUBJECT INDEX

application under Order VII Rule 11 read with S. 151 CPC by defendant No. 2 that he executed the Gift Deed being the Karta cannot be taken into consideration at this stage – Reading the plaint as a whole, it discloses a cause of action.

Smt. Shanti Subba and Others* v. *Shri Jashang Subba ***482A***

Code of Criminal Procedure, 1973 – S. 154 – First Information Report– Object – The principle object of the first information report from the point of view of the informant is to set the criminal law in motion and that of the investigating authorities is to obtain information about the alleged crime so as to enable them to take steps to trace and bring the guilty to book – The question as to whether a particular document, constitutes a first information is to be determined on the relevant facts and circumstances of the case. If the information was cryptic, its main object being to enable the police officer to reach the place of occurrence immediately, such information cannot be considered to be an F.I.R.

Bimal Subba alias Bijay Subba* v. *State of Sikkim ***419A***

Code of Criminal Procedure, 1973 – S. 174 – Police to Inquire and Report on Suicide, etc. – Object – An investigation under S. 174 of the Cr.P.C is confined to the ascertainment of the apparent cause of death. It is concerned with discovering whether the death so caused was on account of an accident, was suicidal, homicidal or caused by an animal or in what manner or by what weapon or instrument the injuries on the body appear to be inflicted – On the lodging of Exhibit-46, the police had merely started inquest under S. 174 of the Cr.P.C – The scope of proceedings under S. 174 of the Cr.P.C is limited, the object of it being merely to ascertain whether a person has died under the circumstances enumerated therein – Only on the lodging of Exhibit-1 did the incident pertaining to a cognizable offence come to light on the basis of which investigation commenced for an offence under S. 302, I.P.C. Exhibit-46 surely does not disclose a cognizable offence much less an offence under S. 302, I.P.C – The argument that Exhibit-1 is hit by the provisions of S. 162 of the Cr.P.C having been made later in time than Exhibit-46 and thereby during the course of investigation cannot be countenanced. It may fittingly be pointed out that a second F.I.R in the same matter is not completely debarred by law but is to be considered in the facts and circumstance of each individual case.

Bimal Subba alias Bijay Subba* v. *State of Sikkim ***419B***

Code of Criminal Procedure, 1973 – S. 439 – Sikkim Anti Drugs Act, 2006 – S. 18 – Bail – Petitioner was arrested on the seizure of controlled substances having been made from the truck bearing No. SK-04D0092, driven by one Bimal Gurung, also arrayed as an accused – The truck in which the controlled substances were carried did not belong to the said accused driver nor to the petitioner. It is also admitted by the Prosecution that the owner of the truck was not arrested, his complicity in the offence having been ruled out – No proof whatsoever emanates at this stage to establish that the consignment was ordered by the accused as allegedly disclosed by the driver Bimal Gurung nor recovery of any articles made from the possession of the petitioner on his arrest – All that the Prosecution is relying on after more than a month and two weeks of investigation is the statement of the driver that the petitioner had asked him to bring the controlled substances. F.I.R mentions that, according to the driver, the petitioner was waiting at "Rolu Temple" for the consignment of controlled substances being transported in the truck and consequent upon such revelation the Police team was immediately dispatched towards Rolu, who successfully intercepted the petitioner and his vehicle at a *pucca* bridge just before Rolu temple – Careful perusal of arrest memo reveals no such details which infact records that the petitioner was arrested at 0240 hours at "Melli" after the F.I.R was lodged at 2245 hours and the driver arrested at 0155 hours. The arrest memo does not mention that Rolu Temple is situated at Melli and the Prosecution on clarification sought by this Court, admits that Melli is in a different location, while Rolu Temple is located elsewhere and not in Melli – It is worth noticing that the controlled substances post recovery have already been seized by the Police and remains in their custody – This Court has repeatedly observed that the sale of controlled substances by unconscionable people and the use of it by all age groups and more especially by the youth of Sikkim has unequivocally had a deleterious effect on the society in the State at large and therefore deserves to be dealt with an iron hand. Having flagged this concern, I can well understand the anxiety of the Police in the present circumstances to ensure that the petitioner remains in custody in view of the large quantity of controlled substances seized being prescription drugs, rampantly misused by sale at exorbitant rates, to users who become victims and in turn embroil their family and society to the negative aspects of its use. Nevertheless the dots must connect and the complicity of the accused/petitioner in the offence must be shown.

Dharmaan Rai* v. *State of Sikkim ***335A***

Code of Criminal Procedure, 1973 – Ss. 439 and 482 – Sikkim Anti Drugs Act, 2006 – S. 18 – Petitioners Raj Kumar Gupta and Achhay Lal Gupta were summoned to the check-post requiring them to furnish valid bills for the seized controlled substances. It is admitted that Achhay Lal Gupta furnished the required bills consequent upon which his consignment was released to him by the Police. Despite such steps having been taken by the Police on due verification of the required bill, Achhay Lal Gupta was taken into custody by the Police revealing a bizarre situation. Raj Kumar Gupta admittedly sought time and furnished the computer generated bill dated 23.04.2020, which revealed the requisition of 36 bottles of Rexdryl from M/ s. Sunrise Distributors, Siliguri, duly paid. Serial No.15 of the said bill indicates that 36 bottles of Rexdryl had also been ordered by him from the said Distributors. The F.I.R was lodged on 24.04.2020, the bill was generated on 23.04.2020 and furnished on 25.04.2020 to the Police – The licence of both the petitioners, Raj Kumar Gupta and Achhay Lal Gupta have been perused duly by me wherein it is indicated that both the petitioners have been authorised to sell all medicines except that in Schedule C and C(1) of the Drugs and Cosmetics Rules, 1945. A month has elapsed since the date of arrest and confinement of the petitioners in judicial custody, yet it is the case of the Prosecution that the authenticity of the bill is yet to be verified by the I.O – The petitioner Lila Bahadur Chettri and the owner of the truck, I find are guilty of having flouted the provisions of the permission granted to them for carrying poultry feed only and no other materials – The said petitioner is oblivious of the contents of the cartons and has followed the directions of his employer in transporting the goods in the cartons. At this juncture, no *mens rea* has been made out against him.

Raj Kumar Gupta* v. *State of Sikkim ***346A***

Code of Criminal Procedure, 1973 – S. 439 – Sikkim Anti Drugs Act, 2006 – S. 18 – Bail – The F.I.R was lodged by Sub-Inspector, Rangpo Police Station who conducted the search of the vehicle. As per the property seizure memo, 30 bottles of Rexdryl cough syrup were seized, the quantity of each bottle has not been mentioned. The Prosecution case hinges on the statement of the driver of the vehicle who, being the only other occupant therein, implicated the petitioner as being the owner of the controlled substances seized. The records placed before this Court reveal that the driver was alone in his vehicle when he was returning to his home at Rangpo, on the West Bengal side. The vehicle was stopped by the petitioner at 2nd mile, Siliguri requesting for a lift. According to the driver,

the petitioner kept his luggage in the boot of the vehicle and thereafter boarded the vehicle. When the search at Rangpo check-post ensued, the controlled substances mentioned above were seized, however, it may relevantly be noted that although the F.I.R reveals that recovery was made from the boot of the vehicle, no mention has been made of any article/bag which contained the bottles to link the ownership of the controlled substances to the petitioner. It is also the admitted position of the Prosecution that no other articles belonging to the petitioner were seized to indicate that the controlled substances belonged to the petitioner – Search and seizure evidently took place on the evening of 13.12.2019 while the F.I.R was lodged on 14.12.2019 – At this stage the Prosecution has not been able to establish *prima facie* by any other evidence save the statement of the driver of the vehicle that the controlled substances belonged to the Petitioner and none else.

Bikky Agarwal* v. *State of Sikkim ***389A***

Constitution of India – Article 226 – Public Interest Litigation disposed of with the following directions: (i) Respondents shall regularly monitor the condition of the temporary bamboo cane bridge to ensure safety of villagers crossing the bridge and to ensure that the bridge remains functional so as to not cause any inconvenience to the affected villagers. The bamboo cane bridge, as and when required, is to be appropriately strengthened; (ii) Respondents will keep the ropeway functional in mechanized form; (iii) Condition of the road on the other side of Kanaka river, i.e. towards the cut off villages i.e. Tingvong GPU, SakyongPentok GPU and Laven ward under Lingthem GPU shall be improved so that the villagers of the remote corners of the State have better connectivity; (iv) Respondents shall ensure completion of construction of the permanent bridge within the schedule time – Liberty granted to *amicus curiae* to approach the Court, if need so arises in the future.

In Re: Villages in Upper Dzongu Marooned Due to Collapse of a Bridge at Mantam Lake, North Sikkim. ***401A***

Indian Evidence Act, 1872 – Cross-Examination – Object – The essence of cross-examination is that it is the interrogation by the Advocate of one party, of a witness called by his adversary, either with the object of obtaining admissions favourable to his cause or to discredit the witness. All questions which are asked with a view to assail the evidence-in-chief are permissible and no provision of law requires cross-examination to be confined to what is only volunteered by the witness. The objective of cross-

examination is thus to elicit the truth and also detect the falsehood in the evidence-in-chief. It thus becomes the bounden duty of the Counsel towards his client to take necessary steps in this context to uphold what is right and just and to expose a dishonest witness – Learned trial Court can forbid questions which tend to offend public decency and are intended to insult or annoy the witness.

Karmapa Charitable Trust* v. *State of Sikkim and Others ***395A***

Indian Evidence Act, 1872 – Courtroom Identification of Accused Persons – Necessity – There is no dock identification of any of the appellants by the victim – The victim's father 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 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 – 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.

Chandra Bahadur Rai and Another* v. *State of Sikkim ***458A***

Indian Evidence Act, 1872 – Appreciation of Statements of Child Victims – 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.

Chandra Bahadur Rai and Another* v. *State of Sikkim ***458C***

Indian Evidence Act, 1872 – S. 27 – How Much of Information Received from Accused May Be Proved – S. 27 is by way of a proviso to Ss. 25 and 26 of the Evidence Act, by which a statement made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused – The phrase "distinctly relates to the fact discovered" in S. 27 is the pivotal aspect of the provision. This phrase refers to that part of the information supplied by the accused which is the

driver and immediate cause of the discovery. If a fact is actually discovered in consequence of information given by the accused, its affords some guarantee of the truth of that part of the information which was the clear, immediate and proximate cause of the discovery.
Bimal Subba alias Bijay Subba* v. *State of Sikkim ***419C***

Indian Evidence Act, 1872 – S. 106 – Burden of Proving Fact Especially Within Knowledge of Any Person – This provision is an exception to the general rule laid down in S. 101 of the Evidence Act that the burden of proving a fact rests on the party who asserts the affirmative of the issue – S. 106 is of course not intended to relieve the Prosecution of the burden cast on it by S. 101, it merely means that where the subject matter of the allegation lies peculiarly within the knowledge of the accused, he must prove it. It cannot apply when the fact is such as is capable of being known to any person other than the accused.
Bimal Subba alias Bijay Subba* v. *State of Sikkim ***419D***

Indian Evidence Act, 1872 – Ss. 61, 63 and 76 – Certified Copy of Public Documents – Proof – Primary documentary evidence must be furnished to prove the contents thereof. The existence of primary evidence generally excludes secondary evidence. Secondary evidence is not admissible until the non-production of primary evidence is satisfactorily accounted for. Secondary evidence is receivable sometimes as forming an exclusion to the rule which provides that the best evidence alone can be given and the party tendering it has proved that primary evidence is not obtainable. In other words, the reasons for non-production of the original document must be supported with sufficient evidence, whereby it must be established that the original document indeed existed but was either lost, misplaced or for some other circumstance unobtainable by the party relying on it – S. 76 of the Evidence Act requires that every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees certifying that the copy is a true copy of such document – Mere filing of a document and reliance on it does not tantamount to proof, the contents thereof must be proved in terms of the legal provision.
Shri Damber Singh Chettri* v. *Shri Lachuman Chettri ***374A***

Limitation Act, 1963 – On the question of limitation, the learned Trial Court was correct in holding that the appellant did return to Sikkim in 1982 after the death of his father and was thus aware of the occupation and

possession of a portion of the disputed properties by the Respondent but took no steps. It may be added that although the appellant averred in his pleadings that he returned home permanently in 2001, it is his evidence however that he returned in the year 2000 and as already mentioned in 1982 as well. The suit was filed only in the year 2014. The lapse of time as discussed above is clear, suffice it to observe that the suit was indeed barred by limitation.

Shri Damber Singh Chettri* v. *Shri Lachuman Chettri ***374B***

Protection of Children from Sexual Offences Act, 2012 – S. 2 (d) – Proof of Age – In a prosecution under the POCSO Act, the establishment of the age of the victim is crucial – It must be proved by cogent evidence that the victim was in fact a child as defined in S. 2(d) – 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.

Chandra Bahadur Rai and Another* v. *State of Sikkim ***458B***

Protection of Children from Sexual Offences Act, 2012 – S. 5 – Aggravated Penetrative Sexual Assault – S. 9 – Aggravated Sexual Assault – The medical evidence is not clinching. None of the observations made by Dr. Rozeela Bhutia (PW-13) on its own would lead to an irresistible conclusion that the appellant had committed penetrative sexual assault or rape on the minor victim (PW-5). The minor victim admitted during her cross-examination that she had stated that the appellant neither opened his clothes nor her clothes. In the circumstances, it is not possible to link the hymen of the victim not being intact to the acts of the appellant alone. Therefore, it would be extremely difficult to sustain the conviction of the appellant for commission of penetrative sexual assault or rape – However, the minor victim has been consistent about the appellant having touched her chest and her vagina. This fact has been corroborated by her statement (Exhibit-6) as well as by the deposition of PW-1. At the time of the incident, the minor victim was barely eight years of age and therefore, may have been susceptible to all kinds of pressures and confusions. However, it is certain that the appellant had in fact sexually assaulted the minor victim.

Kendrap Lepcha* v. *State of Sikkim ***366A***

Protection of Children from Sexual Offences Act, 2012 – S. 9 – Aggravated Sexual Assault – The minor victim (PW-5) identified the appellant as Kendrap Sir who used to teach them Mathematics and Hindi when she was in the 4th and 5th standards. She deposed that on two occasions, the appellant put his finger in her *pisab garne*(vagina). She deposed that on five occasions, he put his hands on her chest/breasts in the classroom of the school. She also deposed about the appellant sexually abusing other school girls. She said she had disclosed it to her mother and given her statement to the learned Magistrate – The defence has cross-examined the minor victim on what she stated about the sexual abuse on other school girls by the appellant. However, the defence could not get anything but a denial to their suggestions that what she stated in her deposition against the appellant was not true. No questions were asked to the minor victim regarding the discrepancies in the statement (Exhibit-6) and her deposition. A close scrutiny of her deposition as well as her statement (Exhibit-6) does establish that the appellant had on more than one occasion put his fingers in her vagina and also molested her several times by touching her breast. These facts have been corroborated by her statement (Exhibit-6) and the deposition of PW-6 [the mother of the minor victim] to whom she had also disclosed that the appellant used to put his hands on chest/breast and her vagina.

Kendrap Lepcha* v. *State of Sikkim ***358A***

Protection of Children from Sexual Offences Act, 2012 – S. 29 – Presumption as to Certain Offences – When the deposition of the victim remained intact, S. 29 did get attracted and in such event, it was necessary for the Court to presume that Chandra Bahadur Rai and TsheringThendup Bhutia had committed and attempted to commit the alleged offences, unless the contrary was proved. Chandra Bahadur Rai and TsheringThendup Bhutia offered no such proof. The evidence produced does not disclose any strong motive to falsely involve Chandra Bahadur Rai and TsheringThendup Bhutia.

Chandra Bahadur Rai and Another* v. *State of Sikkim ***458D***

SLR (2020) SIKKIM 335

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

Bail Application No. 03 of 2020

Dharmaan Rai ….. **PETITIONER**

Versus

State of Sikkim ….. **RESPONDENT**

For the Petitioner: Mr. Leonard Gurung and Ms. Rachhitta Rai, Advocates.

For the Respondent: Mr. Yadev Sharma, Addl. Public Prosecutor and Mr. Sujan Sunwar, Asst. Public Prosecutor.

Date of decision: 26th May 2020

A. Code of Criminal Procedure, 1973 – S. 439 – Sikkim Anti Drugs Act, 2006 – S. 18 – Bail – Petitioner was arrested on the seizure of controlled substances having been made from the truck bearing No. SK-04D0092, driven by one Bimal Gurung, also arrayed as an accused – The truck in which the controlled substances were carried did not belong to the said accused driver nor to the petitioner. It is also admitted by the Prosecution that the owner of the truck was not arrested, his complicity in the offence having been ruled out – No proof whatsoever emanates at this stage to establish that the consignment was ordered by the accused as allegedly disclosed by the driver Bimal Gurung nor recovery of any articles made from the possession of the petitioner on his arrest – All that the Prosecution is relying on after more than a month and two weeks of investigation is the statement of the driver that the petitioner had asked him to bring the controlled substances. F.I.R mentions that, according to the driver, the petitioner was waiting at "Rolu Temple" for the consignment of controlled substances being transported in the truck and consequent upon such revelation the Police team was immediately dispatched towards Rolu, who successfully intercepted the petitioner and his vehicle at a *pucca* bridge

just before Rolu temple – Careful perusal of arrest memo reveals no such details which infact records that the petitioner was arrested at 0240 hours at "Melli" after the F.I.R was lodged at 2245 hours and the driver arrested at 0155 hours. The arrest memo does not mention that Rolu Temple is situated at Melli and the Prosecution on clarification sought by this Court, admits that Melli is in a different location, while Rolu Temple is located elsewhere and not in Melli – It is worth noticing that the controlled substances post recovery have already been seized by the Police and remains in their custody – This Court has repeatedly observed that the sale of controlled substances by unconscionable people and the use of it by all age groups and more especially by the youth of Sikkim has unequivocally had a deleterious effect on the society in the State at large and therefore deserves to be dealt with an iron hand. Having flagged this concern, I can well understand the anxiety of the Police in the present circumstances to ensure that the petitioner remains in custody in view of the large quantity of controlled substances seized being prescription drugs, rampantly misused by sale at exorbitant rates, to users who become victims and in turn embroil their family and society to the negative aspects of its use. Nevertheless the dots must connect and the complicity of the accused/petitioner in the offence must be shown.

(Paras 9 and 10)

Petition allowed.

Chronology of cases cited:

1. Sanjay Chandra v. Central Bureau of Investigation, (2012) 1 SCC 40.
2. Prakash Kumar alias Prakash Bhutto v. State of Gujarat, (2007) 4 SCC 266.
3. Pancho v. State of Haryana, (2011) 10 SCC 165.
4. Dataram Singh v. State of Uttar Pradesh and Another, (2018) 3 SCC 22.
5. Union of India v. Niyazuddin Sk. and Another, (2018) 13 SCC 738.
6. State of Kerala etc. v. Rajesh etc., 2020 SCC OnLine SC 81.
7. Rupa Gurung v. State of Sikkim, 2020 SCC OnLine Sikk 20 (Bail Appln. No. 02 of 2020).
8. Nabin Manger v. State of Sikkim, SLR (2018) Sikkim 1454 :

ORDER

Meenakshi Madan Rai, J

1. The Petitioner, aged about 55 years, seeks to be enlarged on bail having been arrested in connection with Melli P.S. Case No.9/2020, dated 12-04-2020, under Section 7/9/14 of the Sikkim Anti Drugs Act, 2006 (for short, "SADA, 2006") read with Section 7(1)(c)/7(4) [*sic*] of the Sikkim Anti Drugs (Amendment) Act, 2017.

2. During the course of hearing Learned Counsel for the Petitioner canvassed the contention that the Petitioner has been falsely implicated in the instant matter with no proof whatsoever of his complicity in the offence, save the statement of the truck driver, who is also arrayed as an accused, stating that a total of 598 bottles of Cough Syrup of various brands, recovered and seized from the truck driven by him, belonged to the Petitioner and had been transported in his truck on the Petitioner's request. That, neither the controlled substances were seized from the possession of the Petitioner nor is there any other evidence to establish that the Petitioner had requested the truck driver to transport the controlled substances for him, besides which no proof emanates as to the use or sale of the controlled substances by the Petitioner. That, the Petitioner was arrested from "Melli" although the driver had allegedly informed the Police that the Petitioner would be waiting for the alleged consignment of controlled substances near "Rolu" temple, which is however situated between Melli and Jorethang, South Sikkim, thereby revealing the falsity of the driver's statement and the Prosecution case, while the Petitioner is completely innocent. The Petitioner is infact a well known and respected permanent resident of Daragaon, Jorethang, South Sikkim and has been falsely implicated sans grounds by the Prosecution. Owing to his permanent residence in Sikkim the question of him absconding does not arise neither does he intend to tamper with the Prosecution evidence or the witnesses. He undertakes to cooperate with the Investigating Agency and to appear before the Investigating Officer as and when required and in Court at the time of trial. That, this Court may take into consideration that the Petitioner is depressive and a patient of vertigo as fortified by the Medical Certificate, Annexure 7, issued by Dr. Subhash Tamang, ENT, Head and Neck Surgery, District Hospital, Namchi, South Sikkim. That, the owner of the truck was never arrested to examine his involvement, while the Petitioner has been wrongly arrested. That, in view of the grounds put forth the Petitioner be enlarged on furnishing bail, on any condition as deemed appropriate by this Court. In support of his submissions,

Learned Counsel relied on the ratio of ***Sanjay Chandra*** vs. ***Central Bureau of Investigation***[1], ***Prakash Kumar alias Prakash Bhutto*** vs. ***State of Gujarat***[2], ***Pancho*** vs. ***State of Haryana***[3], ***Dataram Singh*** vs. ***State of Uttar Pradesh and Another***[4], ***Union of India*** vs. ***Niyazuddin Sk. and Another***[5], ***State of Kerala etc.*** vs. ***Rajesh etc.***[6], ***Rupa Gurung*** vs. ***State of Sikkim***[7].

3. Learned Additional Public Prosecutor while repudiating the contentions of Learned Counsel for the Petitioner submitted that the accused was indeed arrested on the basis of the statement of the driver of the truck, the accused No.1 in the instant matter, who divulged that the Petitioner had requested him to bring the bottles of Cough Syrup, which are controlled substances in terms of the SADA, 2006. That, the First Information Report also reveals that on recovery of the controlled substances valid bills could not be furnished by the driver, who then made the aforestated revelation adding that the Petitioner would be waiting for him near Rolu Temple, in his vehicle, to receive the consignment of controlled substances. That, on the basis of such revelation the Police team went towards Rolu Temple and intercepted the Petitioner with his vehicle at a bridge before the said Temple. The question of arresting the owner is ruled out as he is not involved in the offence. As the controlled substances are large in number, should the accused be enlarged on bail there is every likelihood that he will tamper with the evidence as admittedly he is an influential person in the locality. That, the Petitioner has criminal antecedents having in the past been involved in a rioting case under the jurisdiction of the Jorethang Police Station and later in Hingdam Police Station case also for a similar offence. Hence, considering his antecedents his involvement in the offence is a foregone conclusion. That, the investigation is still underway and enlarging the Petitioner on bail at this stage would prejudice the Prosecution case. Besides, the menace of drug peddling has to be curbed in the State and on these grounds, the Petition for bail deserves a dismissal. To augment his submissions, Learned Additional Public Prosecutor relied on ***Nabin Manger*** vs. ***State of Sikkim***[8].

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[1] (2012) 1 SCC 40
[2] (2007) 4 SCC 266
[3] (2011) 10 SCC 165
[4] (2018) 3 SCC 22
[5] (2018) 13 SCC 738
[6] 2020 SCC OnLine SC 81
[7] 2020 SCC OnLine Sikk 20 (Bail Appln. No.02 of 2020)
[8] SLR (2018) Sikkim 1454 : MANU/SI/0078/2018 (Bail Appln. No.03 of 2018)

4. I have heard *in extenso* the rival contentions of Learned Counsel and the citations placed at the Bar have been carefully perused. I have also perused carefully the documents furnished before me.

5. The FIR was lodged by Sub-Inspector (SI) Prashant Rai of the Melli P.S. on 12-04-2020, before the Station House Office Melli Police Station on 12-04-2020, a wireless signal having been received from the Assistant Sub-Inspector deployed at the Melli Check Post on 11-04-2020 at around 2245 hours informing him that on checking of the incoming and outgoing vehicles at Melli Check Post the ASI had intercepted truck bearing registration No.SK 04 D 0092 along with the driver. Bottles of Cough Syrup were discovered concealed in the storage compartment above the driver's seat. The SI reached the Melli Check Post and the vehicle was searched in terms of the legal provisions laid down in the SADA, 2006 which led to the recovery of 10 bottles of 100 ml. Rexdryl Cough Syrup and 588 bottles of 100 ml. each of Ownrex Cough Syrup, concealed inside four sacks of rice. Pursuant to the said recovery the driver divulged the involvement of the Petitioner. The Arrest Memo indicates that the Petitioner was booked under Section 7/9/14 of the SADA, 2006 read with Section 7(1)(c)/7(4) of the Sikkim Anti Drugs (Amendment) Act, 2017.

6. Pausing here momentarily, it is necessary to clarify that Section 7 of the SADA, 2006, reads as follows;

"CHAPTER III

PROHIBITION, CONTROL AND REGULATION

Prohibition of certain operations

7. No person shall –

(a) sale, stock for sale or trade in any controlled substance; or

(b) transport either inter-State or intra-State any controlled substance, Without a valid license under the Drugs and Cosmetics Act, 1940 or Sikkim Trade License Act:

Provided that, and subject to the other provisions of the Act and the rules made thereunder,

the possession of verifiable quantities, as prescribed in the rules of controlled substances for medicinal purposes with a valid prescription, or for a legal use of the substance, shall be permissible:

Provided further that the amount of controlled substance in possession shall not be beyond the limit prescribed in prescription slip/card, or in cases of other substances other than drugs, the amount permissible shall be proportionate to its purported use."

7. By the Sikkim Anti Drugs (Amendment) Act, 2017, in Chapter IV pertaining to Offences and Penalties, Section 9 which deals with punishment for contravention of controlled substances, of the SADA, 2006, came to be substituted by the following;

Substitution of Section 9

7. In the Principal Act, for Section 9, the following Section shall be substituted, namely:-

"9.(1) Whoever, in contravention of any provision of this Act or any rule or order made thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses,-

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which shall not be less than two years but may extend to five years and shall also be liable to pay fine which shall not be less than twenty thousand rupees but may extend to fifty thousand rupees;

(b) where the contravention involves large quantity, with rigorous imprisonment for a term which shall not be less than seven years but may extend to ten years and

shall also be liable to pay fine which shall not be less than fifty thousand rupees but may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment which shall not be less than ten years but may extend to fourteen years and shall also be liable to pay fine which shall not be less than one lakh rupees but may extend to two lakh rupees.

(2) ……...……

(3) ……..……

(4) Where the contravention involves a person using a mode of transport or any other form of conveyance, either inter-State or intra-State, such person shall be liable to imprisonment for a term which shall not be less than ten years but which may extend to fourteen years and shall also be liable to fine which shall not be less than one lakh but may extend to ten lakhs rupees and the conveyance as used, shall be liable to be seized and confiscated, which may be released on payment in the following manner:-

(a) Heavy motor vehicle – Rupees two lakhs

(b) Light motor vehicle – Rupees one lakh

(c) wo-or-three wheeled – Rupees fifty thousand

(d) Any other form of conveyance – Rupees twenty-five thousand

(5) ……..……..”

8. During the substitution of Section 9 made vide the Act of 21 of 2017 with effect from 19-09-2017, it is seen that the numerical 7 appears a little above the substituted Section 9. In this regard, it appears that there is some confusion in the Arrest and Surrender Memo pertaining to the Section under which the Petitioner was booked, viz., Section 7/9/14 of the SADA, 2006, read with Section 7(1)(c)/7(4) of the Sikkim Anti Drugs (Amendment) Act 2017. The numerical 7 above the Section 9 does not denote a Section, viz., 7, but is the serial number inserted to indicate the substitution of Section 9 by the said amending Act. Infact, there is no Section 7(1)(c) or Section 7(4) for the reasons enumerated hereinabove and ought to be read as Section 9 and its Sub-Sections, the amending Act of 2017 having substituted Section 9 and not Section 7. The air having been cleared on this aspect, I proceed to examine the matter at hand.

9. Admittedly, the Petitioner was arrested on the seizure of the controlled substances having been made from the truck bearing No.SK 04 D 0092, driven by one Bimal Gurung, also arrayed as an accused in the Melli P.S. Case (*supra*). Admittedly, the truck in which the controlled substances were carried did not belong to the said accused driver nor to the Petitioner herein. It is also admitted by the Prosecution that the owner of the truck was not arrested, his complicity in the offence having been ruled out. On careful examination of the records placed before this Court and the submissions made by the Prosecution, no proof whatsoever emanates at this stage to establish that the consignment was ordered by the accused as allegedly disclosed by the driver Bimal Gurung nor recovery of any articles made from the possession of the Petitioner on his arrest. This is apparent also from Annexure 2, the Arrest/Court Surrender Memo pertaining to the arrest of the Petitioner which fails to disclose recovery of any articles from the Petitioner much less the controlled substances. All that the Prosecution is relying on after more than a month and two weeks of investigation is the statement of the driver that the Petitioner had asked him to bring the controlled substances. The FIR mentions that, according to the driver, the Petitioner was waiting at “Rolu Temple” for the consignment of controlled substances being transported in the truck and consequent upon such revelation the Police team was immediately despatched towards Rolu, who successfully intercepted the Petitioner and his vehicle at a *pucca* bridge just before the Rolu temple. However, a careful perusal of the Arrest Memo reveals no such details which infact records that the Petitioner was arrested at 0240 hours at “Melli” after the FIR was lodged at 2245 hours and the

driver arrested at 0155 hours. The Arrest Memo does not mention that the Rolu Temple is situated at Melli and the Prosecution on clarification sought by this Court, admits that Melli is in a different location, while the Rolu Temple is located elsewhere and not in Melli. It was also the specific plea of the Prosecution that the investigation is still being conducted in the matter and should he be enlarged on bail, the Petitioner is likely to tamper with evidence. While considering this aspect, it is worth noticing that the controlled substances post recovery have already been seized by the Police and remains in their custody. The Accused No.1 is also in judicial custody. There are only two other independent witnesses who evidently belong to Melli, South Sikkim and not to Jorethang of which the Petitioner is a resident. The question of evidence being tampered by the Petitioner, in my considered opinion, appears to be a little far-fetched in the absence of any materials placed in support of this allegation.

10. This Court has repeatedly observed that the sale of controlled substances by unconscionable people and the use of it by all age groups and more especially by the youth of Sikkim has unequivocally had a deleterious effect on the society in the State at large and therefore deserves to be dealt with an iron hand. Having flagged this concern, I can well understand the anxiety of the Police in the present circumstances to ensure that the Petitioner remains in custody in view of the large quantity of controlled substances seized being prescription drugs, rampantly misused by sale at exorbitant rates, to users who become victims and in turn embroil their family and society to the negative aspects of its use. Nevertheless the dots must connect and the complicity of the accused/Petitioner in the offence must be shown. Surely, the statement of the driver with no other evidence whatsoever at this stage to link the Petitioner to the crime would not justify the confinement of the Petitioner in judicial custody. This Court is aware and conscious of the Judgment of the Hon'ble Supreme Court in ***Rajesh*** (*supra*) wherein while discussing Section 37 of the NDPS Act it has held has follows;

> **"20. <u>The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The</u>**

operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is **that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.**

21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

22. We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a sine qua non for granting bail to the accused under the NDPS Act.

[emphasis supplied]"

11. The exact same spirit of Section 37 of the NDPS Act finds place is Section 18 in the SADA, 2006 specifically Section 18(ii). However, in this context, I have to reiterate that despite investigation having stretched on for a month and two weeks the Prosecution has failed to place before this

Court grounds indicating complicity of the Petitioner in the offence at this stage to justify his further detention in custody.

12. In the result, in consideration of the foregoing discussions, this is a fit case where the Petitioner ought to be enlarged on bail. It is accordingly ordered that the Petitioner be released on bail on furnishing PB&SB of Rs.50,000/- (Rupees fifty thousand) only, each, subject to the condition that;

(i) He shall report to the I.O. of the case as and when required until completion of investigation.

(ii) He shall not make attempts to contact the two independent witnesses or for that matter any witnesses pertaining to the instant matter.

(iii) He shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/them to disclose such facts to the Investigating Officer or to the Court.

(iv) He shall not leave Jorethang without the specific written permission of the I.O. of the Case.

13. The observations made herein are only for the purposes of the instant Bail Petition and shall not be construed as a finding on the merits of the matter which shall be considered at the time of trial, if any.

14. The Bail Appln. stands disposed of.

15. Copy of this Order be made available to all the Special Judges (Sikkim Anti Drugs Act, 2006) for information.

SLR (2020) SIKKIM 346

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

Bail Application No. 04 of 2020

Raj Kumar Gupta ….. PETITIONER

Versus

State of Sikkim ….. RESPONDENT

Bail Application No. 05 of 2020

Achhay Lal Gupta ….. PETITIONER

Versus

State of Sikkim ….. RESPONDENT

Bail Application No. 06 of 2020

Lila Bahadur Chettri ….. PETITIONER

Versus

State of Sikkim ….. RESPONDENT

For the Petitioners: Mr. Tarun Choudhury, Advocate.

For the Respondent: Mr. Yadev Sharma, Addl. Public Prosecutor and Mr. Sujan Sunwar, Asst. Public Prosecutor.

Date of decision: 27th May 2020

A. Code of Criminal Procedure, 1973 – Ss. 439 and 482 – Sikkim Anti Drugs Act, 2006 – S. 18 – Petitioners Raj Kumar Gupta and Achhay

Lal Gupta were summoned to the check-post requiring them to furnish valid bills for the seized controlled substances. It is admitted that Achhay Lal Gupta furnished the required bills consequent upon which his consignment was released to him by the Police. Despite such steps having been taken by the Police on due verification of the required bill, Achhay Lal Gupta was taken into custody by the Police revealing a bizarre situation. Raj Kumar Gupta admittedly sought time and furnished the computer generated bill dated 23.04.2020, which revealed the requisition of 36 bottles of Rexdryl from M/s. Sunrise Distributors, Siliguri, duly paid. Serial No.15 of the said bill indicates that 36 bottles of Rexdryl had also been ordered by him from the said Distributors. The F.I.R was lodged on 24.04.2020, the bill was generated on 23.04.2020 and furnished on 25.04.2020 to the Police – The licence of both the petitioners, Raj Kumar Gupta and Achhay Lal Gupta have been perused duly by me wherein it is indicated that both the petitioners have been authorised to sell all medicines except that in Schedule C and C(1) of the Drugs and Cosmetics Rules, 1945. A month has elapsed since the date of arrest and confinement of the petitioners in judicial custody, yet it is the case of the Prosecution that the authenticity of the bill is yet to be verified by the I.O – The petitioner Lila Bahadur Chettri and the owner of the truck, I find are guilty of having flouted the provisions of the permission granted to them for carrying poultry feed only and no other materials – The said petitioner is oblivious of the contents of the cartons and has followed the directions of his employer in transporting the goods in the cartons. At this juncture, no *mens rea* has been made out against him.

(Paras 11, 12 and 13)

Petition allowed.

ORDER

Meenakshi Madan Rai, J

1. These three Bail Petitions are being disposed of by a common Order, emanating as they do from a common FIR.

2. The FIR, Annexure 1, registered as Melli P.S. Case No.11/2020, dated 24-04-2020, under Section 7/9/14 of the Sikkim Anti Drugs Act,

2006 (for short, "SADA, 2006") read with Section 7(1)(b)/7(4) [*sic*] of the Sikkim Anti Drugs (Amendment) Act, 2017, was lodged by Sub-Inspector Melli Police Station before the Station House Officer, Melli P.S. on 24-04-2020, upon information from Assistant Sub-Inspector Durga Prasad Gurung deployed at Melli Check Post, that on routine checking of incoming and outgoing vehicles at Melli Check Post, a truck bearing registration No.SK 04 D 0794 was intercepted at the check post. The vehicle was carrying poultry feed for which the driver furnished the relevant bill. Further checking of the vehicle led to the discovery of some boxes of medicines for two medical Stores at Melli Bazaar, namely, M/s. Jawahar Lall Gupta Medical Store and M/s. Achhay Lal Gupta Medical Store. On opening one of the boxes, controlled substances being Cough Syrup was suspected to be in the said boxes. Thereafter, a search of the vehicle was conducted by the SI in the presence of two independent witnesses and the Sub-Divisional Police Officer (SDPO), Jorethang in terms of the provisions of Section 22 of the SADA, 2006. 36 (thirty-six) bottles of Rexdryl Cough Syrup each containing 100 ml. were recovered from the truck on such search pursuant to which the FIR came to be lodged.

3. Learned Counsel for the Petitioner advancing his submissions for the Petitioner Raj Kumar Gupta, in Bail Appln. No.04 of 2020, contended that although the truck was authorised only to carry poultry feed, yet the Petitioner who runs a duly licensed medical store at Melli had requested the truck owner to instruct the driver to bring some medicines which were urgently required in his shop. That, owing to the pandemic and the restricted movement of vehicles, the Petitioner was unable to procure the medicines which were required by the public at large or any other vehicle to ferry the goods. On the day of the search and seizure of the vehicle, i.e., 24-04-2020, 36 bottles of controlled Cough Syrup were found in the truck along with the other medicines in 24 cartons, requisitioned by the Petitioner and co-accused Achhay Lal Gupta, duly supplied by M/s. Sunrise Distributors, Siliguri. That, the driver had forgotten to carry the bills prepared by the said supplier when he had picked up the said medicines along with the controlled substances which were also included in the bill. That, Annexure 8 to the Petition is certified to be a true copy of the bill, dated 23-04-2020, furnished by M/s. Sunrise Distributors reflecting the name of the 14 other medicines, besides the Cough Syrup listed at serial no.15 therein with payment made. That, although the bill could not be furnished on 24-04-2020 the Petitioner sought time from the Police and furnished it on 25-04-

2020, the very next day. That, this bill was duly verified by the I.O. from the Distributor and found to be genuine. That, the Licence, Annexure 5, issued to M/s. Jawahar Lall Gupta by the Health and Family Welfare Department, Drugs and Cosmetic Cell, Government of Sikkim, under the Drugs and Cosmetics Act, 1940, permitted sale of all categories of drugs including Schedule "H" Drugs of the Drugs and Cosmetics Rules, 1945, except the drugs listed at Schedule C and C(1) of the said Rules and covered the requirements of Section 7 of the SADA, 2006. Consequently, on the bill having been furnished, it is evident that the Petitioner had committed no offence as booked and deserves to be enlarged on bail. That, the Petitioner is a permanent resident of Melli Bazaar, conducting his ancestral business therein besides being a respectable citizen with no criminal antecedents. Hence, the question of him absconding does not arise. That, the Petitioner undertakes to abide by any condition imposed by this Court should he be enlarged on bail.

4. In the case of Achhay Lal Gupta, Petitioner in Bail Appln. No.05 of 2020, it was submitted by Learned Counsel that he is the owner of a medical shop by the name M/s.Achhay Lal Gupta Medical Store at Melli Bazaar, licensed vide Annexure 5 to sell all drugs including Schedule "H" drugs under the Drugs and Cosmetics Rules, 1945, excluding Schedule C and C(1) of the said Rules. That, the Licence, Annexure 5, was issued to the Petitioner by the Health and Family Welfare Department, Drugs and Cosmetic Cell, Government of Sikkim. The Petitioner was arrested by the Police only for the reason that the driver, Lila Bahadur Chettri, of the truck (Petitioner in Bail Appln. No.06 of 2020), had stated that the medicines belonged to Raj Kumar Gupta and Achhay Lal Gupta. However, the medicines ordered by the instant Petitioner Achhay Lal Gupta and transported in the truck, had the requisite bill indicating the purchase of all the medicines for his Medical Store and there were infact no controlled substances in his consignment. 36 bottles of Cough Syrup belonged to Raj Kumar Gupta as duly admitted by him to the Police for which the bill was also furnished the next day by Raj Kumar Gupta. The Police on due verification released the medicines pertaining to the requisition of M/s. Achhay Lal Gupta Medical Store, however despite release of the medicines on due verification of the bill, the Petitioner Achhay Lal Gupta was taken into custody, sans connection between the Petitioner and the controlled substances carried in the truck. The Petitioner is also a permanent resident of Melli Bazaar, South Sikkim, running his business of medicines, has no

criminal antecedents and therefore the question of his absconsion does not arise. That, he will abide by all conditions imposed by the Court should he be enlarged on bail.

5. So far as the Petitioner in Bail Appln. No.06 of 2020 Lila Bahadur Chettri is concerned it is admitted by Learned Counsel for the Petitioner that the truck which the Petitioner was driving was only authorised to carry poultry feed but out of magnanimity and in consideration of the ongoing pandemic and the directions of his owner and the Petitioner himself being of the belief that the medication was required for the general good agreed to carry the medication for the stores of both Raj Kumar Gupta and Achhay Lal Gupta. That, he had no *mens rea* whatsoever and was unaware of the contents of the cartons. In any event, 36 bottles of Rexdryl are duly accounted for and were brought to be sold by licensed medical shops in Melli as established by the bills furnished by the other two Petitioners, in Bail Appln. Nos.04 and 05 of 2020, who had been summoned to the Police Station on him having informed the Police that the consignment of medicines belonged to the other two Petitioners. That, he is a permanent resident of Melli, South Sikkim and will not abscond nor does he have criminal antecedents and is willing to cooperate with investigation and all conditions imposed by this Court.

6. Learned Additional Public Prosecutor while opposing the Petitions filed by the three Petitioners admits that the medicines ordered by Achhay Lal Gupta were found to be duly billed and the medicines and the bill released to the said Petitioner. However, the involvement of the Petitioner in the instant matter is clear as the driver had mentioned his name and stated that he had been requested to carry the controlled substances by the said Petitioner Achhay Lal Gupta. That, so far as the Petitioner Raj Kumar Gupta is concerned although the bill pertaining to 36 bottles of Cough Syrup containing controlled substances was furnished it was only after the FIR was lodged and the recovery and seizures made, indicating *mens rea* on the part of the Petitioner, besides it cannot be ruled out that the document is a false one. That, on account of the pandemic, the Investigating Officer has not been able to verify by going in person to M/s. Sunrise Distributors, Siliguri as to whether Annexure 8, being the bill issued to M/s. Jawahar Lall Gupta Medical Store is a genuine bill or not. So far as the driver, Lila Bahadur Chettri is concerned, the Petitioner was well aware that he was carrying the controlled substances besides being unauthorised to carry the said medicines

the permission only having been granted to carry poultry feed. Hence, in view of the involvement of all the Petitioners in the matter under Section 7/ 9/14 of the Sikkim Anti Drugs Act, 2006 (for short, "SADA, 2006") and Section 7(1)(b)/7(4) of the Sikkim Anti Drugs (Amendment) Act, 2017, the Petitions for bail filed each of them be rejected.

7. The submissions of Learned Counsel for the parties were heard *in extenso* and given due consideration. I have carefully perused all documents on record.

8. The FIR, Annexure 1, indicates that the Petitioners were booked under Section 7/9/14 of the SADA, 2006 read with Section 7(1)(b)/7(4) of the Sikkim Anti Drugs (Amendment) Act, 2017. Pausing here momentarily, it is necessary to clarify that Section 7 of the SADA, 2006, reads as follows;

"CHAPTER III
PROHIBITION, CONTROL AND REGULATION

Prohibition of certain operations

7. No person shall –

(a) sale, stock for sale or trade in any controlled substance; or

(b) transport either inter-State or intra-State any controlled substance,

Without a valid license under the Drugs and Cosmetics Act, 1940 or Sikkim Trade License Act:

Provided that, and subject to the other provisions of the Act and the rules made thereunder, the possession of verifiable quantities, as prescribed in the rules of controlled substances for medicinal purposes with a valid prescription, or for a legal use of the substance, shall be permissible:

Provided further that the amount of controlled substance in possession shall not be beyond the limit prescribed in prescription slip/card, or in cases of other substances other than drugs, the amount permissible shall be proportionate to its purported use.**"**

9. By the Sikkim Anti Drugs (Amendment) Act, 2017, in Chapter IV pertaining to Offences and Penalties, Section 9 which deals with punishment for contravention of controlled substances, of the SADA, 2006, came to be substituted by the following;

"Substitution of Section 9

7. In the Principal Act, for Section 9, the following Section shall be substituted, namely:-

"9.(1) Whoever, in contravention of any provision of this Act or any rule or order made thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses,-

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which shall not be less than two years but may extend to five years and shall also be liable to pay fine which shall not be less than twenty thousand rupees but may extend to fifty thousand rupees;

(b) where the contravention involves large quantity, with rigorous imprisonment for a term which shall not be less than seven years but may extend to ten years and shall also be liable to pay fine which shall not be less than fifty thousand rupees but may extend to one lakh rupees;

(c) where the contravention involves commercial quantity,

with rigorous imprisonment which shall not be less than ten years but may extend to fourteen years and shall also be liable to pay fine which shall not be less than one lakh rupees but may extend to two lakh rupees.

(2) …….....……

(3) …….....……

(4) Where the contravention involves a person using a mode of transport or any other form of conveyance, either inter-State or intra-State, such person shall be liable to imprisonment for a term which shall not be less than ten years but which may extend to fourteen years and shall also be liable to fine which shall not be less than one lakh but may extend to ten lakhs rupees and the conveyance as used, shall be liable to be seized and confiscated, which may be released on payment in the following manner:-

(a) Heavy motor vehicle – Rupees two lakhs

(b) Light motor vehicle – Rupees one lakh

(c) Two-or-three wheeled – Rupees fifty thousand

(d) Any other form of conveyance – Rupees twenty-five thousand

(5) …....……..**”**

During the substitution of Section 9 made vide the Act of 21 of 2017 with effect from 19-09-2017, it is seen that the number 7 appears a

little above the substituted Section 9. In this regard, it appears that there is some confusion in the FIR pertaining to the provisions of the SADA, 2006 the Petitioners having been booked under Section 7/9/14 of the SADA, 2006 and Section 7(1)(b)/7(4) of the Sikkim Anti Drugs (Amendment) Act, 2017. The numerical 7 appearing a little above Section 9 does not denote a Section but is the serial number, inserted to indicate the substitution of Section 9 by the said amending Act. Infact, there is no Section 7(1)(b) or Section 7(4) for the reasons enumerated hereinabove and ought to be read as Section 9 and its Sub-Sections, the amending Act of 2017 having substituted Section 9 and not Section 7. The air having been cleared on this aspect, I proceed to examine the matter at hand.

10. The FIR, Annexure 1, is dated 24-04-2020. The FIR records *inter alia* as follows;

> **"**9. Particulars of properties stolen/involved (Attach separate sheet):
>
> **(a)** 36 bottles of 100 ml REXDRYL cough syrup batch no.04320-5MB2.
>
> **(b)** Truck SK 04 D 0794 (Ecomet).
>
> **(c)** 160 bags of poultry feeds.
>
> **(d)** 24 Nos. of boxes containing medicines with respective bills.**"**

The Prosecution case is that 36 bottles of Rexdryl Cough Syrup of 100 ml. each are controlled substances transported into Sikkim in violation of the provisions of the SADA, 2006. On perusal of the portion *supra* of the FIR, at this juncture, it cannot but be remarked that the FIR itself appears to contradict the Prosecution case since admittedly the 34 boxes containing medicines had their respective bills and thereby were accounted for. Infact, the FIR also reflects *inter alia* as follows;

> **"**……
>
> Subsequently, the involved vehicle was searched as per the provision laid down u/s 22 of SADA 2006 in

order to avoid any further delay in action. The search of vehicle in presence of aforementioned witnesses and SDPO Jorethang who arrived at the PO consequent to the information relayed to him led to the recovery of 36 bottles of 100 ml REXDRYL cough syrup batch no.04320-5MB2 (sic) from the cabin of the aforementioned truck which was seized along with the truck b/r No SK 04D0794 (Ecomet), its document & key, 160 bags of poultry feed and **24 Nos. of boxes containing medicines with respective bills**.

……."

[emphasise supplied]

11. It is the Prosecution case that the Petitioners Raj Kumar Gupta and Achhay Lal Gupta were summoned to the Check Post requiring them to furnish the valid bills for the seized controlled substances. It is admitted that Achhay Lal Gupta furnished the required bills consequent upon which his consignment was released to him by the Police. Despite such steps having been taken by the Police on due verification of the required bill, the Petitioner Achhay Lal Gupta was taken into custody by the Police revealing a bizarre situation. The Petitioner Raj Kumar Gupta admittedly sought time and furnished the computer generated bill Annexure 8, dated 23-04-2020, which revealed the requisition of 36 bottles of Rexdryl from M/s. Sunrise Distributors, Siliguri, duly paid. Serial No.15 of the said bill indicates that 36 bottles of Rexdryl had also been ordered by him from the said Distributors. The FIR as already seen was lodged on 24-04-2020, the bill, Annexure 8, was generated on 23-04-2020 and furnished on 25-04-2020 to the Police.

12. The Licence, Annexure 5, respectively of both the Petitioners, Raj Kumar Gupta and Achhay Lal Gupta, have been perused duly by me, wherein it is indicated that both Petitioners have been authorised to sell all medicines except that in Schedule C and C(1) of the Drugs and Cosmetics Rules, 1945. A month has elapsed since the date of arrest and confinement of the Petitioners in judicial custody, yet it is the case of the Prosecution that the authenticity of the bill Annexure 8 is yet to be verified by the I.O.

The Prosecution case is that due to the prevailing pandemic the I.O. has not been able to travel in person to make the verification from the Distributors. There is no clarity from the side of the Prosecution as to whether the verification has ever been made telephonically by the I.O. and if the answer is in the negative, then why is it so? Learned Counsel for the Petitioners has contended that the bill was found to be genuine on such verification by the I.O. from the Distributors.

13. The Petitioner Lila Bahadur Chettri and the owner of the truck, I find are guilty of having flouted the provisions of the permission granted to them for carrying poultry feed only and no other materials. Suffice it however to state here that no steps have been envisaged in this regard by the concerned authorities so far as facts before this Court disclose and thus require no discussion. The said Petitioner is oblivious of the contents of the cartons and has followed the directions of his employer in transporting the goods in the cartons. At this juncture, no *mens rea* has been made out against him.

14. Consequently, on consideration of all facts and circumstances placed before this Court, I am of the considered opinion that the Petitioners can be enlarged on bail. It is accordingly ordered as follows;

(i) The Petitioners, Raj Kumar Gupta in Bail Appln. No.04 of 2020, Achhay Lal Gupta in Bail Appln. No.05 of 2020 and Lila Bahadur Chettri in Bail Appln. No.06 of 2020, be enlarged on each of them furnishing PB&SB of Rs.50,000/- (Rupees fifty thousand) only, each.

(ii) They shall report to the I.O. of the case as and when required until completion of investigation.

(iii) They shall not make attempts to contact any witness pertaining to the instant matter.

(iv) They shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/them to disclose such facts to the Investigating Officer or to the Court.

(v) They shall remain at Melli and may leave station only with the specific written permission of the I.O. of the Case.

15. The observations made herein are only for the purposes of the instant Bail Petitions and shall not be construed as findings on the merits of the matter, which shall be considered at the time of trial, if any.

16. The Bail Applications stand disposed of accordingly.

17. Copy of this Order be made available to all the Special Judges (Sikkim Anti Drugs Act, 2006) for information.

SLR (2020) SIKKIM 358

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. A. No. 23 of 2018

Kendrap Lepcha ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. Sudesh Joshi, Legal Aid Counsel.

For the Respondent: Mr. Hissey Gyaltsen and Ms. Mukun Dolma Tamang, Assistant Public Prosecutors.

Date of decision: 1st June 2020

A. Protection of Children from Sexual Offences Act, 2012 – S. 9 – Aggravated Sexual Assault – The minor victim (PW-5) identified the appellant as Kendrap Sir who used to teach them Mathematics and Hindi when she was in the 4th and 5th standards. She deposed that on two occasions, the appellant put his finger in her *pisab garne* (vagina). She deposed that on five occasions, he put his hands on her chest/breasts in the classroom of the school. She also deposed about the appellant sexually abusing other school girls. She said she had disclosed it to her mother and given her statement to the learned Magistrate – The defence has cross-examined the minor victim on what she stated about the sexual abuse on other school girls by the appellant. However, the defence could not get anything but a denial to their suggestions that what she stated in her deposition against the appellant was not true. No questions were asked to the minor victim regarding the discrepancies in the statement (Exhibit-6) and her deposition. A close scrutiny of her deposition as well as her statement (Exhibit-6) does establish that the appellant had on more than one occasion put his fingers in her vagina and also molested her several times by touching her breast. These facts have been corroborated by her statement (Exhibit-6)

and the deposition of PW-6 [the mother of the minor victim] to whom she had also disclosed that the appellant used to put his hands on chest/breast and her vagina.

(Para 16)

Appeal partly allowed.

Chronology of cases cited:

1. State of Rajasthan v. Babu Meena, (2013) 4 SCC 206.
2. Kiran Karki @ Chettri Uncle v. State of Sikkim, 2019 SCC Online Sikk 224.

JUDGMENT

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

1. The appellant, a teacher in a Primary School, was tried, convicted and sentenced to imprisonment for the offences of rape, aggravated penetrative sexual assault, aggravated sexual assault and for assault on the minor victim (PW-5), a schoolgirl, with intent to outrage her modesty. Both the judgment of conviction and the order on sentence dated 31.05.2018, have been challenged in the present appeal.

2. The First Information Report (for short 'the FIR') (Exhibit-1) was lodged on 11.12.2016, by a member of the village Panchayat (PW-7), PW-6 [mother of the minor victim (PW-5)], PW-1, PW-9, PW-10 and PW-14 (collectively referred to as the first informants) mothers to five schoolgirls aged between 7 to 11 years. The FIR (Exhibit-1) alleged that PW-14, mother of "O", was bathing her when she noticed redness on her breasts a few days ago. She therefore asked "O" about it but she refused to open up. After a while, "O" narrated the incident and informed PW-14 that she and the other schoolgirls were being sexually assaulted by their teacher, the present appellant. The FIR (Exhibit -1) further alleged that the schoolgirls informed the first informants that the appellant used to touch their breasts in the classroom and outdoors. According to the first informants, the schoolgirls further alleged that the appellant used to put his finger in their private parts and lick it in front of them, make sexual gestures to them and threaten them that if they told their parents or anyone about it, he would cause serious trouble to them.

3. On the basis of the information, FIR No. 25(12)16 dated 11.12.2016 was registered and the case endorsed to Police Inspector Karma Euden Kaleon (PW-16) for investigation.

4. During investigation, the minor victim (PW-5) was examined by Dr. Rozeela Bhutia (PW-13) on 11.12.2016. On her examination, she found that her breast nipples were swollen. She also noticed that her hymen was not intact and it admitted one finger coupled with tenderness and foul smell. Dr. Rozeela Bhutia (PW-13) opined in her medical report (Exhibit-13) that there was clinical evidence of sexual assault.

5. The learned Judicial Magistrate (PW-12) recorded the statement (Exhibit-6) under section 164 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') of the minor victim (PW-5) on 26.12.2016.

6. A consolidated charge-sheet was filed on 28.04.2017 against the appellant for the alleged offence allegedly committed against five schoolgirls of the same school in which he was a teacher. At the stage of framing of charges, the trial of the alleged offences against each of the five schoolgirls was split and each tried separately.

7. On 10.10.2017, the learned Special Judge (POCSO), North Sikkim at Mangan (hereinafter, 'the learned Special Judge'), in *Sessions Trial (POCSO) Case No. 14 of 2017 - State of Sikkim vs. Kendrap Lepcha*, framed eleven charges against the appellant for the commission of the alleged offences against the minor victim (PW-5). The appellant pleaded not guilty and claimed trial. Seventeen witnesses including the Investigating Officer (PW-16) were examined.

8. On 25.05.2018, the appellant was examined under section 313 of the Cr.P.C. The appellant claimed that he had been falsely implicated because he was a strict teacher and the children s parents used to dislike him. When the appellant declined to bring any witness in his defence, the matter was heard by the learned Special Judge. On 31.05.2018, he passed the judgment of conviction and the order on sentence.

9. Mr. Sudesh Joshi, learned counsel for the appellant, at the outset submitted that he does not seek to challenge the minority of the minor victim (PW-5). He, however, vehemently insisted that the evidence of the minor

victim (PW-5) is grossly inconsistent and therefore, unreliable. It was submitted that considering the age of the minor victim (PW-5) and the conflicting statements made by the minor victim (PW-5), it would be dangerous to uphold the conviction of the appellant. Mr. Sudesh Joshi drew our attention to the inconsistency in the FIR (Exhibit-1), the statement (Exhibit-6) and the deposition of the minor victim (PW-5). He drew our attention to the medical evidence as well as the various paragraphs of the impugned judgment which dealt with the statement (Exhibit-6). Mr. Sudesh Joshi relied upon a judgment of the Supreme Court in ***State of Rajasthan vs. Babu Meena***[1] emphasising that a wholly unreliable evidence of a prosecutrix cannot lead to conviction.

10. Mr. Hissay Gyaltsen, learned Assistant Public Prosecutor, however, submitted that the deposition of the minor victim (PW-5) is cogent. The heinous acts have been clearly deposed to and explained by the minor victim (PW-5) even though a child. He drew our attention to the fact that between the recording of the statement (Exhibit-6) and the recording of the deposition, there was a gap of fourteen months which would explain the minor discrepancies between them. He also emphasised that there was no apparent reason or motive to frame the appellant. He, therefore, submitted that the judgment of conviction and order on sentence both dated 31.05.2018 should not be interfered with.

11. PW-6 identified the appellant in court. PW-6 deposed that she was told by the mother of one of the schoolgirls that while bathing her daughter she was told by her that the appellant, their teacher, was sexually assaulting her and other schoolgirls including the minor victim (PW-5). PW-6 enquired about it from the minor victim (PW-5) who told her that the appellant used to put his hands on her chest/breasts and her *pisab garne* (vagina). According to PW-6, the parents then went to the Panchayat for discussing the matter and after informing the matter to the Panchayat member they lodged the FIR (Exhibit-1).

12. PW-7 identified the appellant in Court. According to her, on 08.12.2016, she was told by the mother of the minor victim (PW-5) and the parents of other schoolgirls that the appellant, their teacher, had been sexually assaulting them. After discussions, they lodged the FIR (Exhibit-1).

[1] (2013) 4 SCC 206

13. The other first informants (PW-1, PW-9, PW-10 and PW-14) deposed that they had heard about the schoolgirls being sexually abused by the appellant, the subsequent meeting and then the lodgement of the FIR (Exhibit-1). All the first informants identified the appellant in court. What the first informants heard from the schoolgirls as deposed by them may stand. However, the truth and veracity of what the schoolgirls informed the first informants (PW-1, PW-9, PW-10 and PW-14) could have been verified only if the schoolgirls had been examined. However, none of the schoolgirls were examined except the minor victim (PW-5). The truth, therefore, hinges on the evidence of the minor victim (PW-5).

14. The Deputy Secretary (PW-3) and the Joint Secretary (PW-4) both in the Human Resource Development Department, Government of Sikkim, proved the fact that the appellant had been appointed as an *ad hoc* teacher in the year 2015 and thereafter, reappointed as such in the year 2016. They also proved and exhibited the relevant certified copies of the office orders (Exhibit-3 and Exhibit-5). The fact that the appellant was a teacher in the same school in which the minor victim (PW-5) was a student has been sufficiently proved by the first informants, PW-2 (a teacher in the same school), PW-3 (the Deputy Secretary) and PW-4 (the Joint Secretary), PW-6 [the mother of the minor victim (PW-5)] and the minor victim (PW-5) herself.

15. Although, not challenged, the minority of the minor victim (PW-5) has been proved by the deposition of her parents i.e. PW-6 [the mother of the minor victim (PW-5)] and PW-17 [the father of the minor victim (PW-5)] as well as the deposition of PW-8 (the school in-charge). The minor victims (PW-5) birth certificate produced and exhibited by her father PW-17, the custodian of the birth certificate (Exhibit-20), proved that the minor victim (PW-5) was born on 13.12.2006, thus, establishing that the minor victim (PW-5) was below twelve years at the time of the occurrence.

16. The minor victim (PW-5) identified the appellant as Kendrap Sir who used to teach them Mathematics and Hindi when she was in the 4th and 5th standards. She deposed that on two occasions, the appellant put his finger in her *pisab garne* (vagina). She deposed that on five occasions he put his hands on her chest/breasts in the classroom of the school. She also deposed about the appellant sexually abusing other schoolgirls. She said she had disclosed it to her mother and given her statement (Exhibit-6) to the

learned Magistrate (PW-12). She admitted that the appellant was a strict teacher. The defence has cross-examined the minor victim (PW-5) on what she stated about the sexual abuse on other schoolgirls by the appellant. However, the defence could not get anything but a denial to their suggestions that what she stated in her deposition against the appellant was not true. No questions were asked to the minor victim (PW-5) regarding the discrepancies in the statement (Exhibit-6) and her deposition. A close scrutiny of her deposition as well as her statement (Exhibit-6) does establish that the appellant had on more than one occasion put his fingers in her vagina and also molested her several times by touching her breast. These facts have been corroborated by her statement (Exhibit-6) and the deposition of PW-6 [the mother of the minor victim (PW-5)] to whom she had also disclosed that the appellant used to put his hands on chest/breast and her *pisab garne* (vagina).

17. Mr. Sudesh Joshi had vehemently argued that the several inconsistencies in the deposition of the minor victim (PW-5) and her statement (Exhibit-6) as to what the appellant did to the other schoolgirls were sufficient to create a serious doubt to the prosecution case. The FIR (Exhibit-1) was lodged on 11.12.2016, when one of the first informants came to know about her daughter, a schoolgirl in the school, had been sexually abused by the appellant. The several incidents referred to by the minor victim (PW-5) were of the period 2015-2016. The minor victims (PW-5) statement (Exhibit-6) was recorded on 26.12.2016 and her deposition on 21.02.2018, after nearly fourteen months thereafter. It may be possible to get confused at such a tender age about which act was committed on which schoolgirl but near impossible for a schoolgirl to forget how she was sexually abused that too by her own teacher. The fact that the appellant was the minor victims (PW-5) teacher; to that the minor victim (PW-5) was below 16 years of age at the time of the incident and that the appellant had in more than one occasion inserted his finger in her vagina has been proved beyond reasonable doubt. Section 375(b) IPC provides that insertion of a finger (a part of the body) into the vagina amounts to rape. In the circumstances, we are inclined to accept the submission of Mr. Hissay Gyaltsen that the time gap between the statement (Exhibit-6) and the deposition could have created the confusion regarding the details as to what transpired with which of the schoolgirls. The minor victim (PW-5) is sufficiently clear about the fact that she was sexually abused by the appellant several times by putting his hands on her breasts and by also inserting his

finger in her vagina. The medical report of the minor victim (Exhibit-13) also reflects that her hymen was not intact and her breast nipples swollen. In the circumstances, we are inclined to uphold the appellants conviction under section 376(2)(f)(i) and (n) of the Indian Penal Code, 1860 (for short „the IPC). ***18.*** The appellant has also been sentenced under section 9(f), 9(l) and 9(m) of the POCSO Act. The prosecution has proved that the appellant had put his hands on her chest/breasts on more than one occasion. The fact that the appellant committed these acts of sexual assaults in school where he was a teacher and the minor victim (PW-5) a student, has also been proved. The fact that at the time of the offence the minor victim (PW-5) was below 12 years of age has also been proved. Accordingly, sentences under section 9(f), 9(l) and 9(m) of the POCSO Act are upheld.

19. In ***Kiran Karki @ Chettri Uncle vs. State of Sikkim***[2], a Division Bench of this Court has held that the punishment prescribed under section 376(2) of the IPC is greater in degree than the one provided under the Protection of Children from Sexual Offences Act, 2012 (for short „the POCSO Act). Therefore, in terms of section 42 of the POCSO Act, the appellant is not liable to be punished for the offences under section 5(f), 5(l) and 5(m) of the POCSO Act. Accordingly, the appellants sentences under section 5 of the POCSO Act are set aside.

20. Section 376(2) of the IPC prescribes rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that persons natural life, and shall also be liable to fine. The learned Special Judge has sentenced the appellant to 20 years and a fine of 50,000/- for each of the offences under section 376(2)(f), 376(2)(n) and 376(2)(i) of the IPC. Keeping in mind all the relevant considerations including the age of the appellant, we are of the considered view that a sentence of 10 years of rigorous imprisonment and a fine of 50,000/- each for each of the above offences would be sufficient for the ends of justice. The appellant has been sentenced to 7 years of simple imprisonment and a fine of 40,000/- each for the offences under section 9(f), 9(l) and 9(m) of the POCSO Act. We are not inclined to interfere with the sentences imposed. We do hope that the appellant reflects on his heinous acts during the period of incarceration and aspire to be a better citizen.

[2] 2019 SCC Online Sikk 224

21. As directed by the learned Special Judge, the period of imprisonment for the sentences confirmed shall run concurrently. The period of imprisonment already undergone by the appellant in connection with this case shall be set off against the sentences imposed. The Award of compensation for the offence committed as directed by the learned Special Judge is maintained.

22. The appeal is partly allowed.

23. The impugned order on sentence dated 31.05.2018 stands modified to the above extent. Copy of the judgment be transmitted to the Court of the learned Special Judge (POCSO) North Sikkim at Mangan.

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

SLR (2020) SIKKIM 366

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. A. No. 41 of 2018

Kendrap Lepcha ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. Ajay Rathi, Advocate.

For the Respondent: Mr. Hissey Gyaltsen and Ms. Mukun Dolma Tamang, Assistant Public Prosecutors.

Date of decision: 1st June 2020

A. Protection of Children from Sexual Offences Act, 2012 – S. 5 – Aggravated Penetrative Sexual Assault – S. 9 – Aggravated Sexual Assault – The medical evidence is not clinching. None of the observations made by Dr. Rozeela Bhutia (PW-13) on its own would lead to an irresistible conclusion that the appellant had committed penetrative sexual assault or rape on the minor victim (PW-5). The minor victim admitted during her cross-examination that she had stated that the appellant neither opened his clothes nor her clothes. In the circumstances, it is not possible to link the hymen of the victim not being intact to the acts of the appellant alone. Therefore, it would be extremely difficult to sustain the conviction of the appellant for commission of penetrative sexual assault or rape – However, the minor victim has been consistent about the appellant having touched her chest and her vagina. This fact has been corroborated by her statement (Exhibit-6) as well as by the deposition of PW-1. At the time of the incident, the minor victim was barely eight years of age and therefore, may have been susceptible to all kinds of pressures and confusions. However, it is certain that the appellant had in fact sexually assaulted the minor victim.

(Paras 16 and 17)

Appeal partly allowed.

Case cited:

1. Yerumaua Latchaiah v. State of Andhra Pradesh, (2006) 9 SCC 713.

JUDGMENT

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

1. The appellant, a teacher in a Primary School, was tried, convicted and sentenced to imprisonment for the offences of rape, aggravated penetrative sexual assault, aggravated sexual assault and for assault on the minor victim (PW-5), a schoolgirl, with intent to outrage her modesty. Both the judgment of conviction and the order on sentence dated 31.05.2018, have been challenged in the present appeal.

2. The First Information Report (for short 'the FIR') (Exhibit-1) was lodged on 11.12.2016, by a member of the village Panchayat (PW-6), PW-1 [mother of the minor victim (PW-5)], PW-7, PW-9, PW-10 and PW-14 (collectively referred to as first informants) mothers to the five schoolgirls aged between 7 to 11 years. The FIR (Exhibit-1) alleged that PW-14, mother of "O" (one of the five schoolgirls) was bathing her when she noticed redness on her breasts a few days ago. She therefore asked "O" about it, but she refused to open up. After a while, "O" narrated the incident and informed PW-14 that she and her other schoolgirls were being sexually assaulted by their teacher, the present appellant. The first informants alleged that the schoolgirls informed the first informants that the appellant used to touch their breasts in the classroom and outdoors. According to the first informants, the schoolgirls further alleged that the appellant used to put his finger in their private parts and lick it in front of them, make sexual gestures to them and threaten them that if they told their parents or anyone about it, he would cause serious trouble to them.

3. On the basis of the information, FIR No. 25(12)16 dated 11.12.2016 was registered and the case endorsed to Police Inspector Karma Euden Kaleon (PW-17) for investigation.

4. During the investigation, the minor victim (PW-5) was examined by Dr. Rozeela Bhutia (PW-13) on 11.12.2016 and a medical report (Exhibit-

13) prepared. The appellant was also examined on 11.12.2016 by Dr. Dawa Dolma Bhutia (PW-16) and his medical report (Exhibit-16) was also prepared. The minor victims (PW-5) statement (Exhibit-6) under Section 164 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') was recorded on 26.12.2016 by the learned Judicial Magistrate (PW-12).

5. A consolidated charge-sheet was filed on 28.04.2017 against the appellant for the alleged offence allegedly committed against five schoolgirls of the same school in which he was a teacher. At the stage of framing of charges, the trial of the alleged offences against each of the five minor schoolgirls was split and each tried separately.

6. On 10.10.2017, the learned Special Judge (POCSO), North Sikkim at Mangan (hereinafter, 'the learned Special Judge') in *Sessions Trial (POCSO) Case No. 12 of 2017 - State of Sikkim vs. Kendrap Lepcha*, framed ten charges against the appellant for the commission of the alleged offences against the minor victim (PW-5). The appellant pleaded not guilty and claimed trial. Eighteen witnesses including the Investigating Officer (PW-17) were examined.

7. On 25.05.2018, the appellant was examined under section 313 of the Cr.P.C. The appellant claimed that he had been falsely implicated because he was a strict teacher and the parents of the schoolgirls used to dislike him. When the appellant declined to bring any witness in his defence, the matter was heard by the learned Special Judge and on 31.05.2018 passed the judgment of conviction and the order on sentence.

8. Mr. Ajay Rathi, learned counsel for the appellant submitted that the deposition of the minor victim (PW-5) is inconsistent. To demonstrate that he took us through the cross-examination of the minor victim (PW-5). It was submitted that the medical evidence was inconsistent with the evidence of the minor victim (PW-5). It was argued that the prosecution had not examined the other schoolgirls. He relied upon the judgment of the Honble Supreme Court in ***Yerumaua Latchaiah vs. State of Andhra Pradesh***[1] and prayed for an acquittal.

9. Mr. Hissay Gyaltsen, learned Assistant Public Prosecutor, relied upon the testimony of the minor victim (PW-5) as well and submitted that, save

[1] (2006) 9 SCC 713

minor contradictions, her evidence is cogent and therefore, reliable. He submitted that all other relevant circumstances have been proved by the prosecution. The judgment of conviction and order on sentence are both sound.

10. Dr. Rozeela Bhutia (PW-13), the Medical Officer who examined the minor victim (PW-5) on 11.12.2016, the same day when the FIR (Exhibit-1) was lodged, did not find any external injury on her. However, on vaginal examination she found milky white discharge which had dried up. She also found that the hymen was not intact, and it admitted a tip of one finger. She noticed tenderness there and concluded that there was clinical evidence of sexual assault. In cross-examination, she admitted that the milky white discharge is a normal biological occurrence and the hymenal tear could have been caused by strenuous physical activity. She admitted that even without penetration the vagina can be one finger loose. She further admitted that her finding about clinical evidence of sexual assault was based on the history as reported by the Investigating Officer (PW-17) and the medical examination of the minor victim (PW-5). Dr. Dawa Dolma Bhutia (PW-16) who examined the appellant also on 11.12.2016, could not find any injury on his person.

11. PW-1 deposed that she came to know from some co-villagers, whose children used to study in the same school as the minor victim (PW-5), that they were sexually assaulted by the appellant. When she questioned the minor victim (PW-5), she confirmed that the appellant was putting his hands over her chest and vagina. In cross-examination, she admitted that apart from the appellant there were two more teachers in the school; which is a co-ed school; school is located in the village and is surrounded by many houses; people of the locality often walk through the school compound; the appellant was a strict teacher; he used to conduct Hindi and Maths tests each month; her daughter was not so good in studies; when the appellant was the teacher in the school, her daughter attended school regularly; she personally did not know if any sexual assault was committed on her daughter or other schoolgirls; there was a meeting regarding the matter in the village between the parents, including her, and the villagers; prior to the said meeting her daughter never complained of having been sexually abused by the appellant or about any pain in her private parts; she did not see any blood stains in the undergarment of her daughter during and

around the concerned period; the meeting was called by the mother of one of the victims which was not held in the school but in the village; prior to the said meeting they had never heard that the appellant had committed any sexual assault on any of the schoolgirls; the FIR (Exhibit-1) was signed by her on the insistence of the mother of one of the victims; the FIR (Exhibit-1) was not scribed by her and she did not know the contents thereof, which were also not read over and explained to her.

12. The other first informants (PW-6, PW-7, PW-9 and PW-10) deposed that they had heard the schoolgirls had been sexually abused by the appellant, the subsequent meeting and then the lodging of the FIR (Exhibit-1). All the first informants identified the appellant in Court.

13. The deposition of the first informants reveal that each of the five schoolgirls had informed their respective mothers, i.e., the first informants (PW-1, PW-7, PW-9, PW-10 and PW-14), that they had been sexually abused by the appellant. What they heard from the schoolgirls as deposed by them may stand. However, the truth and veracity of what the schoolgirls informed the first informants (PW-1, PW-7, PW-9, PW-10 and PW-14) could have been verified only if the schoolgirls had been examined. However, none of the schoolgirls were examined except the minor victim (PW-5). The truth and veracity of the allegations made by the six first informants in the FIR (Exhibit-1) dated 11.12.2016, therefore, hinges on the evidence of the minor victim (PW-5) alone.

14. At the time of deposition, the minor victim (PW-5) was ten years old. She identified the appellant in Court. She deposed that he used to be their teacher. She also named him as Kendrap Sir who used to teach them English, Environmental Science and Mathematics. She disclosed that earlier when she was in the third standard the appellant used to put his hands on her chest on the pretext of adjusting her shirt collar. According to her, he did so on about two occasions. She further deposed that the appellant used to put his fingers in her vagina on the pretext of adjusting her shirt and skirt. She said that he used to do the above acts both in the classroom and while taking tuitions in his house. She verified that she had given her statement (Exhibit-6) before the learned Magistrate. During her cross-examination, she admitted that she had stated to the learned Magistrate that the appellant did not open his clothes. She also admitted that she had informed the learned Magistrate that she did not know the appellant s name. She admitted that

she had also not stated before the learned Magistrate as to how many times the appellant had done the alleged acts to her as well as the fact that the appellant used to violate her during tuitions at his house. She admitted that the alleged incidents occurred in the classroom of the school where other schoolgirls were also there. She then clarified that the other schoolgirls used to go out of the classroom at that time. She admitted that the appellant was a strict teacher.

15. The cross-examination of the minor victim (PW-5) does show the improvements made in the version of the minor victim (PW-5) from the statements made by her to the learned Magistrate under section 164 Cr.P.C. She had not stated that the appellant used to put his hands in her vagina on the pretext of adjusting her shirt and skirt to the learned Magistrate although she deposed it. In fact, in her statement (Exhibit-6), she had specifically stated that the appellant neither opened his clothes or her clothes. In her statement (Exhibit-6), she had disclosed that the appellant used to touch her chest and put his hands on her vagina.

16. The medical evidence is not clinching. None of the observations made by Dr. Rozeela Bhutia (PW-13) on its own would lead to an irresistible conclusion that the appellant had committed penetrative sexual assault or rape on the minor victim (PW-5). The minor victim (PW-5) admitted during her cross-examination that she had stated that the appellant neither opened his clothes nor her clothes. In the circumstances, it is not possible to link the hymen of the victim not being intact to the acts of the appellant alone. Therefore, it would be extremely difficult to sustain the conviction of the appellant for commission of penetrative sexual assault or rape.

17. However, the minor victim (PW-5) has been consistent about the appellant having touched her chest and her vagina. This fact has been corroborated by her statement (Exhibit-6) as well as by the deposition of PW-1. At the time of the incident, the minor victim was barely eight years of age and therefore, may have been susceptible to all kinds of pressures and confusions. However, it is certain that the appellant had in fact sexually assaulted the minor victim (PW-5).

18. It is certain that the appellant did in fact commit sexual assault on the minor victim (PW-5). The evidence adduced by the prosecution also proved that the appellant committed sexual assault.

19. The fact that the appellant was a teacher of the minor victim (PW-5) has been sufficiently proved by the prosecution witnesses including the minor victim (PW-5), her mother (PW-1), PW-3 (the Deputy Secretary) and PW-4 (the Joint Secretary) both in the Human Resource Development Department of the Government of Sikkim, who proved his appointment orders – Exhibit 8 and Exhibit 9.

20. Although not challenged, the age of the minor victim (PW-5) has also been conclusively proved by the evidence of her parents i.e. mother (PW-1) and father (PW-18), the birth certificate (Exhibit-20), the deposition of the Principal In-charge of the school (PW-15) who proved the entry in the school admission register (Exhibit-14) which shows her date of birth as 24.06.2008 as also reflected in her birth certificate (Exhibit-20). Thus, at the time of the offence the minor victim (PW-5) was below the age of twelve years.

21. Consequently, the conviction of the appellant for the offence under sections 9(f), 9(l) and 9(m) of the POCSO Act are sustained. The convictions of the appellant under section 5(f), 5(l) and 5(m) of the POCSO Act are set aside. The conviction of the appellant under section 354 IPC is also set aside in view of section 71 IPC.

22. Although, the learned Special Judge had noticed the provision of section 42 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act'), he has sentenced the appellant under section 376(2) of the Indian Penal Code, 1860 (for short "the IPC") and section 5 of the POCSO Act. This would be incorrect and illegal. Section 42 of the POCSO Act provides that the offender found guilty of such offence shall be liable to punishment either under the POCSO Act or under the IPC as provided for punishment which is greater in degree. The learned Special Judge was required to examine which of the two offences provided for punishment was greater in degree and accordingly sentence the appellant. However, as we are inclined to interfere with the judgment of conviction against the appellant for commission of penetrative sexual assault and rape, we do not need to state anything further.

23. The learned Special Judge has sentenced the appellant under section 376(2)(f), 376(2)(n) and 376(2)(i) IPC and section 5(f), 5(l) and 5(m) of the POCSO Act, which are set aside. The sentence under section 354 IPC

is also set aside. The sentences under section 9(f), 9(l) and 9(m) of the POCSO Act are sustained.

24. As directed by the learned Special Judge, the period of imprisonment for the sentences confirmed shall run concurrently.

25. Consequently, the compensation awarded by the learned Special Judge is modified and it is directed that the minor victim (PW-5) shall be awarded a sum of Rs.50,000/- (fifty thousand).

26. The appeal is partly allowed.

27. The impugned order on sentence dated 31.05.2018 stands modified to the above extent.

28. Copy of the judgment be transmitted to the Court of the learned Special Judge (POCSO) North Sikkim at Mangan and another to the learned Member Secretary, Sikkim State Legal Services Authority, Gangtok, for compliance.

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

SLR (2020) SIKKIM 374

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

R.F.A. No. 05 of 2017

Shri Damber Singh Chettri ….. APPELLANT

Versus

Shri Lachuman Chettri ….. RESPONDENT

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

For the Respondent: Mr. N. Rai, Senior Advocate with Mr. Kumar Sharma and Ms. Sudha Sewa, Advocates.

Date of decision: 1st June 2020

A. Indian Evidence Act, 1872 – Ss. 61, 63 and 76 – Certified Copy of Public Documents – Proof – Primary documentary evidence must be furnished to prove the contents thereof. The existence of primary evidence generally excludes secondary evidence. Secondary evidence is not admissible until the non-production of primary evidence is satisfactorily accounted for. Secondary evidence is receivable sometimes as forming an exclusion to the rule which provides that the best evidence alone can be given and the party tendering it has proved that primary evidence is not obtainable. In other words, the reasons for non-production of the original document must be supported with sufficient evidence, whereby it must be established that the original document indeed existed but was either lost, misplaced or for some other circumstance unobtainable by the party relying on it – S. 76 of the Evidence Act requires that every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees certifying that the copy is a true copy of such document – Mere filing of a document and reliance on it does not tantamount to proof, the contents thereof must be proved in terms of the legal provision.

(Paras 10 and 12)

B. Limitation Act, 1963 – On the question of limitation, the learned Trial Court was correct in holding that the appellant did return to Sikkim in 1982 after the death of his father and was thus aware of the occupation and possession of a portion of the disputed properties by the Respondent but took no steps. It may be added that although the appellant averred in his pleadings that he returned home permanently in 2001, it is his evidence however that he returned in the year 2000 and as already mentioned in 1982 as well. The suit was filed only in the year 2014. The lapse of time as discussed above is clear, suffice it to observe that the suit was indeed barred by limitation.

(Para 19)

Appeal dismissed.

Chronology of cases cited:

1. K.B. Bhandari v. Laxuman Limboo and Another, Sikkim Law Reports (2017) Sikkim 41.
2. Mahesh Kumar (Dead) by LRs. v. Vinod Kumar and Others, (2012) 4 SCC 387.
3. H.P. Vedavyasachar v. Shivashankara and Another, (2009) 8 SCC 231.

JUDGMENT

Meenakshi Madan Rai, J

1. The Appellant is before this Court assailing the Judgment and Decree, dated 24-03-2017, in Title Suit No.05 of 2014, *Shri Damber Singh Chettri* vs. *Shri Lachuman Chettri*, vide which the Learned District Judge, West Sikkim, at Gyalshing, dismissed his Suit.

2. The facts pivot around the ownership of two plots of land over which both the Appellant and the Respondent claim ownership, viz., Plot Nos.344 and 345, as recorded in the survey records of 1950-52, situated at Lungjik Block, Gyalshing, West Sikkim, measuring 4.75 and 0.13 acres respectively, converted to Plot Nos.482, 488, 486, 987, 489, 490 and 541, measuring a total area of 2.0800 hectares, during the 1977-78 survey operations. The Appellant claims that he is the son of one late Nayan Singh

Chettri and grandson of Late Ganja Singh Chettri. The Respondent is his brother-in-law, a former resident of Srinagi, West Sikkim, now residing at Lower Lungjik Block, West Sikkim. As per the Appellant, his father had two sons, himself and his late brother Dhan Bahadur Chettri, a bachelor, who passed away in the year 1954, leaving behind Plot Nos.343, 344, 345, 349, 352 and 356 (1950-52 records), measuring a total area of 6.69 hectares, situated at Lungjik Block, West Sikkim. On his passing, the entire properties allegedly came into the possession and occupation of the Appellant and his father, Nayan Singh Chettri. In the year 1977, the Appellant left for Manipur seeking livelihood and on his fathers demise in 1980 he was unable to attend the death rites due to a Malaria epidemic in Manipur which he too contracted. In 1982, he returned home for a short period and handed over the suit properties to the Respondent for its maintenance. On his return home finally in 2001 he found that the said suit properties were illegally occupied by the Respondent as its owner. On 26-04-2011, on enquiry under the Right to Information Act, 2005, from the Office of the District Collector, West Sikkim, he found that the suit properties were recorded in the name of Dhan Bahadur Chettri as per the records of 1952 and later sold to the Respondent. The Appellant hence filed the Title Suit and sought a declaration that registration and mutation of Plot Nos. 344 and 345 (1950-52 records) converted to 482, 488, 486, 987, 489, 490 and 541 (1977-78 records) in the name of the Respondent is liable to be cancelled. He also sought a declaration that the entire plots of land mentioned in Schedule 'A' to the plaint are his ancestral properties which ought to be mutated and registered in his name and handed over to him by the Respondent.

3. The Appellants averments were disputed by the Respondent who asserted that he had married the Appellants younger sister in the year 1979 but was neither aware nor informed that the Appellant had a sibling named Dhan Bahadur Chettri. His father-in-law, Nayan Singh Chettri possessed some landed property including the suit property which was sold to him on 08-02-1978, vide Exhibit 'A', duly substantiated by Money Receipt, Exhibit 'G', while Exhibit 'H' scribed by Nayan Singh Chettri addressed to the Gram Panchayat of Lungjik Block revealed the exigencies compelling him to sell the property to the Respondent. The Respondent averred that infact the Appellant the only son of his parents had intermittently visited them before their demise and was well aware of the transaction of the disputed plots of which the Respondent has been in continuous possession and occupation since 1978, hence the Suit is not maintainable.

4. The Learned Trial Court framed the following issues for determination;

i. Whether the suit of the Plaintiff is barred by the Law of Limitation?

ii. Whether the suit lands are ancestral landed properties of the Plaintiff and the Defendant had no right to transfer and to take possession of the suit lands in his name since he is a stranger to the ancestral lineage of the Plaintiff?

iii. Whether the suit lands were given to the Defendant for the solitary purpose of its maintenance but same were illegally transferred in his name without the consent and knowledge of the Plaintiff?

iv. Whether the Defendant during the prolonged absence of the Plaintiff had fraudulently managed to manufacture some documents for the registration and mutation of the suit lands in his favour?

v. Whether the Plaintiff had a brother named Late Dhan Bahadur Chettri and that he died in the year 1974?

vi. Whether the Plaintiff returned to the State of Sikkim from Manipur only in the year 2001 after leaving Sikkim in the year 1977?

vii. Whether the Defendant had purchased Plots bearing No.344 and 345 (old Plot No.) bearing new Plots No.482, 483, 486, 487, 488, 489, 490, 451 from Nayan Singh Chettri for a consideration value of Rs.5,000/- vide registered Sale-Deed dated 08.02.1978?

viii. Whether the Plaintiff is entitled for any relief or reliefs as prayed by him?

5. The Issues were taken up for determination whereby Issue Nos.1 and 6 were considered together and it was concluded that from the evidence on record the Appellant did return to Sikkim in 1982 after the death of his father and was thus aware of the occupation and possession of a portion of his properties by the Respondent. However, he filed the first

Suit before the Court only in the year 2012 well past the period of limitation. The Issues were decided accordingly. In Issue No.2 it was observed that the Plaintiff left home and remained out of touch with his parents and returned only in 1982. Consequently the father being old and infirm out of dire necessity sold the property. The whereabouts of the Appellant being unknown, the question of his consent did not arise and the sale was duly proved by Exhibits 'H' and 'J'. The Issue was decided accordingly. Issue Nos.3 and 4 were taken up together and it was held that in light of the detailed findings in Issue Nos. 2 and 6, Issues 3 and 4 were redundant. In Issue No.5 it was found that the Plaintiff failed to satisfactorily prove that Late Nayan Singh Chettri had another son by the name of Dhan Bahadur Chettri. In Issue No.7, it was reiterated that consequent upon the findings in Issue No.2, this Issue should also be decided in favour of the Respondent and concluded accordingly. In Issue No.8, the Learned Trial Court held that in view of the findings in Issue Nos.1 to 7 decided as above, the Appellant is not entitled to any of the reliefs claimed and dismissed the Plaintiffs suit.

6. What requires determination by this Court is whether the disputed property belonged to Dhan Bahadur Chettri and whether Nayan Singh Chettri sold it to the Respondent, although he was incompetent to do so.

7. Learned Counsel for the Appellant while urging that the impugned Judgment deserves to be set aside contended that the Learned Trial Court overlooked relevant material on record which was in favour of the Appellant. That, the suit properties comprising of Plot Nos.344 and 345 is the ancestral property of the Appellant which the Respondent had surreptitiously recorded in his name when the Appellant was living in Manipur. That, the Respondent s claim that he purchased the land from Nayan Singh Chettri, father of the Appellant, in 1978 as the Appellant had left home for the last 15 years and his aged parents were unable to cultivate the land are blatantly false statements. The Respondent was married to the Appellants step-sister only in the year 1979, while the transaction allegedly took place in the year 1978 before the wedlock, which therefore renders the claim of the Respondent of being the care giver of the Appellants parents questionable, as that role would not have been possible before his marriage to their daughter. That, Exhibit 'A' the Sale Deed document records the "*name of seller*" as "*Nayan Singh Chettri*", when infact the property did not belong to him as evident from Exhibit 'D', the "*Parcha*

Khatian" pertaining to the suit land standing in the name of Dhan Bahadur Chettri. It was next contended that Exhibit 'A' has been executed by one Chabilal Khulal, purportedly the holder of the Power of Attorney on behalf of Nayan Singh Chettri, sans documents to substantiate this circumstance, rendering Exhibit 'A' suspicious and a manufactured one. That, the entire case of the Respondent hinges around Exhibit 'H' said to have been addressed by Nayan Singh Chettri to the Block Mondal and Gram Panchayat, Lungjik in 14-02-1978, declaring the sale of the suit lands to the Respondent, but the document is an unregistered one, thereby legally invalid. That, infact the property was transferred to Dhan Bahadur Chettri, the Appellants elder brother directly from his grandfather Ganja Singh Chettri. The boundaries on the West of the transacted land, detailed in Exhibit 'A' are also the lands of Dhan Bahadur Chettri and the land allegedly sold also belonged to him and not Nayan Singh Chettri, thereby rendering Nayan Singh incompetent to sell the property. That, Exhibit 'B' the "*Parcha Khatian*" showing Plot Nos.344 and 345 in the name of the Respondent is also a false document, as Exhibit 'A' the Sale Deed, was registered on 29-06-1979, but copying fees seeking a copy of the document was deposited on 06-06-1979, prior to its registration, thus disclosing falsehood. The Learned Trial Court was in error in considering Exhibit 'G' the money receipt relied on by the Respondent to establish that a sum of Rs.5,000/- (Rupees five thousand) only, was paid by the Respondent to the Power of Attorney Holder Chabilal Khulal, which is devoid of Plot Numbers and could well be referring to any other plot of land besides being an unregistered document. Hence, in the light of the evidence on record, the impugned Judgment and Decree, both dated 24-03-2017, deserves to be set aside.

8. The allegations of the Appellant came to be strongly repudiated by Learned Senior Counsel who contended that all that the Appellant has done to establish his case is by referring to the weaknesses of the Respondents case but has failed to establish the strength of his case by any evidence, documentary or otherwise, contrary to legal principles. Inviting the attention of this Court to the documents of the Appellant it was submitted that Exhibit 1 records the name of Dhan Bahadur Chettri, son of Nayan Singh Chettri and was obtained on 11-01-2011. The document is manifestly a manufactured document as Plot Nos. 344 and 345 mentioned are those as existing in 1950-52 records but the area reflected on it is in hectares as per the 1977-78 records, instead of in acres which was prevalent during that

period. That, Exhibit 'D' relied on by the Respondent depicts the correct picture inasmuch as the original owner shown therein is Nayan Singh Chettri, son of Ganja Singh Chettri which was subsequently corrected by scoring out Ganja Singh and inserting the name of Dhan Bahadur Chettri, son of Nayan Singh Chettri, vide O.O. (Office Order) No.135 of 1982-83. This document obtained in 2016 correctly depicts the absence of Plot Nos.344 and 345 therein indicating the sale of the two disputed Plots in 1978, which now stand recorded in the Respondents name having been purchased by him then. These circumstances thus fortify the details recorded in Exhibit 'A', revealing the name of the seller correctly as "Nayan Singh Chettri", as the property was his. The name Dhan Bahadur Chettri on Exhibit 'A', on the Western boundary, is of another entity and not the alleged imaginary sibling of the Appellant. The seller and Dhan Bahadur both owned land on the western boundary of the transacted land which has been reflected in Exhibit 'A'. The said Dhan Bahadur Chettri was also a witness to the transaction which took place vide Exhibit 'A' and had affixed his signature thereon as a witness. That, Exhibit 'D' which was prepared in 1982-83 stands testimony to the sale of the two plots, while Exhibit 1 is a false and manufactured document. Exhibit 3 reflects information obtained by the Appellant from the Sub-Divisional Magistrate (HQ) Gyalshing, revealing that Plot Nos.344 and 345 measuring 4.75 and 0.13 acres respectively had been sold to Lachuman Chettri, son of Late Amar Bahadur Chettri of Lungjik Block, thus establishing the sale. Learned Senior Counsel also relied upon Exhibit 'F' (collectively), which indicated that the land rent in the year 1962 was deposited by Nayan Singh Chettri thereby fortifying the claim of his ownership over the property. That, infact it was the Appellant who was variously and interchangeably addressed as "Dhan Bahadur Chettri" and "Damber Singh Chettri". The Appellant had at no stage handed over the property to the Respondent for its maintenance and the property was legitimately purchased by him from Nayan Singh Chettri as validated by all documents relied on by the Respondent. So far as the question of unregistered documents was concerned, strength was drawn from Section 90 of the Indian Evidence Act, 1872 as the documents were above 30 years. That, the additional evidence ordered to be recorded by this Court has established that Chabilal Khulal was the Power of Attorney holder of Nayan Singh Chettri, while the Office notes Exhibit 'T' clarified that Nayan Singh Chettri was indeed the owner of 6.69 acres of land and not Dhan Bahadur as claimed. To further fortify the Respondents case reliance was

placed on ***K. B. Bhandari*** vs. ***Laxuman Limboo and Another***[1], ***Mahesh Kumar (Dead) by Lrs.*** vs. ***Vinod Kumar and Others***[2] and ***H. P. Vedavyasachar*** vs. ***Shivashankara and Another***[3]. That, in view of the documentary evidence on record, the impugned Judgment of the Learned Trial Court suffers from no infirmity and consequently the Appeal be dismissed.

9. The rival contentions of Learned Counsel for the parties were heard *in extenso*. The evidence, documents on record and the citations placed at the Bar have also been carefully perused as also the impugned Judgment.

10. To finally determine the question framed hereinabove, it would be essential to first take into consideration Exhibit 1 relied on by the Appellant which is a *"Parcha-Khatian"*. The document *inter alia* indicates registration of Plot Nos.344 and 345 in the name of Dhan Bahadur, son of Nayan Singh, caste 'Chettri'. The document is an attested copy. Section 61 of the Indian Evidence Act, 1872, provides that the contents of documents must be proved either by primary or by secondary evidence. Section 63 of the Evidence Act enumerates what secondary evidence means and includes. Section 76 deals with certified copies of public documents. It is clear from a consideration of the aforestated provisions of the Indian Evidence Act, 1872, that primary documentary evidence must be furnished to prove the contents thereof. The existence of primary evidence generally excludes secondary evidence. Secondary evidence is not admissible until the non-production of primary evidence is satisfactorily accounted for. Secondary evidence is receivable sometimes as forming an exclusion to the rule which provides that the best evidence alone can be given and the party tendering it has proved that primary evidence is not obtainable. In other words, the reasons for non-production of the original document must be supported with sufficient evidence, whereby it must be established that the original document indeed existed but was either lost, misplaced or for some other circumstance unobtainable by the party relying on it. The Plaintiff himself has not given any reasons for non-production of the original of Exhibit 1. His evidence is to the effect that Exhibit 1 is a "certified copy" of the *"Parcha-Khatian"*. On a perusal of Exhibit 1, it is evident that the document is an "attested" photocopy of a "certified to be true copy", allegedly attested by the

[1] Sikkim Law Reports (2017) Sikkim 41
[2] (2012) 4 SCC 387
3 (2009) 8 SCC 231 (Paragraph 7 and 10)

Additional District Collector, Gyalshing, West Sikkim. Exhibit 1 is therefore not even the photocopy of the original document but a photocopy of a "certified to be true copy". The Appellant has failed to furnish any reasons as to why such an attested copy was produced before the Court. No mention of the original or the certified copy from which photocopy of Exhibit 1 was reproduced was made by the Appellant nor reasons furnished for its non-production. P.W.2 H. K. Chettri, SDM, Gyalshing admitted that Exhibit 1 was an "attested copy" of the "*Parcha-Khatian*" of Lungjik Block, recorded in the name of Dhan Bahadur Chettri, son of Nayan Singh Chettri, attested by ADC, West Sikkim. He did not identify the signature of the Attesting Officer and infact stated that the said document is required to be verified from the records of 1950-52 maintained in the Head Office, viz., the Land Revenue and Disaster Management Department, a clear indication that he did not endorse the contents or the authenticity of the document. No questions were put to P.W.3 Bikram Rai, the Revenue Supervisor with regard to Exhibit 1, while P.W.4 the Revenue Officer-cum-Assistant Director, Land Revenue Department, Gyalshing, admitted that Exhibit 1 is not a certified copy, but is an attested copy. That, the column for measurements in Exhibit 1 mentioned 'hectares' but the area was described in 'acres' and had been attested by the ADC, West Sikkim. This witness also failed to identify the signature of the Attesting Authority while the attesting authority was never produced as a witness. Section 76 of the Evidence Act requires that every public officer having the custody of an public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees certifying that the copy is a true copy of such document. Exhibit 1 as already noticed is not a certified copy but merely an attested one rendering Section 76 also obsolete for its purposes and on account of these circumstances Exhibit 1 is infact inadmissible in evidence. In the light of the aforestated discussions Exhibit 1 fails to inspire confidence and renders no assistance whatsoever to the Appellants case.

11. Although it is the Appellants claim that the property belonged initially to his grandfather Ganja Singh Chettri and was transferred in the name of Dhan Bahadur, however no proof of registration or of such ownership or transfer thereof was produced by the Appellant in support of his claim. The voluntary stance of the Appellant during cross-examination was that his paternal great grandmother had transferred some of the lands in the name of his elder brother, late Dhan Bahadur Chettri, much earlier in time when his

father Nayan Singh Chettri went missing during the survey operation of 1950-52, this statement of his father having gone missing indeed adds a new twist to his tale, bereft of pleadings and is palpably an afterthought and not worthy of consideration. Besides this evidence elicited from him during cross-examination appears to be in contradiction to his evidence-in-chief, wherein, he has stated that all the landed properties were directly transferred to the title and possession of his elder brother Late Dhan Bahadur Chettri, for its temporary management, as the Appellant was too young to manage his ancestral property at the relevant point of time. At this juncture, brief reference can be made to Exhibit 'D' filed by the Respondent. It was argued by Learned Counsel for the Appellant that Exhibit 'D' stands in the name of Dhan Bahadur Chettri, showing his ownership over the disputed plots, thereby divesting Nayan Singh of powers to alienate the property to the Respondent. On the contrary, perusal of Exhibit 'D' reveals that the plot numbers recorded therein are 343, 349, 352, 356 and originally stood recorded in the name of Nayan Singh, son of Ganja Singh. The document also reveals that vide O.O. (Office Order) No.135 of 1982-83 the name of Ganja Singh came to be struck off and the name of Dhan Bahadur, son of Nayan Singh was shown to be the owner. In other words, in 1982-83 evidently after the demise of Nayan Singh the properties mentioned therein came to be recorded in the name of Dhan Bahadur, son of Nayan Singh which earlier were recorded in the name of Nayan Singh, son of Ganja Singh. Despite the above exercise it is pertinent to notice that Exhibit 'D' makes no mention of Plot Nos.344 and 345, but only reflects Plot Nos.343, 349, 352 and 356. The evidence of D.W.5, the Head Surveyor and D.W.6, the Revenue Officer of the Land Revenue and Disaster Management Department, has fortified the contents of Exhibit 'D' by deposing that Late Nayan Singh Chettri son of Ganja Singh Chettri was the registered owner of Plot Nos.343, 344, 345, 349, 352 and 356 of which Plot Nos.344 and 345 had been sold out to the Defendant. It therefore concludes vide Exhibit 'D' that Plot Nos.344 and 345 did not belong to Dhan Bahadur.

12. Exhibit 2, is a certified true copy sketch map showing the disputed plots of land and its surrounding plots. The document was filed by the Appellant to prove that the disputed plots, i.e., Plot Nos.344 and 345, were recorded in the name of Dhan Bahadur Chettri. However, this document remained unproved by the Appellant as also his witnesses, P.W.2, P.W.3 and P.W.4 as none of them shed light on its contents while P.W.2

stated deposed that Exhibits 1, 2 and 3 were required to be verified from the records of 1950-52 maintained in the Head Office. Mere filing of a document and reliance on it does not tantamount to proof, the contents thereof must be proved in terms of the legal provision. Hence, Exhibit 2 requires no consideration being an unproved document.

13. The Appellants claim that he handed over the entire property of Dhan Bahadur Chettri to the Respondent in 1982 for maintenance also finds no substantiation in view of the admitted position that no documents were infact executed between both of them contracting such a settlement and no witnesses existed to such an agreement either. The Respondents persistent stand was that the property was purchased by him from the Appellants father in view of the exigencies mentioned in Exhibit 'H'. That having been said, reference to Exhibit 7 is appropriate, which is a letter addressed by the Appellant to the District Collector seeking information with regard to the old Plot Nos.343, 349, 352 and 356 as per the survey records of 1950-52 and 1979-80. No information pertaining to Plot Nos.344 and 345 was sought by the Appellant in Exhibit 7. In response to this application, a spot verification was conducted by the concerned authority in the presence of the Appellant. Exhibit 8, the report of the spot verification reveals that Plot Nos.349 and 352 stand in the name of Nayan Singh Chettri, son of Ganja Singh Chettri, while Plot No.356 was found to be recorded in the name of Aita Ram, son of Gajur Singh Limboo during the survey operation of 1977-78. Plot No.343 is alleged to be in the name of the Respondent, Lachuman Chettri, son of Amber Bahadur Chettri. Since Exhibit 7 made no query about Plot Nos.344 and 345, the response, i.e., Exhibit 8 consequently bore no reference to the said plot numbers. Suffice it to note in this context, that, the Respondent in his evidence claims to be in possession of only two plots of land, i.e., Plot Nos.344 and 345, out of the entire plots of land mentioned in the Schedule to the Plaint. That, he is ready to part with any extra lands found to be in his possession, on physical verification. The Respondents claim that Plot Nos.344 and 345 measuring 4.75 and 0.13 acres now measuring 2.0800 hectares, bearing Plot Nos.482, 488, 486, 987, 489, 490 and 541 was sold to him by Nayan Singh Chettri is duly substantiated by Exhibit 'G' and Exhibit 'H' besides Exhibit 'A', filed by him. Vide Exhibit 'G', Nayan Singh Chettri acknowledged receipt of a sum of Rs.5,000/- (Rupees five thousand) only, from the Respondent as consideration amount for the lands sold by him to the Respondent. Exhibit 'H' is a document explaining to the Block, 'Mandol' and Gram Panchayat

of Lungjik the exigencies prompting such alienation. The argument of Learned Counsel for the Respondent that the Learned Trial Court was in error in considering Exhibit 'G' and Exhibit 'H' being unregistered documents holds no water. Relevant reference may be made to Rule 7 of the Sikkim State Rules Registration of Documents, 1930, extracted hereinbelow;

> **"**7. The person or persons executing the deed on his or their authorised representative with one or more witnesses to the execution of it, shall attend at the Registrar's office and prove by solemn affirmation before the Registrar the due execution of deeds upon which the Registrar shall cause an exact copy of the deed to be entered in the proper register and after having caused it to be carefully compared with the original shall attest the copy with his signature and shall also cause the parties or their authorised representative in attendance to subscribe their signatures to the copy and shall then return the original with a certificate under his signature endorsed thereon specifying the date on which such deed was so registered with REFERENCE to the book containing the registry thereof and the page and number under which the same shall have been entered therein.**"**

14. Hence, the Rules require registration of the Sale Deed document, Exhibit 'A' is undeniably and undisputedly a registered document thereby fulfilling the requisites of the Rules. The Sale Deed came to be executed on 08-02-1978 and was registered on 26-09-1979. Pursuant to Exhibit 'G', Exhibit 'A' the Sale Deed document came to be executed and registered in terms of the legal provisions and the consideration value of Rs.5,000/- (Rupees five thousand) only, as having been made on 08-02-1978 reflected in Exhibit 'G' has been duly acknowledged in Exhibit 'A' as well. Exhibit „H requires no registration as it only bears the reasons for alienation of the land by the seller.

15. On the other hand, a reading of Exhibit 'A' which is the Sale Deed document executed by Nayan Singh Chettri admittedly the father of the

Appellant, in favour of the Respondent, reveals Plot Nos.344 and 345, bearing measurement 4.75 and 0.13 acres, akin to the measurements detailed by the Appellants witness, i.e., 4.75 and 0.13 acres, now measuring 2.0800 hectares. Exhibit 'A' is to be read along with Exhibit 'E', the boundaries as given in Exhibit 'A' finds substantiation in Exhibit 'E', the document having been prepared by the Revenue Surveyor, checked by the Head Surveyor and such preparation duly attested by the Revenue Officer with original official ink stamps, reflecting the genuineness of the document. Hence, it is clear that Plot Nos.344 and 345 was transferred by way of Exhibit 'A', the Sale Deed document prepared between Nayan Singh Chettri and the purchaser Lachuman Chettri.

16. Although it was vehemently argued that Exhibit 'A' does not bear the signature of the seller and doubts were raised by the Appellant regarding the Power of Attorney given by Nayan Chettri to Chhabilal Khulal, this is belied by the additional evidence recorded. In this regard, it may pertinently be mentioned that this Court had vide Order dated 30-09-2019, remanded the matter to the Learned Trial Court for recording additional evidence with regard to the documents as detailed in I.A. No.02 of 2019. It may be recapitulated that I.A. No.02 of 2019 was an application filed by the Respondent seeking to file additional documents at the appellate stage. The grounds put forth by the Respondent for non-production of the documents before the Learned Trial Court were found to be adequate and satisfactory. Hence, for clarity in the matter and for conclusion sans ambiguities the additional documents were permitted to be taken in evidence. Consequently, the Respondent furnished the documents relied upon him and additional evidence was recorded whereby Exhibit 'T' to Exhibit 'Z' and Exhibits 'AA' to 'AI' were furnished by the Respondent. Exhibit 'AB' reflects a Notice bearing No.4(218)79-80 dated 09-05-1979, issued by the Registrar, West District Gyalshing, giving notice to all concerned that Naina Singh Chhetri was giving the Power of Attorney to Chabi Lall Chhetri for the purpose of executing and completing the registration of Sale Deed in favour of Lachuman Chettri of Siri Badam Block in respect of Plot Nos. 344 and 345 measuring 4.88 acres of Lungchik Block and any person having objection to such a step was to file his claim or objection. The authenticity of this document is supported by the evidence of D.W.8 Amrit Raj Rai posted as Revenue Officer-cum-Assistant Director at Land Revenue Department, Gyalshing, West Sikkim, in February, 2019. Exhibit 'AC' issued by the same Authority states that Exhibit 'A' will be registered on 10-

06-1979 if no objection is received. Evidently, none were forthcoming in response to both the Notices *supra*. The Respondent went on to depose that Exhibit 'T' are documents pertaining to the request for registration of Sale Deed made by Nayan Singh Chettri to the concerned authority dated 08-02-1978. The documents being office notings of the concerned Registering Authorities reflects *inter alia* as follows;

> **"**……
>
> *While verifying the above sold land according to the sellers purchase the sold land stands in the name of seller. Seller possesses only 6.69 acres land in his name. Purchaser do not possess any landed properties, but he is Sikkim Subject holder S.S. No.125 Volume No.XII Shrinagi block.*
>
> ……**"**

The seller mentioned hereinabove is Nayan Singh Chettri who had applied to the concerned authority for registration of Sale Deed and issuance of Power of Attorney to Chabilal Khulal, while the purchaser is identified as Lachuman Chettri. The document also reveals as follows;

> **"**……
>
> *In this connection the seller has stated that due to ill health he cannot attend in the Court for the execution of seller (sic). Therefore, he has given a power of attorney to one Shri Chabillal Chettri of Maneybong Block ……*
>
> *As such, power of attorney notice for one month may kindly be issued ……***"**

17. Exhibit 'T', the official records, maintained in the concerned Department is also revelatory of the fact that the properties stood recorded in the name of Nayan Singh Chettri who as per the Registering Authorities owned 6.69 acres of land. Nayan Singh Chettri, vide Exhibit 'U', dated 08-02-1978 had pleaded to the Registering Authority that Plot Nos.344 and 345 sold by him to Lachuman Chhetri be registered. These documents unambiguously establish that the Sale Deed document Exhibit 'A' was duly executed by Chabilal Khulal as the holder of the Power of Attorney of the

seller who was ailing and consequently registered in the name of Lachuman Chettri, thus soundly quelling all doubts raised by the Appellant in this context.

18. The Appellant failed to establish by any evidence whatsoever the existence of his sibling. No villagers who would have been in the know of such matters were brought before the Court as witnesses. The alleged "sibling" appears to be a figment of the Appellants imagination sans evidence on this aspect.

19. On the question of limitation, the Learned Trial Court was correct in holding that the Appellant did return to Sikkim in 1982 after the death of his father and was thus aware of the occupation and possession of a portion of the disputed properties by the Respondent but took no steps. It may be added that although the Appellant averred in his pleadings that he returned home permanently in 2001, it is his evidence however that he returned in the year 2000 and as already mentioned in 1982 as well. The Suit was filed only in the year 2014. The lapse of time as discussed above is clear, suffice it to observe that the Suit was indeed barred by limitation. The Appellants claim that he had given the landed properties for management by the Respondent brooks no consideration as no documentary evidence or witnesses thereof have been furnished for augmentation of the claim. On examining Exhibit 'B' the argument raised by the Appellant pertaining to its falsity is apparently farfetched and the authenticity of the document cannot be doubted.

20. In conclusion, it emanates with clarity from the foregoing discussions that the Appellant has failed to establish his case. The impugned Judgment and decree of the Learned Trial Court warrants no interference.

21. No order as to costs.

22. A copy of the Judgment be transmitted forthwith to the Learned Trial Court along with records.

SLR (2020) SIKKIM 389

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

Bail Application No. 07 of 2020

Bikky Agarwal ….. **PETITIONER**

Versus

State of Sikkim ….. **RESPONDENT**

For the Petitioner: Mr. Ajay Rathi, Mr. Rahul Rathi, Ms. Phurba Diki Sherpa and Mr. Ladong R. Lepcha, Advocates.

For the Respondent: Ms. Mukun Dolma Tamang, Asst. Public Prosecutor.

Date of decision: 6th June 2020

A. Code of Criminal Procedure, 1973 – S. 439 – Sikkim Anti Drugs Act, 2006 – S. 18 – Bail – The F.I.R was lodged by Sub-Inspector, Rangpo Police Station who conducted the search of the vehicle. As per the property seizure memo, 30 bottles of Rexdryl cough syrup were seized, the quantity of each bottle has not been mentioned. The Prosecution case hinges on the statement of the driver of the vehicle who, being the only other occupant therein, implicated the petitioner as being the owner of the controlled substances seized. The records placed before this Court reveal that the driver was alone in his vehicle when he was returning to his home at Rangpo, on the West Bengal side. The vehicle was stopped by the petitioner at 2nd mile, Siliguri requesting for a lift. According to the driver, the petitioner kept his luggage in the boot of the vehicle and thereafter boarded the vehicle. When the search at Rangpo check-post ensued, the controlled substances mentioned above were seized, however, it may relevantly be noted that although the F.I.R reveals that recovery was made from the boot of the vehicle, no mention has been made of any article/bag which contained the bottles to link the ownership of the controlled substances to the petitioner. It is also the admitted position of the

Prosecution that no other articles belonging to the petitioner were seized to indicate that the controlled substances belonged to the petitioner – Search and seizure evidently took place on the evening of 13.12.2019 while the F.I.R was lodged on 14.12.2019 – At this stage the Prosecution has not been able to establish *prima facie* by any other evidence save the statement of the driver of the vehicle that the controlled substances belonged to the Petitioner and none else.

(Para 5)

Petition allowed.

ORDER

Meenakshi Madan Rai, J

1. The Petitioner herein, aged about 22 years, was arrested on 14.12.2019 at Rangpo Check Post, East Sikkim, in connection with FIR No.43-2019, dated 14.12.2019, at 02:50 Hrs, under Sections 7(a)(b)/9/14 of the Sikkim Anti Drugs Act, 2006 (for short, "SADA, 2006"). The controlled substances were allegedly seized at 00:45 Hrs.

2. Learned Counsel for the Petitioner advancing his arguments, submitted that investigation in the matter is completed and Charge-Sheet has been filed before the concerned Court which however rejected the Petitioner's application for bail. The Petitioner and the Driver were the only occupants of the vehicle, the Petitioner having taken a lift in it from Siliguri. On reaching Rangpo Check Post the vehicle was stopped by the Police who conducted routine checking of the vehicle and recovered and seized controlled substances, allegedly being 30 (thirty) bottles of Rexdryl cough syrup from the boot of the vehicle. The vehicle was registered in the name of the Driver, Feroj Ansari who however, was not arrested in the instant matter and neither his role in the matter was delved into nor his vehicle seized. That, there is no proof whatsoever to establish that the controlled substances belonged to the Petitioner and no other personal belongings of the Petitioner such as clothes or Identity Cards were recovered from the vehicle to link the controlled substances and thereby the offence to the Petitioner. That, the Petitioner was arrested on the mere statement of the Driver of the vehicle sans proof whatsoever and has been falsely implicated in the case. That, the Petitioner is innocent, has no criminal antecedents and

is the only earning member in his family consisting of aged parents who will be prejudiced by his incarceration. Hence, in the facts and circumstances, the Petitioner deserves to be enlarged on bail. He undertakes to abide by any stringent terms and conditions imposed, if so released. Learned Counsel placed reliance on the Orders of this Court in Bail Appln. No.02 of 2020, Rupa Gurung vs. State of Sikkim dated 11.03.2020 and Bail Appln. No.03 of 2020, Dharmaan Rai vs. State of Sikkim dated 26.05.2020.

3. *Per contra*, learned Assistant Public Prosecutor emphatically objected to the petition for bail and while relying on the FIR submitted that the Petitioner who was seated in the back seat of the taxi vehicle was searched on the Sub Inspector of Police (Complainant) suspecting that he could be in possession of controlled substances. Such search of the Petitioner and his belongings kept in the boot of the vehicle fructified in the recovery of 30 (thirty) bottles of Rexdryl cough syrup, Hindi newspapers, one red coloured carry bag and a black polythene. These recoveries indicate that the suspicions of the Complainant were well-founded. Inviting the attention of this Court to the statement of the Driver Feroj Ansari under Section 161 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.") learned Assistant Public Prosecutor contended that the Driver's statement clearly reveals that the Petitioner had kept his luggage in the boot of the vehicle and thereafter boarded the vehicle. The controlled substances were recovered from the boot and therefore unequivocally belonged to the Petitioner. The statement of the other seizure witness also lends credence to the statement of Feroj Ansari thereby establishing that the controlled substances had been brought by the Petitioner and belonged to him. Learned Assistant Public Prosecutor however conceded that no other article belonging to the Petitioner was seized to establish that the controlled substances belonged to the Petitioner and none else. It was also conceded that the role of the taxi Driver was not investigated into.

4. I have heard the rival contentions of learned Counsel for the parties at length. I have also perused the documents placed before me being the FIR, Property Seizure Memo, Arrest Memo and the Final Report under Section 173 Cr.P.C.

5. The FIR was lodged by the Sub Inspector, Rangpo Police Station who conducted the search of the vehicle. As per the Property Seizure Memo, 30 (thirty) bottles of *Rexdryl* Cough Syrup were seized, the quantity

of each bottle has not been mentioned. The Prosecution case hinges on the statement of the Driver of the vehicle who, being the only other occupant therein, implicated the Petitioner as being the owner of the controlled substances seized. The records placed before this Court reveal that the Driver was alone in his vehicle bearing Registration No.WB74AZ-3629 when he was returning to his home at Rangpo, on the West Bengal side. The vehicle was stopped by the Petitioner at 2nd Mile, Siliguri requesting for a lift. According to the Driver, the Petitioner kept his luggage in the boot of the vehicle and thereafter boarded the vehicle. When the search at Rangpo Check Post ensued, the controlled substances mentioned above were seized, however, it may relevantly be noted that although the FIR reveals that recovery was made from the boot of the vehicle, no mention has been made of any article/bag which contained the bottles to link the ownership of the controlled substances to the Petitioner. It is also the admitted position of the Prosecution that no other articles belonging to the Petitioner were seized to indicate that the controlled substances belonged to the Petitioner. The search and seizure evidently took place on the evening of 13.12.2019 while the FIR was lodged on 14.12.2019. At this stage the Prosecution has not been able to establish *prima facie* by any other evidence save the statement of the Driver of the vehicle that the controlled substances belonged to the Petitioner and none else. Admittedly no efforts were made to rule out the complicity of the Driver in the matter. Hence, these are the circumstances that have been placed before this Court to establish that the Petitioner is guilty of the offence under Sections 7(a)(b)/9/ 14 of the SADA, 2006.

6. Section 18 of the SADA, 2006 reads as follows;

> "**18**. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 –
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable under this Act shall be released on bail or on his own bond unless –
>
> (i) the Public Prosecutor has been heard and also given an

opportunity to oppose the application for such release, and

(ii) **where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.**

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail."

(Emphasis supplied)

The provision of law *supra* is self-explanatory and requires no elucidation. Suffice it to state that the Prosecution *prima facie* must link the offence to the Petitioner rendering his complicity in the offence indubitably which however is lacking herein at this juncture. In the light of the materials placed before this Court, the provision of law *supra* and the discussions which have emanated, I am of the considered opinion that this is a fit case where the Petitioner can be enlarged on bail. In passing, it may relevantly be noticed that the FIR and the Property Seizure Memo records that 30 (thirty) bottles of Rexdryl Cough Syrup were seized while the investigation reveals that the Exhibits recovered and seized were "Altorex- CD" and "Reksodin cough syrup."

7. It is accordingly ordered that the Petitioner be enlarged on bail on furnishing PB&SB of Rs.50,000/- (Rupees fifty thousand) only, each, subject to the conditions that;

(i) He shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/them to disclose such facts to the Investigating Officer or to the Court.

(ii) He shall not leave Rangpo without the specific written permission of the Investigating Officer of the case.

(iii) He shall appear before the Court on all dates of trial.

Should any of the above conditions be flouted his bail bonds shall stand cancelled.

8. The observations made herein shall in no manner be construed as findings on the merits of the matter.

9. Bail Appln. stands disposed of.

10. Copy of this Order be sent to the learned Special Judge, SADA, 2006, East Sikkim at Gangtok, for information.

Karmapa Charitable Trust & Ors. v. State of Sikkim & Ors.

SLR (2020) SIKKIM 395

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

W.P (C) No. 04 of 2020

Karmapa Charitable Trust and Others ….. PETITIONERS

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Mr. B. Sharma and Mr. K.K. Rai, Senior Advocates with Mr. Shiv Kumar Pandey and Mr. N.T. Bhutia, Advocates.

For Respondent 1-2: Dr. Doma T. Bhutia, Additional Advocate General and Mr. Hissey Gyaltsen, Assistant Government Advocate.

For Respondent No.3 : Mr. N. Rai and Mr. Anmole Prasad, Senior Advocates with Mr. Zangpo Sherpa, Ms. Yangchen D. Gyatso and Mr. Sagar Chettri, Advocates.

Date of decision: 15th June 2020

A. Indian Evidence Act, 1872 – Cross-Examination – Object – The essence of cross-examination is that it is the interrogation by the Advocate of one party, of a witness called by his adversary, either with the object of obtaining admissions favourable to his cause or to discredit the witness. All questions which are asked with a view to assail the evidence-in-chief are permissible and no provision of law requires cross-examination to be confined to what is only volunteered by the witness. The objective of cross-examination is thus to elicit the truth and also detect the falsehood in the evidence-in-chief. It thus becomes the bounden duty of the Counsel towards his client to take necessary steps in this context to uphold what is right and just and to expose a dishonest witness – Learned trial Court can

forbid questions which tend to offend public decency and are intended to insult or annoy the witness.

(Para 10)

Petition partially allowed.

Chronology of cases cited:

1. R.K. Chandolia v. CBI and Others, 2012 SCC Online Del 2047.
2. D.P. Sinha v. Brig. E.T. Sen (Retired), 1969 SCC Online Del 201.
3. Dineshbhai Zaverbhai Vora v. State of Gujarat, 2018 Cri.LJ 1588.
4. Yeshpal Jashbhai Parikh v. Rasiklal Umedchand Parikh, AIR 1955 Bombay 318.

ORDER (ORAL)

Meenakshi Madan Rai, J

1. Pursuant to the Order of this Court dated 24.03.2020, copy of the Petition has been served upon the Caveator-Respondent No.3 who had filed Caveat Petition No.02 of 2020.

2. All Respondents are represented by their respective learned Counsel today. They waive formal Notice.

3. I.A. No.01 of 2020, a stay application, has also been filed by the Petitioners along with the Writ Petition seeking stay of the impugned Order, dated 12.02.2020.

4. Heard learned Senior Counsel for the Petitioners and Respondent No.3.

5. Learned Additional Advocate General for Respondents No.1 and 2 had no submissions to make.

6. The Petitioners herein are aggrieved by the Order dated 12.02.2020, passed by the learned District Judge, East Sikkim at Gangtok, in Title Suit No.01 of 2017 *(Karmapa Charitable Trust and Others vs. State of Sikkim and Others) inter alia* on grounds that it was ordered as follows;

"Given the facts and circumstances, it would suffice if the Plaintiffs are given three(03) days time for the cross-examination of the Defendant No.3."

7. Learned Senior Counsel Mr. K.K. Rai, while assailing the Order, canvassed the contention that the evidence of Respondent No.3 (Defendant No.3 in Title Suit No.01 of 2017 *supra*) is being recorded before the learned Commissioner, a retired District Judge. The witness is only conversant in the Tibetan vernacular and the cross-examination is being conducted with the aid of two Interpreters *viz.* Mr. Jigmee Wangchuk Bhutia, Post Graduate Teacher, Enchey Senior Secondary School, Gangtok and Mr. Ugen Tsewang, Ex-Translator, Namgyal Institute of Tibetology, Gangtok. Consequently, the recording of the evidence of Respondent No.3 in the said circumstances becomes protracted as it has to be translated from the Tibetan vernacular to English and then only recorded thereby requiring substantial amount of time. The learned Commissioner, during cross-examination of the Respondent No.3, has never observed that the Petitioners had asked any irrelevant questions. However, the impugned Order came to be passed and the curtailment of time for cross-examination of Respondent No.3 to three days would lead to miscarriage of justice and is contrary to the basic tenets of fair trial, hence the instant application praying that the impugned Order be set aside and ten days' time be granted to the Petitioners to cross-examine the Respondent No.3.

8. Learned Senior Counsel for the Respondent No.3, for his part, advanced the argument that the witness was being subjected to harassment by prolonged cross-examination and irrelevant questions being put to him. The cross-examination is sought to be continued only for the purpose of badgering the witness by asking pointless and arbitrary questions when, in fact, the cross-examination has covered the main aspects of the case and the Petitioners do not require more than a day for recording further evidence. Such dilatory tactics has humiliated and traumatized the Respondent No.3 as scant consideration is paid to the fact that he is a senior citizen and in frail health. In fact, the learned trial Court has correctly considered that the witness has already been examined for four days and therefore permitted three days further time for his cross-examination. That, the learned trial Court is clothed with powers to control the time limit for the cross-examination for which reliance was placed on the ratiocinations of ***R.K. Chandolia vs. CBI & Ors.***[1], ***D.P. Sinha vs. Brig. E.T. Sen***

[1] 2012 SCC Online Del 2047

(Retired)[2], ***Dineshbhai Zaverbhai Vora vs. State of Gujarat***[3] and ***Yeshpal Jashbhai Parikh vs. Rasiklal Umedchand Parikh***[4]. That, in consideration of the above submissions, the petition deserves a dismissal.

9. I have carefully considered the rival submissions of learned Counsel at length. I have also perused the orders of the learned Commissioner, cross-examination of the Respondent No.3 and the impugned Order, for the instant purpose, including the citations made at the Bar.

10. It may relevantly be noticed that the essence of cross-examination is that it is the interrogation by the Advocate of one party, of a witness called by his adversary, either with the object of obtaining admissions favourable to his cause or to discredit the witness. All questions which are asked with a view to assail the evidence-in-chief are permissible and no provision of law requires cross-examination to be confined to what is only volunteered by the witness. The objective of cross-examination is thus to elicit the truth and also detect the falsehood in the evidence-in-chief. It thus becomes the bounden duty of the Counsel towards his client to take necessary steps in this context to uphold what is right and just and to expose a dishonest witness. At this juncture, reference may be made to Section 151 of the Indian Evidence Act, 1872 ("Evidence Act") which provides that the Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed. Thus, Section 151 of the Evidence Act prohibits questions to elicit indecent or scandalous imputations from the witnesses in the guise of shaking the credibility of any witness and every trial Court is empowered to forbid such questions. Section 152 of the Evidence Act requires that the Court shall forbid any questions which appears to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form. This Section is self-explanatory and the learned trial Court can forbid questions which tend to offend public decency and are intended to insult or annoy the witness.

11. It is not the case of the Respondent No.3 that scandalous or indecent questions were put to the witness nor has there been any intention

[2] 1969 SCC Online Del 201
[3] 2018 Cri.LJ 1588
[4] AIR 1955 Bombay 318

to insult the witness although the cross-examination being conducted may be cumbersome to him. The allegation against the Petitioners is that the witness is being badgered and the cross-examination being prolonged unnecessarily. This allegation evidently has no legs to stand. The object of cross-examination has already been elucidated *supra.* It is not denied that the witness is only familiar with the Tibetan vernacular as a result of which the evidence deposed by him is required to be translated for the benefit of the parties and then only recorded. It is obvious that this process would be long-winded and would involve a substantial amount of time. Admittedly, the evidence is being recorded before the learned Commissioner, a retired District Judge. As pointed out by learned Senior Counsel for the Petitioners, the learned Commissioner has made no remark that the Petitioners have asked irrelevant questions during the cross-examination of the Respondent No.3. In fact, at this juncture, it would be relevant to extract the Order of the learned Commissioner, dated 23.11.2019, which *inter alia* reveals as follows;

> *"Date is fixed for further evidence of the defendant No.3. However, the same could not be taken up for the reason that as the defendant No.3 who has to attend some important religious conference at Dharamsala, he will not be able to attend for his cross-examination till March, 2020. Shri Chezung Bhutia, the Constituted Attorney of the defendant No.3 filed an application for adjournment with a copy to the learned Counsel for the plaintiffs.*
>
> ***In the adjournment petition, it is stated under para 1 that the matter has been fixed for evidence of the defendant No.3 at Siliguri commencing from 19.11.2019 till 22.11.2019 as mutually settled between the respective Counsels with the Commissioner. This statement is not correct as I was not told that the evidence of the defendant No.3 would be held only from 19.11.2019 till 22.11.2019. It is fact that I was informed that the evidence would commenced*** (sic) ***from 19.11.2019 at Siliguri but no date was fixed or decided that same should be completed by 22.11.2019****."*
>
> **(Emphasis supplied)**

This is being extracted to indicate the conduct of the Respondent No.3 which is not above board.

12. The records reveal that the evidence of the Respondent No.3 commenced from 19.11.2019, the cross-examination commenced on the same day and continued for four days till 22.11.2019. This Court is conscious and aware that the learned trial Court is clothed with powers to limit the time frame for cross-examination. Nevertheless the peculiar facts and circumstances of the instant matter and the stakes involved have to be taken into consideration which therefore dictates that parties do not get the impression of being short-changed.

13. Thus, in light of the submissions of learned Counsel for the Petitioners and the Respondent No.3 and in consideration of the peculiar circumstances of the instant matter, although the prayer of learned Senior Counsel for the Petitioners seeking ten days for further cross-examination cannot be allowed, however in the interest of justice, I am of the considered opinion that a total period of ten days can be allowed for cross-examination which includes the four days in which the witness has already been examined. Hence, the Petitioners are allowed an additional six days time for further cross-examination of the Respondent No.3 inclusive of the day it commences and concludes. The dates shall be fixed as deemed fit by the learned trial Court duly taking into consideration the prevailing Covid-19 pandemic and the precautions necessarily to be observed. It is expected and trusted that the Petitioners will not venture into irrelevant, random and manifestly vexatious questions during cross-examination.

14. The impugned Order dated 12.02.2020 passed by the learned District Judge, East Sikkim at Gangtok in Title Suit No.01 of 2017 *(Karmapa Charitable Trust and Others vs. State of Sikkim and Others)* is modified to the extent above.

15. Writ Petition disposed of accordingly as also all other pending applications.

16. Copy of this Order be forwarded to the learned trial Court for information and compliance.

SLR (2020) SIKKIM 401

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

W.P (C) No. 09 of 2019

In Re: Villages in Upper Dzongu Marooned Due to Collapse of a Bridge at Mantam Lake, North Sikkim.

Date of decision: 20th June 2020

A. Constitution of India – Article 226 – Public Interest Litigation disposed of with the following directions: (i) Respondents shall regularly monitor the condition of the temporary bamboo cane bridge to ensure safety of villagers crossing the bridge and to ensure that the bridge remains functional so as to not cause any inconvenience to the affected villagers. The bamboo cane bridge, as and when required, is to be appropriately strengthened; (ii) Respondents will keep the ropeway functional in mechanized form; (iii) Condition of the road on the other side of Kanaka river, i.e. towards the cut off villages i.e. Tingvong GPU, Sakyong Pentok GPU and Laven ward under Lingthem GPU shall be improved so that the villagers of the remote corners of the State have better connectivity; (iv) Respondents shall ensure completion of construction of the permanent bridge within the schedule time – Liberty granted to *amicus curiae* to approach the Court, if need so arises in the future.

(Paras 20 and 21)

Petition partially allowed.

JUDGMENT AND ORDER

The judgment of the Court was delivered by ***Arup Kumar Goswami, CJ***

This matter is taken up through V.C.

2. Heard Mr. Tashi Rapten Barfungpa, learned Amicus Curiae as well as Mr. Vivek Kohli, learned Advocate General, Sikkim.

3. This Suo Motu Public Interest Litigation was registered on the basis of newspaper reports. A news article captioned "Newly constructed bridge in Dzongu overflowed, 13 villages affected" was published on 05th May, 2019 issue of Sikkim Express, wherein it was stated that due to heavy rainfall in North Sikkim, water level of Kanaka river had risen resulting in submersion of the bailey bridge, which was built over the river at Dzogu. Similar news with the caption "Heavy rainfall submerge Mantam bridge" was also reported in Summit Times on its 05th May, 2019 issue.

4. A news item was published on 19th June, 2019 issue of Sikkim Express, under the headline "13 Villages Marooned". Summit Times, on its 19th June, 2019 issue reported the events under the headline "Rain scare sends jitters along Teesta".

5. At the very outset, it is relevant to be noticed that as a result of heavy landslide on 13.08.2016, natural flow of Kanaka river was blocked resulting in formation of a lake - one village was submerged and several wards were marooned.

6. This Court had taken cognizance of the aforesaid incident on 17.08.2016 and had registered a suo motu writ petition, registered as WP (PIL) No. 05 of 2016, titled "In Re: Debacle in Upper Dzongu".

7. The aforesaid Public Interest Litigation was disposed of by an order dated 27.06.2018. Paragraphs 9, 10, 11 and 12 of the aforesaid order reads as follows: -

> **"**9. Over the months, the Task Force undertook the task of controlled blasting for draining the artificial lake. So far as the construction of Bridge is concerned, the LR&DM Department undertook to furnish technical details about the possibility of constructing a Suspension Bridge to accommodate one vehicle in place of the Foot Bridge which was proposed then. It was brought to the notice of this Court that the Government had taken a decision to establish a two lane permanent RCC Bridge connecting the people living on the other side of the

lake for which a sum of Rs.49,05,75,000/- (Rupees forty-nine crores, five lakhs and seventy-five thousand) only, have been sanctioned. In the meanwhile, a Suspension Foot Bridge would be installed to facilitate the movement of goods and basic necessities to people who stranded are on the other side of the lake. On 25-04-2018 the State Government in its Affidavit submitted that the Suspension Foot Bridge would be completed by the end of May, 2018, while financial bid was being examined for the two lane RCC Bridge, the technical evaluation being completed.

10. Today, it is submitted before this Court that the Suspension Foot Bridge is now complete and is being used by people for their daily thoroughfare, installation of wire mesh on the sideways of the Bridge would be completed in two weeks. That, tender process for construction of two lane RCC Bridge is completed and the process of award of work is underway. The Amici Curiae submit that total completion of the Suspension Bridge including painting would take about one month, however, he concedes that presently the Bridge is ready for use.

11. In view of the aforesaid circumstances, we are of the considered opinion that necessary directions given by this Court pertaining to relief and rehabilitation measures of affected people of the landslide area including construction of Bridges have been complied with.

12. Nothing further remains for adjudication and hence, the matter stands disposed of with liberty granted to the Learned Amici Curiae to approach this Court, if and when the need so arises.**"**

8. In this proceeding, a report in the form of an affidavit was filed by the Chief Secretary and the Principal Chief Engineer-cum-Secretary, Roads

& Bridges Department, Government of Sikkim, i.e. respondent nos. 1 and 4, respectively, on 19.09.2019, admitting that due to heavy downpour on 18.06.2019, the foot suspension bridge over river Kanaka at Mantam, Upper Dzongu had been damaged and the bridge had collapsed. It is stated that a cane bridge was constructed and opened for public on 02.09.2019 so that no inconvenience is caused to the public of Tingbong GPU, Sakyong Pentok GPU and Laven GPU. It is stated that a steel bridge downstream of the foot suspension bridge connecting Lingthem to Tingvong, Kusong, Lingzya and other adjoining villages falling on the left bank of the river Kanaka had also been damaged by the floods and as the volume of the water in the lake is very high and volatile, restoration of temporary bridge for vehicular traffic can be taken only after the monsoon is over.

9. In the affidavit, it is stated that in order to address the issue of connectivity permanently, a proposal was sanctioned for construction of a permanent bridge over river Kanaka at a cost of Rs.88.54 crores and the work order had been issued to National Projects Construction Corporation Limited on 28.01.2019 and the scheduled completion time is January, 2021.

10. Learned Amicus Curiae, after visiting the site, had submitted a report/suggestions on 01.11.2019. In the report/suggestions of the learned Amicus Curiae, it is stated that the road leading towards Mantam village connecting Lingthem GPU is in a pathetic condition. Similarly, the road on the other side of river Kanaka towards the cut off villages was also pathetic. In the report/suggestions, learned Amicus Curiae had stated that a ropeway had been constructed by the Public Works Department, Roads and Bridges, Government of Sikkim for the purpose of transportation of goods. However, after inauguration of the same sometime in the year 2002, it had remained mostly inoperative. Earlier, when the same was operational, villagers were allowed to use it during day time for transportation of goods provided they arranged diesel for the machine. It is further stated that presently in times of need, the villagers are making use of the ropeway by manually pulling it with their hands. In the report/suggestions learned Amicus Curiae had put on record that villagers had indicated to him that if the ropeway was made operative, it would solve their problem to a certain extent while transporting rations and items of their daily use from the other side of the river (Ruklu Kayam, under Lingthem GPU) across to 6th mile

Tingvong, through the ropeway. Learned Amicus Curiae had suggested the following temporary measures for mitigating the suffering of the villagers on the other side of the lake and river:

"I. Since the conditions of the roads are not only Pathetic but dangerous and is a serious concern voiced by majority of the villagers, there is a dire need for immediately improving the road condition on both the sides of the river.

II. The path leading to the Bamboo Cane Bridge needs to be made more stable and comfortable for people of all age and gender to commute through. The logs as depicted in the pictures annexed herewith should be replaced with strong wooden planks for balance and stability.

III. Since the bridge could be used during the nighttime as well, the area in and around the bridge needs to be provided proper lighting. Arrangements for street lights needs to be made immediately on both the sides of the river as well as on the bridge. With winters approaching and the days being replaced by longer nights, proper lighting over and across the existing Bamboo Cane Bridge becomes all the more essential.

IV. The State respondents could make immediate arrangements to make the rope-way operative which connects Ruklu Kayam village under Lingthem – Lingdem GPU to 6th Mile Tingvong on the other side of the river. The functioning of the rope way shall ease the problems of the people of the cut off villages in transporting rations and goods required for their day to day use including raw materials required for private as well as government construction works being carried out in these villages.

V. Looking at the terrain and the site where the work for the construction of permanent bridge is being carried out, the Amicus as well as the villagers have serious doubt that the same shall be completed within the scheduled time i.e. January 2021, therefore in order to make sure that the Temporary Bridge that the Government is to construct does not meet the same fate of being washed away by the river like the previous suspension bridge, the Respondents could take some expert suggestion and look at the option of River Training so that the flow of the river towards a certain direction is controlled which could eventually help in permanently protecting the bridge for the use of public till the construction of the permanent bridge is completed and even thereafter.

VI. Since some of the villagers were of the opinion that the abutment of the previous bridge not being constructed at the right place could be one of the reason for the bridge not being able to withstand the pressure of the river, the government, before the construction of the bridge could consult the Panchayats and the residents of the area who could have better knowledge about the terrain and quality of the land.

The Amicus Curiae seeks the liberty of this Hon'ble Court to allow the Amicus to place any further reports or suggestions as and when the same is required.**"**

11. Subsequent to filing of the aforesaid report/suggestions of the learned Amicus Curiae, respondent nos. 1 and 4 filed an affidavit dated 03.12.2019 stating as follows: -

"That the Roads and Bridges Department has instructed the concerned field Officers in North Sikkim to take up the works Vide letter no. loose/ACE/ N/E/R& B /36 dated 7/11/19 and accordingly as directed by the High Court many steps have already been taken up to mitigate the issues. A copy of the letter is annexed and marked herewith as **Annexure- R 1.**

I. That the road on right bank of the river has been temporarily restored and riding quality has been considerably improved and loaded vehicles are plying comfortably on this stretch of the road. The temporary restoration of road on left bank of the river will be taken up after completion of temporary bridge which is under construction.

(A copy of the recent Photographs of restored roads is annexed and marked herewith as **Annexure – R 2).**

II. With regard to the temporary measures as directed, the Path leading to the Cane Bridge has been made comfortable and stable for people of all ages and gender to commute through to the possible extent. Once the construction of the temporary vehicular bridge is completed and all pedestrian as well as vehicular traffic is diverted through the bridge further improvement works would be taken up because as of now due to continuous use of the bridge by the people works are hindered now and then.

(A copy of photographs been annexed and marked herewith as **Annexure – R3).**

III. As directed for proper lighting in and around the bridge the same has been carried out by providing lighting over and across the existing bamboo Cane Bridge.

(A copy of the photographs has been marked and annexed herewith as **Annexure – R4).**

IV. With regard to the ropeway operation as directed it is to submit that as per the records it was constructed under the funding by the SJEWD, sponsored by the Ministry of Tribal Affairs, Government of India in the year 2002. It is found that the onus of maintenance of the ropeway falls under the purview of LRDM Department. As of now the Ropeway is in operation status.

V. With regard to the construction of a permanent bridge, the foundation work for the abutments is ongoing and simultaneously the fabrication of bridge parts is also nearing completion. The bridge will be completed within the schedule time i.e. January 2021.

VI. Men and Machineries are engaged for erection of a temporary vehicular bridge across the river for easy movement of vehicles during the lean period. The work for the same is underway on war-footing and would be completed positively in all respects by 12/12/2019. Further, it is to submit that delay in commencement of this work is mainly attributed by the land disputes in the initial stage of the site where the work was to be taken up. The concerned Gram Panchayat has given a certificate, certifying the dispute, settlement and completion of the temporary vehicular bridge.

(A copy of the certificate is annexed and marked herewith as **Annexure – R5**).

(A copy of photographs of progress of the work of construction of temporary vehicular

bridge has been enclosed for reference at **Annexure – R6).”**

12. By an order dated 05.12.2019, this Court directed the matter to be listed on 19.02.2020 to take note of further developments. A report in the form of an affidavit was filed by respondent nos. 1 and 4 on 15.02.2020. It is stated therein that the construction of the temporary bridge for all pedestrian as well as vehicular traffic across river Kanaka was completed on 12.12.2019. With regard to the construction of permanent bridge, it is stated that excavation in foundation work for both the abutments at Tingbong and Kayum side were completed for 2-lane bridge over Kanaka river. The fabrication of steel bridge parts had been completed at the workshop and transportation and stacking at work site is under process and stacking of the reinforcing bars had been completed. It is stated that the concrete works for the abutments will be completed within the scheduled time.

13. Order of this Court dated 19.02.2020 goes to show that Mr. Kohli had submitted that though temporary vehicular bridge had been constructed and was functional, with the onset of monsoon, the bridge has to be dismantled as the surging water of river Kanaka will submerge the temporary bridge and during the period of monsoon, the bamboo bridge, which was in existence, would have to be used by the villagers and others. He further submitted that the bamboo bridge may be required to be strengthened before the onset of monsoon. He further submitted that the ropeway, which was at that point of time operated manually, might have to be made functional to operate in a mechanized way.

14. In the aforesaid order dated 19.02.2020, this Court had taken note of the submission of Mr. Barfungpa that the motor of the ropeway was not in working condition and that is why the same was required to be operated manually. The order goes to show that the learned Advocate General had submitted that he would look into all aspects of the matter and would file a comprehensive report relating to strengthening of the bamboo bridge and mechanized operation of the ropeway.

15. Though, by the aforesaid order dated 19.02.2020, the case was directed to be listed on 23.04.2020, due to lockdown, the same could not be listed and the matter came to be listed on 10.06.2020. Till then, because

of lockdown, the report was not filed and on a prayer made by the learned State Counsel, while granting seven days' time to file an affidavit, the matter was directed to be listed today.

16. Accordingly, an affidavit dated 18.06.2020 in the form of a report was filed by respondent nos. 1 and 4.

17. In the said affidavit, it is stated that the temporary bamboo cane bridge was strengthened using a ten ton capacity winching machine to pull the main cable to minimize the sagging. After the sagging was minimized, the damaged bamboo decking was replaced ensuring that there was no gap in between and after such replacement of the decking, the gap between foot bridge and the river, at the minimum, is 8 feet. It is further stated that the ropeway has been mechanized and the villagers are using the same. With regard to construction of the permanent bridge, it is stated that though very little progress was achieved during the period of lockdown on account of COVID-19 pandemic, the scheduled completion date had not been revised from the earlier scheduled date, which is 21.01.2021.

18. Mr. Barfungpa has submitted that though the bamboo bridge has been constructed, as the same is the lifeline for the villagers of Tingvong GPU, Sakyong Pentok GPU and Laven ward under Lingthem GPU, respondent authorities should regularly monitor the condition of the bamboo bridge and whenever required, strengthen the same so that the villagers are not cut off from the rest of the world. Mr. Barfungpa further submits that a direction may also be issued to improve the condition of the road leading towards Mantam village and further connecting Lingthem GPU and the condition of the road towards the cut off villages. He further submits that the Public Interest Litigation may be disposed of by directing the respondent authorities to keep the ropeway functional in mechanized form and to ensure that the permanent bridge is constructed without any delay and within the scheduled completion date.

19. Mr. Kohli has submitted that in view of the steps taken by the respondents, nothing further survives for consideration in this case and the petition may be disposed of with a liberty to the learned Amicus Curiae to approach this Court again if the occasion arises.

20. Considering the matter in its entirety and taking note of the submissions as well as the affidavits/reports on the record, we dispose of this Public Interest Litigation with the following directions:-

(i) The respondents shall regularly monitor the condition of the temporary bamboo cane bridge to ensure safety of villagers crossing the bridge and to ensure that the bridge remains functional so as to not cause any inconvenience to the affected villagers. The bamboo cane bridge, as and when required, is to be appropriately strengthened.

(ii) Respondents will keep the ropeway functional in mechanized form.

(iii) Condition of the road on the other side of Kanaka river, i.e. towards the cut off villages i.e. Tingvong GPU, Sakyong Pentok GPU and Laven ward under Lingthem GPU shall be improved so that the villagers of the remote corners of the State have better connectivity.

(iv) Respondents shall ensure completion of construction of the permanent bridge within the schedule time.

21. While disposing of the petition, we grant liberty to learned Amicus Curiae to approach this Court, if need so arises in future.

SLR (2020) SIKKIM 412
(Before Hon'ble the Chief Justice and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Spl. Appeal No. 01 of 2020

The Municipal Commissioner,
Gangtok Municipal Corporation and Another ….. APPELLANTS

Versus

Mrs. Pabitra Singh Kami and Others ….. RESPONDENTS

For the Appellants: Mr. Jorgay Namka, Advocate.

For Respondent 1-2: Mr. N. Rai, Senior Counsel assisted by Mr. Sunil Kumar Baraily, Advocate.

For Respondent No.3 : Mr. Thupden G. Bhutia, Advocate.

Date of decision: 22nd June 2020

A. Code of Civil Procedure, 1908 – S. 100A – Sikkim High Court (Practice and Procedure) Rules, 2011 – Rule 148 – Whether Letters Patent Appeal is Maintainable before Division Bench against the Judgment Passed by a Single Judge – In *Geeta Devi*, a learned Single Judge of the High Court of Rajasthan had decided an appeal preferred against the award of the Motor Accidents Claims Tribunal. An appeal was preferred against the said judgment before the Division Bench and the Division Bench of the Rajasthan High Court had held that against the order of a learned Single Judge, the appeal does not lie in view of S. 100A C.P.C – While dismissing the appeal preferred against the judgment of the Division Bench, the Hon'ble Supreme Court held that intra-court appeal in the High Court was not maintainable in view of S. 100A C.P.C notwithstanding anything in the High Court Rules or the Letters Patent to the contrary – The law laid down by the Hon'ble Supreme Court in *Geeta Devi* applies on all fours to the present proceedings and, therefore, it will

not be necessary for this Court to embark upon an enquiry to find out as to whether Rule 148 of the P.P Rules contemplated a special appeal of the present nature. Even if it is assumed that Rule 148 of the P.P. Rules did not restrict filing of an appeal against the judgment passed by the learned Single Judge in an appeal preferred against an award passed by the Motor Accidents Claims Tribunal, the same will not enure to the benefit of the appellants in view of the dicta in *Geeta Devi* – Appeal not maintainable.

(Paras 12, 13 and 14)

Appeal dismissed.

Chronology of cases cited:

1. The Bharat Bank Ltd., Delhi v. The Employee of the Bharat Bank Ltd., Delhi and the Bharat Bank Employees Union, Delhi, AIR 1950 SC 188.
2. Associated Cement Companies Ltd. v. P.N. Sharma and Another, AIR 1965 SC 1595.
3. Fazal Ali v. Amna Khatun and Others, AIR 2004 Rajasthan 39.
4. P.S. Sathappan (dead) by LRs. v. Andhra Bank Ltd. and Others, (2004)11 SCC 672.
5. Geeta Devi and Others v. Puran Ram Raigar and Another, (2010) 9 SCC 84.

JUDGMENT (ORAL)

The judgment of the Court was delivered by ***Arup Kumar Goswami, CJ***

Heard Mr. Jorgay Namka, learned Counsel, appearing for the appellants. Also heard Mr. N. Rai, learned Senior Counsel assisted by Mr. Sunil Kumar Baraily, learned Counsel, appearing for respondent nos. 1 & 2 as well as Mr. Thupden G. Bhutia, learned Counsel, appearing for respondent no.3.

2. This special appeal is directed against the judgment dated 01.07.2019 passed by the learned Single Judge in MAC App. No.11 of 2017, whereby the appeal preferred by the present appellants against the

award dated 28.07.2017 passed by the learned Motor Accident Claims Tribunal, East Sikkim at Gangtok in MACT Case No.27 of 2016, was dismissed.

3. On the very first day when the appeal was listed on 21.08.2019, this Court fixed the case for hearing on the question of maintainability of the appeal and liberty was granted to the appellants to serve the respondents.

4. Accordingly, we have heard the learned Counsel for the parties on the maintainability of this appeal.

5. Mr. Namka submits that Rule 148 of the Sikkim High Court (Practice and Procedure) Rules, 2011 (for short, PP Rules) makes it abundantly clear that this special appeal is maintainable before the Division Bench as judgment of the learned Single Judge was not passed in exercise of Appellate jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the High Court. He submits that Rule 148 of the PP Rules does not bar an appeal before the Division Bench against the judgment of a learned Single Judge in respect of an award or an order passed by a Motor Accidents Claims Tribunal. He has contended that Courts and Tribunals are distinct entities and they are not one and the same thing. In this connection, he has placed reliance on the judgments of the Hon'ble Supreme Court in ***The Bharat Bank Ltd., Delhi*** vs. ***The Employee of the Bharat Bank Ltd., Delhi, and the Bharat Bank Employees Union, Delhi***, reported in ***AIR 1950 SC 188*** and ***Associated Cement Companies Ltd.*** vs. ***P.N. Sharma and Anr.***, reported in ***AIR 1965 SC 1595***. He contends that even the amendment of Section 100A of the Civil Procedure Code, 1908 (for short, CPC) by the Code of Civil Procedure (Amendment) Act, 2002 will not take away the Letters Patent jurisdiction of the High Court as the Tribunal under the Motor Vehicles Act, 1988 (for short, MV Act) is not a Civil Court as contemplated under CPC. In this regard, he has drawn the attention of this Court to a judgment of the Rajasthan High Court in the case of ***Fazal Ali*** vs. ***Amna Khatun & Ors.***, reported in ***AIR 2004 Rajasthan 39***. He submits that in the aforesaid case, a special appeal before the Division Bench against a judgment of a learned Single Judge in an appeal preferred under Section 173 of MV Act was held to be maintainable by holding that the amended provision under Section

100A CPC introduced by the Code of Civil Procedure (Amendment) Act, 2002 has no impact on the power of a Division Bench to entertain and adjudicate the matter. Mr. Namka has also relied upon a decision of the Hon'ble Supreme Court in the case of ***P.S. Sathappan (Dead) by Lrs.*** vs. ***Andhra Bank Ltd. and Ors.*** reported in ***(2004) 11 SCC 672***. **6.** Mr. Bhutia, learned Counsel appearing for respondent no. 3, endorses the submissions of Mr. Jorgay Namka.

7. Mr. N. Rai, learned Senior Counsel appearing for respondent nos. 1 and 2, submits that the issue is squarely covered by the judgment of the Hon'ble Supreme Court in the case of ***Geeta Devi and Ors.*** vs. ***Puran Ram Raigar and Anr.***, reported in ***(2010) 9 SCC 84***, wherein the Hon'ble Supreme Court categorically held that intra-court appeal in the High Court was not maintainable against the order of the learned Single Judge deciding an appeal preferred against an award of Motor Accident Claims Tribunal in view of Section 100A CPC notwithstanding anything in the High Court Rules or the Letters Patent to the contrary. Accordingly, he submits that even if it is construed that a special appeal was envisaged under Section 148 of the PP Rules against the judgment of a learned Single Judge passed in an appeal arising out of a challenge made to an award passed by the Motor Accident Claims Tribunal, the same will not, in any manner, assist the appellant in view of the pronouncement made by the Hon'ble Supreme Court in ***Geeta Devi*** (supra.). Accordingly, he prays for dismissal of the appeal as not maintainable.

8. At the outset, it will be appropriate to take note of Section 148 of the PP Rules, which reads as under:-

> ***"148. Letters Patent Appeals:-*** *(1) An appeal shall lie to the Division Bench from the Judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the High Court, and not being an order made in the exercise of revisional jurisdiction, and not being sentence or order passed or made in exercise of Criminal jurisdiction) of a Judge of the High Court sitting singly.*

(2) The period of limitation for an appeal under this rule shall be thirty days from the date of the Judgment, decree or final order, as the case may be."

9. Section 100A CPC, after the amendment of Code of Civil Procedure (Amendment) Act, 2002, reads as follows:-

"100A. No further appeal in certain cases.- *Notwithstanding anything contained in any Letters Patent for any High Court or in any instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge."*

10. Prior to the aforesaid amendment, Section 100A CPC, read as follows:-

*"**100A. No further appeal in certain cases.-** Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment, decision or order of such single Judge in such appeal or from any decree passed in such appeal."*

11. In ***P.S. Sathappan (Dead) by Lrs.*** (supra), an application was filed before the execution court for setting aside the court auction. The same being dismissed, an appeal was filed before the Madras High Court. On the dismissal of the same by the learned Single Judge, a letters patent appeal was filed. The same was dismissed by the Full Bench of the Madras High

Court holding that in terms of Section 104(2) CPC, an appeal to a Division Bench against an order passed by the appellate court was not maintainable. When the matter reached the Hon'ble Supreme Court, because of the importance of the question, the same was referred to a Constitution Bench for consideration. The majority view was that the appeal was maintainable. It is to be noted at this juncture that while rendering the aforesaid decision, the Hon'ble Supreme Court had taken note of Section 100A prior to its amendment in 2002. While coming to the aforesaid conclusion, the Hon'ble Supreme Court had observed that at the relevant time, neither Section 100A nor Section 104(2) CPC barred a letters patent appeal. In paragraph 30, it was observed as follows:-

> *"…… It must be stated that now by virtue of Section 100-A no letters patent appeal would be maintainable. However, it is an admitted position that the law which would prevail would be the law at the relevant time. At the relevant time neither Section 100-A nor Section 104(2) barred a letters patent appeal."*

12. A perusal of the judgment in ***Geeta Devi*** (supra) goes to show that a learned Single Judge of the High Court of Rajasthan had decided an appeal preferred against the award of the Motor Accidents Claims Tribunal. An appeal was preferred against the said judgment before the Division Bench and the Division Bench of the Rajasthan High Court had held that against the order of the learned Single Judge, the appeal does not lie in view of Section 100A CPC. While dismissing the appeal preferred against the judgment of the Division Bench, the Hon'ble Supreme Court held that intra-court appeal in the High Court was not maintainable in view of Section 100A CPC notwithstanding anything in the High Court Rules or the Letters Patent to the contrary.

13. The law laid down by the Hon'ble Supreme Court in ***Geeta Devi*** (supra) applies on all fours to the present proceedings and, therefore, it will not be necessary for this Court to embark upon an enquiry to find out as to whether Section 148 of the PP Rules contemplated a special appeal of the present nature. Even if it is assumed that Section 148 of the PP Rules did

not restrict filing of an appeal against the judgment passed by the learned Single Judge in an appeal preferred against an award passed by the Motor Accidents Claims Tribunal, the same will not enure to the benefit of the appellants in view of the dicta in ***Geeta Devi*** (supra).

14. In view of the above discussions, we hold that this appeal is not maintainable and accordingly, the same is dismissed. Accordingly, I.A. No.1 of 2019 and I.A. No.2 of 2020 become infructuous.

SLR (2020) SIKKIM 419

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

Crl. A. No. 25 of 2017

Bimal Subba alias **Bijay Subba** ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. N. Rai, Senior Advocate and
Mr. Sushant Subba, Legal Aid Counsel.

For the Respondent: Dr. Doma T. Bhutia, Public Prosecutor with
Mr. S.K. Chettri, Additional Public
Prosecutor and Ms. Mukun Dolma Tamang,
Asst. Public Prosecutor.

Date of decision: 24th June 2020

A. Code of Criminal Procedure, 1973 – S. 154 – First Information Report– Object – The principle object of the first information report from the point of view of the informant is to set the criminal law in motion and that of the investigating authorities is to obtain information about the alleged crime so as to enable them to take steps to trace and bring the guilty to book – The question as to whether a particular document, constitutes a first information is to be determined on the relevant facts and circumstances of the case. If the information was cryptic, its main object being to enable the police officer to reach the place of occurrence immediately, such information cannot be considered to be an F.I.R.

(Para 7(i))

B. Code of Criminal Procedure, 1973 – S. 174 – Police to Inquire and Report on Suicide, etc. – Object – An investigation under S. 174 of the Cr.P.C is confined to the ascertainment of the apparent cause of death. It is concerned with discovering whether the death so caused was on

account of an accident, was suicidal, homicidal or caused by an animal or in what manner or by what weapon or instrument the injuries on the body appear to be inflicted – On the lodging of Exhibit-46, the police had merely started inquest under S. 174 of the Cr.P.C – The scope of proceedings under S. 174 of the Cr.P.C is limited, the object of it being merely to ascertain whether a person has died under the circumstances enumerated therein – Only on the lodging of Exhibit-1 did the incident pertaining to a cognizable offence come to light on the basis of which investigation commenced for an offence under S. 302, I.P.C. Exhibit-46 surely does not disclose a cognizable offence much less an offence under S. 302, I.P.C – The argument that Exhibit-1 is hit by the provisions of S. 162 of the Cr.P.C having been made later in time than Exhibit-46 and thereby during the course of investigation cannot be countenanced. It may fittingly be pointed out that a second F.I.R in the same matter is not completely debarred by law but is to be considered in the facts and circumstance of each individual case.

(Para 7(ii) and (iii))

C. Indian Evidence Act, 1872 – S. 27 – How Much of Information Received from Accused May Be Proved – S. 27 is by way of a proviso to Ss. 25 and 26 of the Evidence Act, by which a statement made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused – The phrase "distinctly relates to the fact discovered" in S. 27 is the pivotal aspect of the provision. This phrase refers to that part of the information supplied by the accused which is the driver and immediate cause of the discovery. If a fact is actually discovered in consequence of information given by the accused, its affords some guarantee of the truth of that part of the information which was the clear, immediate and proximate cause of the discovery.

(Para 8 (i) and (ii))

D. Indian Evidence Act, 1872 – S. 106 – Burden of Proving Fact Especially Within Knowledge of Any Person – This provision is an exception to the general rule laid down in S. 101 of the Evidence Act that the burden of proving a fact rests on the party who asserts the affirmative of the issue – S. 106 is of course not intended to relieve the Prosecution of the burden cast on it by S. 101, it merely means that where the subject matter of the allegation lies peculiarly within the knowledge of the accused,

he must prove it. It cannot apply when the fact is such as is capable of being known to any person other than the accused.

(Para 9 (vii))

Appeal dismissed.

Chronology of cases cited:

1. Meghaji Godadji Thakore and Another v. The State of Gujarat, 1993 Cri..L.J 730 (Gujarat).
2. Pulukuri Kottaya and Others v. Emperor, AIR 1947 PC 67.
3. Anter Singh v. State of Rajasthan, AIR 2004 SC 2865.
4. State v. Zilla Singh, 1973 Cri.L.J 1384 (J&K).
5. Narayan Rao v. State of Andhra Pradesh, AIR 1957 SC 737.
6. Gholtu Modi and etc. v. State of Bihar, 1986 Cri.L.J 1031(Patna).
7. Gora Ghasi v. State of Orissa, AIR 1983 SC 360.
8. Kharga Bahadur Pradhan v. State of Sikkim, 2015 Cri.L.J 2519 (Sikkim).
9. Rambraksh alias Jalim v. State of Chhattisgarh, (2016) 12 SCC 251.
10. Hari and Others v. State of Rajasthan, 2010 Cri.L.J. 308 (Raj).
11. Anvar P.V. v. P.K. Basheer and Others, (2014) 10 SCC 473.
12. Sonu alias Amar v. State of Haryana, (2017) 8 SCC 570.
13. Hanuman Hariyana Brahmin v. State of Rajasthan, 2017 SCC OnLine Raj 3821.
14. Nagappa Dondiba Kalal v. State of Karnataka, AIR 1980 SC 1753.
15. Radha Mohan Singh alias Lal Saheb and Others v. State of U.P., (2006) 2 SCC 450.
16. Tapinder Singh v. State of Punjab and Another, (1970) 2 SCC 113.
17. Animireddy Venkata Ramana and Others v. Public Prosecutor, High Court of Andhra Pradesh, (2008) 5 SCC 368.
18. Babubhai v. State of Gujarat and Others, (2010) 12 SCC 254.

19. Awadesh Kumar Jha alias Akhilesh Kumar Jha and Another v. State of Bihar, (2016) 3 SCC 8.

20. Rameshwar Dayal and Others v. State of Uttar Pradesh, (1978) 2 SCC 518.

21. Krishna Mochi and Others v. State of Bihar, (2002) 6 SCC 81.

22. State of U.P. v. Harban Sahai and Others, (1998) 6 SCC 50.

23. Prakash Chand v. State (Delhi Admn.), AIR 1979 SC 400.

24. Sana alias Sanatan alias Dhaneswar Samal v. State of Orissa, 2010 Cri.L.J. 299 (Orissa).

25. Kishore Bhadke v. State of Maharashtra, AIR 2017 SC 279.

26. Dhanaj Singh alias Shera and Others v. State of Punjab, (2004) 3 SCC 654.

27. Superintendent of Police, CBI and Others v. Tapan Kumar Singh, (2003) 6 SCC 175.

28. Lalita Kumari v. Government of Uttar Pradesh and Others, (2014) 2 SCC 1

29. Nirmal Singh Kahlon v. State of Punjab and Others, (2009) 1 SCC 441.

30. Shivaji Sahabrao Bobade and Another v. State of Maharashtra, (1973) 2 SCC 793.

31. Modan Singh v. State of Rajasthan, (1978) 4 SCC 435.

32. Mohd. Aslam v. State of Maharashtra, (2001) 9 SCC 362.

33. State of Maharashtra v. Ramlal Devappa Rathod and Others, (2015) 15 SCC 77.

34. Damber Bahadur Chhetri v. State of Sikkim, 2010 Cri.L.J 3076 (Sikkim).

35. Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116.

36. Satpal v. State of Haryana, (2018) 6 SCC 610.

37. Jai Prakash v. State of Uttar Pradesh, 2019 SCC OnLine SC 1525.

38. Karnel Singh v. State of M.P, (1995) 5 SCC 518,

39. State of Karnataka v. Suvarnamma and Another, (2015) 1 SCC 323.

40. Dayal Singh and Others v. State of Uttaranchal, (2012) 8 SCC 263.

41. Anant Chintaman Lagu v. The State of Bombay, AIR 1960 SC 500.

42. Solanki Chimanbhai Ukabhai v. State of Gujarat, 1983) 2 SCC 174.

43. Ram Swaroop and Others v. State of U.P., (2000) 2 SCC 461.

JUDGMENT

The judgment of the Court was delivered by ***Meenakshi Madan Rai, J***

1. The appellant was convicted of the offence under Section 302 of the Indian Penal Code, 1860 (for short, "the IPC") by the impugned Judgment dated 31-07-2017, in Sessions Trial Case No.01 of 2015. By an Order on Sentence of the same date, he was to undergo imprisonment for life and to pay a fine of Rs.25,000/- (Rupees twenty-five thousand) only, with a default clause of imprisonment. The period of imprisonment already undergone by him was set off against the ordered imprisonment. Aggrieved, the appellant is before this Court.

2(i). We may briefly advert to the facts of the case. On 05-12-2014, one Shiv Prakash Gupta (P.W.1) of Naya Bazar, West Sikkim, lodged a written report (Exhibit 1), before the Namchi Police Station, South Sikkim, informing therein that on 02-12-2014, Bimal Subba (the appellant), along with two of his friends (one male and one female) had hired the taxi of one Rohit Shah (the victim) of Naya Bazar. Thereafter, the victim went missing from his home. That, on receiving information from the Namchi District Hospital on 05-12-2014 around 3 p.m. that an unidentified body was lying therein, he reached the Hospital and identified the body as that of the victim. Suspecting that the appellant and his two friends had murdered the victim, he lodged the FIR, Exhibit 1.

(ii) Based on such information, Namchi Police Station Case No.149/14, dated 05-12-2014, under Sections 302/34 of the IPC was registered and investigation taken up. Investigation led to the discovery that the appellant after hiring the Alto vehicle went with the victim to South Sikkim to enable the appellant elope with P.W.13. *En route* to her house he did away with

the victim with the help of M.O.XX. On completion of investigation, Charge-Sheet came to be submitted against the appellant under Sections 302/382 of the IPC. The learned trial Court framed Charge against the appellant under Section 302 of the IPC to which he entered a plea of "not guilty". To bring home the charge against the appellant, the Prosecution examined 49 witnesses including the Investigating Officer (I.O.), P.W.49 of the case. On closure of evidence, the appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (for short, Cr.P.C.), his responses recorded, arguments heard and thereafter, the impugned Judgment and Order on Sentence pronounced.

3(i). Advancing a multipronged argument for the appellant before this Court, learned Senior Counsel contended that the alleged FIR, Exhibit 1, dated 05-12-2014, contains overwriting on various dates mentioned therein, rendering the document suspicious. That, Exhibit 1 makes a mention of a report having been lodged at the Naya Bazar Police Station informing of the missing victim, which however finds no place in the documents filed by the Prosecution, thereby raising doubts of its very existence. That, as Exhibit 46, report lodged by one Indra Lall Gurung on 03-12-2014, pertaining to the incident was first in point of time, hence Exhibit 1 lodged by P.W.1 is the second FIR and is thus hit by the provisions of Section 162 of the Cr.P.C. Exhibit 1 indicates that there were two other people along with the appellant and the victim in the vehicle when they left Jorethang, but no investigation transpired into the role of the other occupants.

(ii) That, the disclosure statement of the appellant (Exhibit 15) under Section 27 of the Indian Evidence Act, 1872 (for short, Evidence Act) on which the Prosecution is relying on is rife with defects, besides being inculpatory and involuntary rendering it inadmissible in evidence. That, P.W.14, the alleged witness to Exhibit 15, under cross-examination has admitted that he only heard the appellant answering questions put to him, during which, he stated that he had killed the victim and could show the place where he had killed him, establishing the involuntary nature of the statement which ought to be rejected. On this aspect reliance was placed on ***Meghaji Godadji Thakore and Another*** vs. ***The State of Gujarat***[1]. That, the evidence of P.W.14 also leads to the conclusion that Exhibit 15 was recorded after the discovery of the alleged weapon of offence, iron

[1] 1993 CRI.L.J. 730 (Gujarat)

rod, M.O.XX, while the cross-examination of P.W.42, another witness to Exhibit 15, indicates that it was recovered from an open and accessible area being near a village footpath, hence the alleged recovery deserves to be discarded. That, even assuming that the alleged statement of the appellant that he could show the I.O. the place where he had thrown the rod is admissible, the iron rod, M.O.XX, furnished before the Court was devoid of blood stains, which negates the prosecution allegation of the said object being the weapon of offence. Urging that Exhibit 15 is inadmissible in evidence, reliance was placed on ***Pulukuri Kottaya and Others*** vs. ***Emperor***[2], ***Anter Singh*** vs. ***State of Rajasthan***[3] and ***State*** vs. ***Zilla Singh***[4]. That, confession to a police officer is not to be proved as held in ***Narayan Rao*** vs. ***State of Andhra Pradesh***[5].

(iii) That, the request for Post-Mortem examination, Exhibit 43, dated 07-12-2014, records that on 03-12-2014, at about 1550 hours, an unidentified body was found lying with multiple head injuries in the dry field of one Rudra Prasad Siwakoti. Contrarily, Exhibit 41 Inquest Form dated 04-12-2014 and Exhibit 45, the second Inquest Form dated 05-12-2014, both reveal that the dead body was found on 04-12-2014, at around 10.00 hours. That, the anomalies in the documents vitiate the Prosecution case which therefore should be construed in favour of the appellant. That, Exhibits 41 and 45 record that the body was lying in a prone position in a pool of blood oozing out from the head. Considering that the Prosecution case was that the dead body as per Exhibit 43 was recovered on 03-12-2014, i.e., more than twenty-four hours before, this circumstance is a medical impossibility and throws a spanner in the Prosecution case. Attention of this Court was also invited to the evidence of P.W.43, the Doctor who conducted the autopsy on 07-12-2014, at 12 p.m., and who opined in his Report, Exhibit 42, that the death had occurred in less than 24 hours, lending a fresh contradiction to the Prosecution allegation. That, even if the Prosecution case of recovery of the dead body being 03-12-2014 is to be believed, the Post-Mortem was conducted only on 07-12-2014 sans explanation for the delay. It was emphasized that the injuries reflected in Exhibits 41 and 45 do not corroborate the injuries reflected in Exhibit 42. Resultantly, the benefit of the anomalies must go to the appellant. That,

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[2] AIR 1947 PC 67
[3] AIR 2004 SC 2865
[4] 1973 CRI.L.J. 1384 (J&K)
[5] AIR 1957 SC 737

P.W.42 was informed by one *Gurung daju* on 03-12-2014 that the dead body of an unknown person was lying in the paddy field, but the said informant was never examined by the Prosecution to establish this aspect of its case. These contradictions are compounded by the evidence of the I.O., according to whom, the body was recovered from a small forest, while the other witnesses deposed that it was found in the dry field of one Rudra Prasad Siwakoti.

(iv) That, P.W.35, the Scientific Officer in the Biology Division of the Regional Forensic Science Laboratory, Saramsa, was present at the place of occurrence directing collection of samples for analysis. As a Scientific Officer she ought not to have visited the alleged place of occurrence, thus having actively participated in the investigation, she is an interested witness whose evidence cannot be considered. On this aspect, reliance was placed on ***Gholtu Modi and etc.*** vs. ***State of Bihar***[6] wherein it was held that entrustment of investigation to police officer who formed a part of the raiding party and lodged the FIR was improper. That, the hair strands which were collected from the Alto No.SK 01 PA 4083 did not match with that of either the appellant or P.W.13, his girlfriend. The learned Trial Court was in error in concluding that the blood stains found in the wearing apparels of the appellant matched the blood group of the victim, the RFSL report Exhibit 30 being devoid of such finding.

(v) That, the only circumstance that the Prosecution is relying on to link the crime to the appellant is the evidence of P.W.33, the mother of the victim, who claimed to have seen M.O.XX in his possession on 02-12-2014, but being an interested witness, her evidence is not trustworthy. Moreover, if the appellant had the requisite *mens rea* he would likely have concealed the weapon of offence from her. Her evidence that the victim left with the appellant on 02-12-2014 is necessarily to be linked to the evidence of P.W.43 who in Exhibit 42 opined that the death had occurred less than 24 hours, meaning thereby on 06-12-2014. Consequently, the last seen theory is inapplicable, the gap between 02-12-2014, the date on which the victim and the appellant were allegedly seen together by P.W.33 and 06-12-2014, the date of occurrence of the death being too far apart to reach a conclusion that the appellant was the perpetrator of the crime. That, the last seen theory being unsubstantiated the evidence against the appellant is slender and he merits an acquittal. On this aspect, reliance was placed on

[6] 1986 CRI.L.J. 1031 (Patna)

Kora Ghasi vs. ***State of Orissa***[7]. Reliance was also placed on ***Kharga Bahadur Pradhan*** vs. ***State of Sikkim***[8] and ***Rambraksh alias Jalim*** vs. ***State of Chhattisgarh***[9] where the appellants were acquitted *inter alia* on this ground.

(vi) That, the delay in forwarding of the FIR to the Magistrate without reasons leads to an inference that the FIR could have been ante dated by the investigating officer. On this count, reliance was placed on ***Hari and Others*** vs. ***State of Rajasthan***[10]. It was further urged that Exhibit 10, purportedly a certified copy of the register showing the log entry of an Alto vehicle bearing registration No.SK 01 PA 4083 is a manufactured document, for the reason that in other entries the description of the vehicle as "Alto" is specific whereas in the entry pertaining to the vehicle in question, the entry is recorded as "A/car". The entries for other vehicles make no mention of the time of entry at the check post, contrary to that of the concerned vehicle M.O.XXVII. That, camera footage relied on by the Prosecution as proof of vehicle entry is inadmissible in evidence being violative of the provisions of Section 65B of the Evidence Act which mandates proper certification of electronic evidence. Assistance on this count was obtained from the ratio in ***Anvar P.V.*** vs. ***P. K. Basheer and Others***[11] where it was held that electronic record produced for inspection of the Court is documentary evidence under Section 3 of the Evidence Act and can be proved only in accordance with the procedure prescribed in Section 65B. That, this ratio was reiterated in ***Sonu alias Amar*** vs. ***State of Haryana***[12].

(vii) That, the Prosecution has also furnished Exhibit 5, which is a copy of the entry made in the register of "Sarita Hotel" where the appellant and his girlfriend P.W.13 allegedly spent some nights. However, the register indicates that they checked into the hotel on 03-12-2014 and checked out the same day at 4 p.m. thereby demolishing the Prosecution case.

(viii) That, as the provisions of Section 311A of the Cr.P.C. were not complied with when the specimen signature of the appellant was collected

[7] AIR 1983 SC 360
[8] 2015 CRI.L.J. 2519 (Sikkim)
[9] (2016) 12 SCC 251
[10] 2010 CRI.L.J. 308 (Raj)
[11] (2014) 10 SCC 473
[12] (2017) 8 SCC 570

for the purposes of investigation, this suffices to reject the evidentiary value of the document Exhibit 20. Reliance was placed on ***Hanuman Hariyana Brahmin*** vs. ***State of Rajasthan***[13]. That, no proof emanates in the Prosecution case to establish that the vehicle was driven by and taken to Sundong from Jorethang by the Appellant. In any event, in the absence of any Prosecution evidence to establish the last seen theory, the appellant at the most can be convicted for the offence of theft of the vehicle. Relying on the decision in ***Nagappa Dondiba Kalal*** vs. ***State of Karnataka***[14] wherein it was held that recovery of ornaments of deceased at the instance of the accused cannot be an inference that he had murdered her, it was concluded that similarly the sale of the Alto by the appellant cannot be linked to the victim s death. Hence, in view of the aforesaid circumstances, it is evident that the anomalies in the Prosecution case render nugatory the effort of the Prosecution to link the offence under Section 302 IPC to the appellant, which therefore entitles him to an acquittal.

4(i). *Per contra*, rebutting the contentions of the appellant, learned Public Prosecutor advanced the argument that four circumstances establish the guilt of the appellant, viz., his motive, the last seen together theory, the recovery of the weapon of offence M.O.XX, at his instance and his non-explanation about how he came to be in possession of the Alto vehicle, M.O.XXVII when it belonged to the victim. His lies to the wife (P.W.32) of the victim when she had called him, by telling her that the victim was already asleep and on the next morning on another call made by her to the victim, told her that they were both in Hong Kong Bazaar at Siliguri. The appellant on seeing the police at his relatives house at Tingmoo, South Sikkim, fled from there, confirming thereby his complicity in the crime by his conduct.

(ii) Denying that two FIRs were filed in the instant case, learned Public Prosecutor sought to clarify that Exhibit 46, alleged to be the first FIR is infact merely a report informing the police of an unidentified dead body, found on 03-12-2014 by some villagers. Pursuant to Exhibit 46 the Namchi Police Station registered an Unnatural Death (UD) Case under Section 174 of the Cr.P.C. Canvassing the contention that an investigation under Section 174 of the Cr.P.C. is limited in scope it was submitted that the circumstances under what he was assaulted or witnesses thereof are foreign to the ambit and scope of the proceedings under Section 174 of the Cr.P.C.

[13] 2017 SCC OnLine Raj 3821
[14] AIR 1980 SC 1753

To drive home this point reliance was placed on ***Radha Mohan Singh alias Lal Saheb and Others*** vs. ***State of U.P.***[15]. That, no error emanates on the finding of the learned trial Court that investigation on the basis of Exhibit 46 was only with regard to an unnatural death case and not murder. That, it is settled law that any complaint which does not specify a cognizable offence cannot be treated as an FIR. Arguing that the mere fact that the information was the first in point of time does not by itself clothe it with the character of a first information report, reliance was placed on ***Tapinder Singh*** vs. ***State of Punjab and Another***[16]. That, P.W.47, SHO, Namchi Police Station admitted under cross-examination that Exhibit 46 is a report under Section 174 of the Cr.P.C. As a result Exhibit 1 is the FIR which reveals a cognizable offence and cannot be said to be hit by the provisions of Section 162 of the Cr.P.C. Strength in this context was garnered from ***Animireddy Venkata Ramana and Others*** vs. ***Public Prosecutor, High Court of Andhra Pradesh***[17], ***Babubhai*** vs. ***State of Gujarat and Others***[18] and ***Awadesh Kumar Jha alias Akhilesh Kumar Jha and Another*** vs. ***State of Bihar***[19].

(iii) It was next contended that the appellant cannot contend that Exhibit 41 is inadmissible in evidence as no questions were put to the concerned witness in cross-examination to demolish the document. This submission was fortified by the ratio in ***Rameshwar Dayal and Others*** vs. ***State of Uttar Pradesh***[20].

(iv) The argument that the informant of Exhibit 46 was not examined is not tenable since P.W.42 on receiving the information from him had duly visited the place of occurrence, seen the dead body and was examined as a witness. Hence, the argument that the non-examination of the informant vitiates the Prosecution case is mis-construed. That, in ***Krishna Mochi and Others*** vs. ***State of Bihar***[21] it was observed that even if the FIR is not proved it would not be a ground for acquittal but would depend on the evidence led by the prosecution. While referring to the ratio of ***State of U.P.*** vs. ***Harban Sahai and Others***[22] it was urged that picking out insignificant discrepancies in the Prosecution case does not vitiate it.

[15] (2006) 2 SCC 450
[16] (1970) 2 SCC 113
[17] (2008) 5 SCC 368
[18] (2010) 12 SCC 254
[19] (2016) 3 SCC 8
[20] (1978) 2 SCC 518
[21] (2002) 6 SCC 81
[22] (1998) 6 SCC 50

(v) That, the Prosecution case has clearly been established by an unbroken chain of events, as the extra-marital relationship between the appellant and P.W.13 has been admitted by her and fortified by the evidence of P.W.23, her brother and P.W.24, her mother. P.W.13 admits to having accompanied the appellant in M.O.XXVII on 02-12-2014. Exhibit 5 indicates that on 03-12-2014 both of them put up at "Sarita hotel" in Ravangla Bazaar, fortified by the evidence of P.W.16, the Hotel Manager and P.W.18, who took them to Tingmoo, South Sikkim, in his taxi from Ravangla Bazaar. The recovery of the dead body in South Sikkim near the house of P.W.13 provides another link to the guilt of the appellant, while the evidence of PWs 31, 32 and 33 have conclusively proved that on 02-12-2014 the appellant hired the Alto vehicle bearing No.SK 01 PA 4083 of the victim and both of them were seen together for the last time on that date at around 05.30 p.m. P.W.33, the mother of the victim had seen M.O.XX, the rod, in the possession of the appellant for which he has failed to furnish any reason even under his examination under Section 313 of the Cr.P.C.

(vi) That, Exhibit 15 is admissible in evidence as recovery of articles were made from the place as stated by him and the provisions of Section 27 of the Evidence Act are to be construed along with the provisions of Section 8 of the same Act. On this count, reliance was placed on ***Prakash Chand*** vs. ***State (Delhi Admn.)***[23] and ***Sana alias Sanatan alias Dhaneswar Samal*** vs. ***State of Orissa***[24].

(vii) The evidence of P.W.43 leads to the conclusion that the death occurred on account of injuries to the brain of the victim, while the RFSL report reveals that the bark of the tree, M.O.VIIA (collectively), and the wearing apparels of the appellant contained the blood of the victim. The argument of inadmissibility of the experts evidence holds no water sans prohibition by any legal provision. That, the absence of the blood group of the appellant cannot be fatal to the Prosecution case and on this aspect strength was drawn from ***Kishore Bhadke*** vs. ***State of Maharashtra***[25]. Financial constraints of the appellant at the time of his elopement was the reason for the occurrence of the incident which finds support in the evidence of P.W.28 and P.W.34. The sale of the Alto by the appellant is duly proved

[23] AIR 1979 SC 400
[24] 2010 CRI.L.J. 299 (Orissa)
[25] AIR 2017 SC 279

by P.W.17, the purchaser and corroborated by the evidence of PWs 45, 25, 30, 34 who identified the appellant in the Court room. The evidence of P.W.16 lends credence to the fact that the appellant had stayed at his hotel in Ravangla duly supported by the evidence of P.W.13 and Exhibit 5. That, defective investigation is not fatal to the Prosecution case for which reliance was placed on ***Dhanaj Singh alias Shera and Others*** vs. ***State of Punjab***[26]. It was submitted that the entire materials on record and the circumstances relied on by the Prosecution have been proved beyond a reasonable doubt and the findings of the learned Trial Court do not suffer from any infirmity and hence, the Appeal deserves a dismissal.

5. We have heard at length the rival contentions of both parties. We have also carefully perused and considered the entire evidence, all other documents on record and the impugned Judgment and Order on Sentence. We have seen the citations placed at the Bar.

6. The questions that fall for consideration before this Court are –

(i) *Whether there were two FIRs in the instant matter which would thus vitiate the Prosecution case?*

(ii) *Whether the statement given by the appellant under Section 27 of the Evidence Act stands the test of legality?*

(iii) *Whether the circumstantial evidence furnished before the Court irrefutably links the offence to the appellant?*

7(i). While addressing the first question flagged, it would be beneficial to refer to the provisions of Section 154 of the Cr.P.C. which requires that every information relating to the commission of a cognizable offence whether given orally or otherwise to the Officer-in-Charge of a Police Station has to be reduced to writing by or under his direction and is to be signed by the informant. The substance of the information is to be entered in a book to be kept by such officer in the form prescribed by the State Government in this behalf. A copy of the information recorded under Section 154(1) Cr.P.C. is to be made over to the informant free of cost. If there is a refusal to record the information the complainant is necessarily to take steps as provided under Section 154(3) of the Cr.P.C. The principle object of the first

[26] (2004) 3 SCC 654

information report from the point of view of the informant is to set the criminal law in motion and that of the investigating authorities is to obtain information about the alleged crime so as to enable them to take steps to trace and bring the guilty to book. The question as to whether a particular document, in the instant matter, Exhibit 46, constitutes a first information is to be determined on the relevant facts and circumstances of the case. If the information was cryptic, its main object being to enable the police officer to reach the place of occurrence immediately, such information cannot be considered to be an FIR.

(ii) The object of Section 154 of the Cr.P.C. having been established, we may consider the relevant portion of the provisions of Section 174 of the Cr.P.C. which is extracted hereinbelow;

> **"174. Police to enquire and report on suicide, etc.–**(1) When the officer in charge of a police station or some other police officer specially empowered by the State Government in that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any), such marks appear to have been inflicted.

> (2) The report shall be signed by such police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub-divisional Magistrate.
>
> …….
>
> (3) When–
>
> …….
>
> (iv) there is any doubt regarding the cause of death; or
>
> (v) the police officer for any other reason considers it expedient so to do, he shall. subject to such rules as the State Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the State Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.
>
> (4) …….**"**

From a bare perusal of the afore-extracted provisions it emanates that an investigation under Section 174 of the Cr.P.C. is confined to the ascertainment of the apparent cause of death. It is concerned with discovering whether the death so caused was on account of an accident, was suicidal, homicidal or caused by an animal or in what manner or by what weapon or instrument the injuries on the body appear to be inflicted. In ***Radha Mohan Singh*** (*supra*), the Supreme Court while discussing the ambit and scope of Section 174 of the Cr.P.C. held as follows;

> **"15.** …… The object of the proceedings is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so, what is the apparent cause of the death.

> The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted is foreign to the ambit and scope of the proceedings under Section 174. Neither in practice, nor in law, was it necessary for the police to mention those details in the inquest report. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. Their omission is not sufficient to put the prosecution out of Court. …..…**"**

In ***Superintendent of Police, CBI and Others*** vs. ***Tapan Kumar Singh***[27] the Supreme Court while deciding whether the GD entry could be treated as an FIR in an appropriate case where it discloses the commission of cognizable offence *inter alia* held that;

> **"16.** The parties before us did not dispute the legal position that a GD entry may be treated as a first information report in an appropriate case, where it discloses the commission of a cognizable offence. If the contention of the appellants is upheld, the order of the High Court must be set aside because if there was in law a first information report disclosing the commission of a cognizable offence, the police had the power and jurisdiction to investigate, and in the process of investigation to conduct search and seizure. ……...……
>
> **20.** …….. An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eyewitness so as to be able to disclose in great detail all aspects of the offence committed. **What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a**

[27] (2003) 6 SCC 175

> **basis for the police officer to suspect the commission of a cognizable offence.** ……...…**"**
>
> [emphasis supplied]

In the same thread, the Supreme Court in ***Lalita Kumari*** vs. ***Government of Uttar Pradesh and Others***[28] held as follows;

> **"120.** …….....….
> ……..……..
>
> **120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.**
>
> **120.3.** If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.
>
> **120.4.** The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.
>
> ……..**"**
>
> [emphasis supplied]

(iii) On the anvil of the principles above, we may now examine whether Exhibit 46 gives information pertaining to a cognizable offence. The contents of Exhibit 46 essentially informs the police that a dead body had been sighted, soaked in blood, no other information or details are disclosed in Exhibit 46. On receipt of Exhibit 46, the place was visited and consequent thereto Exhibit 41, Inquest Report, dated 04-12-2014, was prepared, the body having been evacuated to Namchi District Hospital. Hue and cry

[28] (2014) 2 SCC 1

notices was sent to various Police Stations and Police Out-Posts for identification of the body. Pursuant to such notice, P.W.1 along with P.W.2 and P.W.3 reached the Namchi Hospital and identified the body as that of the victim, Rohit Shah. On such identification, Exhibit 1 was lodged by P.W.1. It thus emerges with clarity that on the lodging of Exhibit 46 the police had merely started inquest under Section 174 of the Cr.P.C. As already discussed, the scope of proceedings under Section 174 of the Cr.P.C. is limited, the object of it being merely to ascertain whether a person has died under the circumstances enumerated therein. Only on the lodging of Exhibit 1 did the incident pertaining to a cognizable offence come to light on the basis of which investigation commenced for an offence under Section 302 IPC. Exhibit 46 surely does not disclose a cognizable offence much less an offence under Section 302 of the IPC. Hence, the argument that Exhibit 1 is hit by the provisions of Section 162 of the Cr.P.C. having been made later in time than Exhibit 46 and thereby during the course of investigation cannot be countenanced. It may fittingly be pointed out that a second FIR in the same matter is not completely debarred by law but is to be considered in the facts and circumstance of each individual case. The Supreme Court in ***Nirmal Singh Kahlon*** vs. ***State of Punjab and Others***[29] considered a case where an FIR had been lodged on 14-06-2002 in respect of offences committed by individuals. Subsequently, the matter was handed over to the Central Bureau of Investigation (CBI), during the investigation of which huge amount of material was collected and statements of large number of persons recorded and the CBI came to the conclusion that a scam was involved in the selection process of Panchayat Secretaries. A second FIR was lodged by the CBI. The Supreme Court after appreciating the evidence, came to the conclusion that the matter investigated by CBI involved a larger conspiracy. Therefore, the investigation of the CBI had been made on a much wider canvass and the second FIR was found permissible and required to be investigated.

(iv) Related to this discussion is also the argument of learned Senior Counsel that the complainant Indra Lall Gurung who lodged Exhibit 46 was not examined. In ***Krishna Mochi*** (*supra*) the Supreme Court has observed as follows;

> **"35.** It has been further submitted that **the informant, Satendra Kumar Sharma has not been examined as such, the first information**

[29] (2009) 1 SCC 441

> **report cannot be used as a substantive piece of evidence inasmuch as on this ground as well the appellants are entitled to an order of acquittal. The submission is totally misconceived. Even if the first information report is not proved, it would not be a ground for acquittal, but the case would depend upon the evidence led by the prosecution. Therefore, non-examination of the informant cannot in any manner affect the prosecution case."**
>
> [emphasis supplied]

The ratio clears the air on non-examination of an informant. Besides, the evidence of the informant of Exhibit 46 is not vital to the Prosecution case nor does it negate it as steps were taken pursuant to Exhibit 46 and P.W.42 vouched for its contents.

8(i). The second question flagged for consideration is taken up next. Before embarking on a discussion, it is apposite to extract the provisions of Section 27 of the Evidence Act;

> **"27. How much of information received from accused may be proved**.%Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.**"**

Section 27 is by way of a proviso to Sections 25 and 26 of the Evidence Act, by which a statement made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. The conditions prescribed in Section 27 enabling admissibility of the statement of the accused made to the police are enumerated in ***Pulukuri Kottaya*** (*supra*) as follows;

> **"**[10]. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables

certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and there upon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused. ……..**"**

In ***Anter Singh*** (*supra*) while referring to the decision of ***Pulukuri Kottaya*** (*supra*) it was summed up as follows;

"16. The various requirements of the section can be summed up as follows:

(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in

consequence of some information received from the accused and not by the accused's own act.

(4) The person giving the information must be accused of any offence.

(5) He must be in the custody of a police officer.

(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.**"**

(ii) The phrase **"**distinctly relates to the fact discovered**"** in Section 27 of the Evidence Act is the pivotal aspect of the provision. This phrase refers to that part of the information supplied by the accused which is the driver and immediate cause of the discovery. If a fact is actually discovered in consequence of information given by the accused, its affords some guarantee of the truth of that part of the information which was the clear, immediate and proximate cause of the discovery. Bearing in mind the principles so enunciated, we now examine Exhibit 15 which is the disclosure statement of the appellant recorded under Section 27 of the Evidence Act by the I.O. of the case in the presence of two witnesses, P.W.14 and P.W.42. The appellant made several inculpatory statements and, *inter alia*, stated that **"***I can show you the place where I threw the rod***"**. Even if the evidence of P.W.14 fails to support the Prosecution case, P.W.42, also a witness to Exhibit 15, has stated that on 06-12-2014 the appellant in his presence made a disclosure statement before the Namchi Police confessing that he threw the iron rod with which he assaulted the deceased just above the place where the dead body was lying and that he could show the place where he had thrown the rod. His evidence remained undecimated in cross-examination. In our considered view, the evidence of P.W.42 does not deserve to be discarded as untrustworthy merely for the reason that it is not corroborated by P.W.14 when M.O.XX was infact recovered by the police from the place disclosed by the appellant and seized vide Exhibit 16. So far as P.W.14 is concerned it would be in the appropriateness of things to cut

him some slack considering the rural background and his perception of the disclosure statement. In this context, apposite reference may be made to ***Shivaji Sahabrao Bobade and Another*** vs. ***State of Maharashtra***[30] wherein the Supreme Court observed as follows;

> **"8.** Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered. ……."

(iii) The I.O. who recorded Exhibit 15 has deposed that the appellant had disclosed the whereabouts of M.O.XX, the weapon of offence. Considering that the I.O. is often termed as an interested witness there is restraint exercised by Courts to rely on the testimony of the I.O. However, the ratiocination in ***Modan Singh*** vs. ***State of Rajasthan***[31] dispels all such perplexity. The Supreme Court therein observed as follows;

> **"9.** The only other material on which the prosecution can connect the appellant with the crime is the recovery of the fired cartridge, Ex. 9 and the seizure of the pistol Ex. 8 and the deposition of the Ballistic expert, PW 9. It is found that the witnesses who have been examined for attesting the seizure have not supported the prosecution version. **On behalf of the defence it was submitted that the seizure witnesses were men of status in the**

[30] (1973) 2 SCC 793
[31] (1978) 4 SCC 435

> **village and their not supporting the recovery would be fatal to the prosecution. We would rather not place any reliance on the witnesses who attested the seizure memo. If the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version."**
>
> [emphasis supplied]

Similarly, in ***Mohd. Aslam*** vs. ***State of Maharashtra***[32] the Supreme Court held as follows;

> **"7.** Regarding A-1 Mohmed Aslam (@ Sheru Mohd. Hasan) the only evidence for possession of the forbidden lethal weapon is the testimony of PW 34 (Nagesh Shivdas Lohar, Assistant Commissioner of Police, CID Intelligence, Mumbai). **Learned counsel contended that two panch witnesses who were cited to support the recovery turned hostile and therefore the evidence of PW 34 became unsupported. We cannot agree with the said contention. If panch witnesses turned hostile, which happens very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated. Nor do we agree with the contention that his testimony is unsupported or uncorroborated. The very fact that PW 34 produced in the court lethal weapons recovered is a very formidable circumstance to support his evidence."**
>
> [emphasis supplied]

More recently, in ***State of Maharashtra vs Ramlal Devappa Rathod and Others***[33] the Supreme Court concluded that;

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[32] (2001) 9 SCC 362
[33] (2015) 15 SCC 77

> **"19.** It also requires to be noted that pursuant to the disclosure statements made by A-1 Ramlal, A-2 Ramchandra, A-3 Limbaji, A-29 Shivaji and A-30 Pandit, certain weapons with bloodstains were recovered immediately on the day after the incident. **The aforesaid recoveries have been doubted by the trial court inasmuch as the independent panchas had not supported the prosecution case. However, PW 18 Pratap Kisan Pawar in his testimony deposed that such recoveries were made pursuant to the disclosure statements of the accused.** It has been laid down by this Court in *Mohd. Aslam* v. *State of Maharashtra* [(2001) 9 SCC 362 : 2002 SCC (Cri) 1024] and *Anter Singh* v. *State of Rajasthan* [(2004) 10 SCC 657 : 2005 SCC (Cri) 597] **that the recoveries need not always be proved through the deposition of the panchas and can be supported through the testimony of the investigating officer. The fact that the recoveries were made soon after the incident is again a relevant circumstance and we accept that the recoveries can be considered against the respondents as one more circumstance."**
>
> [emphasis supplied]

(iv) In the light of the aforestated pronouncements applied in the premise of the instant case, it is clear that the evidence of P.W.42 not only fortifies the stand of P.W.49, the I.O., but is vindicated by the recovery of M.O.XX from the place as disclosed by the appellant. Although learned Senior Counsel for the appellant relied on ***Damber Bahadur Chhetri*** vs. ***State of Sikkim***[34] wherein it was held that recovery of blood stained clothes from the house of the appellant and the shoes belonging to the deceased on the basis of confessional statement to the police was of no assistance to the Prosecution case as it did not link the crime to the appellant, the instant matter is clearly distinguishable from the ratio *supra*. In the instant case the place where recovery of M.O.XX was made was from a village thereby a

[34] 2010 CRI.L.J. 3076 (Sikkim)

rural setting, frequented only by cowherds grazing their cattle and M.O.XX was found inside the bushes not from an open space or the road side. It may relevantly be noticed that P.W.14 too admitted that on reaching the spot they searched for M.O.XX on the spot stated by the appellant and on such directions it was recovered by a police personnel. Besides, the statement of the appellant, ***"****I can show you the place where I threw the rod****"*** is undisputedly admissible in evidence. Hence, the contents of Exhibit 15 insofar as it relates to the discovery is admissible in evidence. This Court of course disregards and discards the inculpatory statements made in it.

9(i). The final question that requires determination is whether the circumstantial evidence furnished before the Court irrefutably links the offence to the appellant. Undisputedly, the entire case of the Prosecution is based on circumstantial evidence. The five golden principles that constitute proof of a case based on circumstantial evidence has been elucidated in ***Sharad Birdhichand Sarda*** vs. ***State of Maharashtra***[35] extracted here in below;

> **"153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> *(1)* the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* [(1973) 2 SCC 793] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]
>
> "Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance

[35] (1984) 4 SCC 116

between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(*2*) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(*3*) the circumstances should be of a conclusive nature and tendency,

(*4*) they should exclude every possible hypothesis except the one to be proved, and

(*5*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.**"**

(ii) On the touchstone of these principles, we now proceed to examine whether the circumstances link the offence to the appellant with the chain of evidence being complete so as not to raise any doubts that the appellant was the perpetrator. Conversely we also seek to examine whether the evidence militates against the probability of the Prosecution case. In this context, the Prosecution had advanced the argument of last seen together theory which is invoked as a facet of circumstantial evidence. In ***Satpal*** vs. ***State of Haryana***[36], the Supreme Court observed as follows;

"6. We have considered the respective submissions and the evidence on record. There is no eyewitness to the occurrence but only circumstances coupled with the fact of the deceased having been last seen with the appellant. **Criminal jurisprudence and the plethora of judicial precedents leave little room**

[36] (2018) 6 SCC 610

for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine."

[emphasis supplied]

(iii) The worth and utility of the last seen together theory has therefore been expounded *supra*. The evidence of P.W.31 the father of the victim establishes that the appellant had come to his house on the relevant day looking for the victim. P.W.31 requested his wife P.W.33 to call the victim and later that evening the appellant and the victim left in his "Alto", bearing registration No.SK 01 PA 4083. The fact that the appellant and the victim had left together in the Alto stood the test of cross-examination and was duly corroborated by the evidence of P.W.33, the mother of the victim, who also stated that the victim left the place along with the appellant on the concerned evening. Thus, it obtains that P.W.31 and P.W.33 had both seen the appellant accompanying the victim in his Alto. As providence would have it, that night their son did not return. It was argued that the last seen theory

is not tenable by learned Senior Counsel by placing reliance on ***Kharga Bahadur Pradhan*** (*supra*) but the facts in the instant matter are clearly distinguishable. The appellant was not only seen together with the victim for the last time by P.W.33 on 02-12-2014 but suddenly the appellant came to be in possession of the Alto vehicle which belonged to the deceased and he continued to be in its possession till he sold it at Ravangla as substantiated by the evidence of PWs 13, 17, 45, 15, 25, 30 and 34. Neither P.W.31 nor P.W.33 had any reason to falsely implicate the appellant nor was any shown by the appellant.

(iv) Another mysterious circumstance which emerges is why the appellant had informed P.W.32 that her husband was already asleep on 02-12-2014 when she had rung up the victim and why on 03-12-2014 he had again told her that the victim and himself were at Hong Kong market. When this circumstance is factored in with the other circumstances it is clear that the appellant after doing away with the victim was making unsuccessful attempts to cover his tracks. The Prosecution case also finds support from the fact that the house of P.W.13 is located near the place where the body of the victim was recovered.

(v) The possession of the vehicle with the appellant is conceivably the most important link in the chain that binds the appellant to the crime. P.W.13 stated that on 02-12-2014 the appellant came to her house in an Alto vehicle to pick her up. She took her infant son along. The appellant booked all of them into a hotel in Ravangla, South Sikkim, where they spent two days and two nights. While at Ravangla the appellant sold the Alto and brought her to a place called Tingley to the house of P.W.19, his relative. The police came in pursuit and brought them to the Namchi Police Station the next day. P.W.19 and P.W.22 corroborated the evidence of P.W.13 concerning their arrival in the house of the witnesses. Both witnesses added that the same night police personnel came looking for the appellant who meanwhile on sighting them had fled from the witnesses home. As per P.W.19, the victim was apprehended from Lamaten village the following day. The appellants conduct of fleeing points an unflinching needle of suspicion towards him for obvious reasons.

(vi) P.W.17, a mechanic who was working in a garage at Ralang road, Ravangla corroborated the appellants possession of the Alto, M.O.XXVII.

According to him, the appellant approached and told him that his vehicle had broken down *en route* to Ravangla. P.W.17 accompanied the appellant to the spot of the breakdown and after partial repairs brought the vehicle to the workshop which was left there by the appellant, for the night. The following morning as the appellant had no money to pay for the repairing charges he sought to sell the vehicle, which P.W.17 agreed to purchase for a sum of Rs.50,000/- (Rupees fifty thousand) only, towards which he paid Rs.20,000/- (Rupees twenty thousand) only, vide Exhibit 20, the sale document prepared by P.W.45. This document was vehemently objected to by learned Senior Counsel contending that the signature of the appellant was obtained in violation to the provisions of Section 311A of the Cr.P.C. We have given due consideration to this argument and it is apparent that the I.O. has failed to abide by the mandate of the said Statute, hence this document is being disregarded as evidence. Notwithstanding non-consideration of this document, the fact of possession of the vehicle by the appellant cannot be wished away since the evidence of P.W.17 is duly supported by the evidence of not only P.W.13 but also P.W.25 who stated that P.W.17 requested him to be a witness to the transaction of the sale of the Alto which was being sold to him by the appellant. P.W.45, the owner of the garage substantiated the agreement made between the appellant and P.W.17 with regard to the transaction, having identified the appellant as the person who had sold the vehicle. P.W.34 was called by the appellant to Ravangla to witness the transaction. P.W.30 also corroborated the evidence of the witnesses *supra* with regard to the transaction and that the vehicle reportedly belonged to the appellant present in the garage. The evidence of these witnesses established that the appellant was in possession of the vehicle M.O.XXVII which concededly did not belong to him, duly proved by its handing over to P.W.31 vide Exhibit 25. The appellant for his part has failed to throw light as to how he came to be in possession of the vehicle sans the victim.

(vii) Pertinently, we may now look at the provisions of Section 106 of the Evidence Act which provides as follows;

> **"106. Burden of proving fact especially within knowledge**."When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.**"**

This provision is an exception to the general rule laid down in Section 101 of the Evidence Act which lays down that the burden of proving a fact rests on the party who asserts the affirmative of the issue. We hasten to add that Section 106 is of course not intended to relieve the Prosecution of the burden cast on it by Section 101, it merely means that where the subject matter of the allegation lies peculiarly within the knowledge of the accused, he must prove it. It cannot apply when the fact is such as is capable of being known to any person other than the accused. It is apparent that the appellant has failed to discharge the burden cast on him by this provision with regard to the possession of the vehicle and M.O.XX and the disappearance of the victim.

(viii) The presence of the appellant in "Sarita hotel" is established by the oral evidence of P.W.16, the person who was running the hotel. It may be remarked that Exhibit 5 is a rather deficient documentary proof furnished by the Prosecution to establish the occupation of the hotel room by the appellant and P.W.13 and deserves to be discarded. In the same thread we deem it essential to disregard Exhibit 22, copy of the vehicle movement register, for the reasons pointed out by learned Senior Counsel for the appellant *supra*. The Pen Drive, M.O.XXIV and M.O.XI, the CD, relied on by the Prosecution meets the same fate as legal provisions mandated by Section 65B of the Evidence Act have been flouted. However, we reiterate with emphasis that it is now settled law that poor investigation ought not to be allowed to obliterate the Prosecution case when evidence points unerringly and cogently to the guilt of the accused. The Supreme Court in ***Jai Prakash*** vs. ***State of Uttar Pradesh***[37] in this context opined as follows;

> **"23.** ..... It is well-settled that any omission on the part of the Investigating Officer cannot go against the prosecution case. If the Investigating Officer has deliberately omitted to do what he ought to have done in the interest of justice, it means that such acts or omissions of Investigating Officer should not be taken in favour of the accused. ....."

In ***Karnel Singh*** vs. ***State of M.P.***[38] the Supreme Court observed as follows;

[37] 2019 SCC OnLine SC 1525
[38] (1995) 5 SCC 518

> **"5.** Notwithstanding our unhappiness regarding the nature of investigation, we have to consider whether the evidence on record, even on strict scrutiny, establishes the guilt. In cases of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. Any investigating officer, in fairness to the prosecutrix as well as the accused, would have recorded the statements of the two witnesses and would have drawn up a proper seizure-memo in regard to the „chaddi. That is the reason why we have said that the investigation was slipshod and defective.**"**

In ***State of Karnataka*** vs. ***Suvarnamma and Another***[39] the Supreme Court observed as follows;

> **"18.** ..... (*ii*) Mere lapse of investigating agency could not be enough to throw out overwhelming evidence clearly establishing the case of the prosecution. ....."

(ix) The presence of P.W.35 the Scientific Officer at the place of occurrence was decried vehemently by learned Senior Counsel for the appellant for reasons stated *supra*. In ***Modi, A Textbook of Medical Jurisprudence and Toxicology***, 24th Edition 2013, it is recorded as follows;

> **"CHAPTER 2 LEGAL PROCEDURE IN CRIMINAL COURTS Crl.A. No.25 of 2017** 34 **Bimal Subba alias Bijay Subba** vs. **State of Sikkim**
>
> .....
>
> DIFFICULTIES IN DETECTION OF CRIME
>
> .....

[39] (2015) 1 SCC 323

> Visiting the scene of crime might help the doctor doing the autopsy in getting a better idea of how the injuries could have occurred. Evidence of signs of struggle at the scene of a crime needs to be correlated with the injuries that might have occurred due to a struggle. ……..
>
> ……..
>
> The advantages of calling the medical expert in the same way as the police calls the forensic science personnel, need not be over emphasized. Visits to the scene should, as far as possible, be arranged before disturbing the scene. ……. ……..**"**

This, in our considered opinion, ought to dispel any doubts harboured by the appellant with regard to the presence of the expert at the scene of crime. It goes without saying that no legal provision was set forth by the appellant to augment his contention, which in any event has no legs to stand.

(x) Another important circumstance which rears its head and points to the appellant as the perpetrator of the offence are the blood stains found on his clothings worn on the relevant day. Although denied by learned Senior Counsel for the appellant, while addressing this concern, we may relevantly look into Exhibit 30, the RFSL Report and the evidence of P.W.35. The appellants articles of clothing were seized and forwarded for scientific analysis. The clothes were identified as follows;

(i) One red coloured T-shirt marked as Exhibit BIO-112(B1) in the laboratory, i.e., M.O.XXI; and

(ii) One dark greenish blue jeans trousers marked as BIO-112(B2), i.e., M.O.XXII.

The said articles of clothing tested positive for the blood group 'B'. M.O.XX, the weapon of offence, also contained blood of the group 'B'. Blood group 'B' without a doubt was that of the deceased as the sample of the victim s blood marked as BIO-112(D), i.e., M.O.XXIX, was examined

by P.W.35 and stands sentinel to this aspect of the Prosecution case. The contention of learned Senior Counsel that the iron rod, M.O.XX bears no blood is evidently an erroneous submission made without considering the evidence of P.W.35 and the RFSL report, Exhibit 30. P.W.33, mother of the victim has stated that when the appellant had come to her shop-cum-tea stall at Naya Bazar, West Sikkim, on the morning of 02-12-2014, he had a rod with him which he took along with him when he left the shop. A Test Identification Parade for M.O.XX was conducted by the learned Judicial Magistrate, West District, at Gyalshing, wherein P.W.33 identified the iron rod M.O.XX as being the same one she had seen in the possession of the appellant. Despite incisive cross-examination, her evidence stood undemolished. Merely because P.W.33 is the mother of the victim her evidence cannot be discredited by labeling her as an interested witness when she is otherwise a trustworthy witness. Hence, the recovery of M.O.XX at the place of occurrence, the blood stains on it of the blood group „B identified as that of the victim and the identification of M.O.XX as the one in the appellants possession by P.W.33 lends unqualified credence to the Prosecution case. The pieces of the bark of the tree M.O.VIIA (collectively) collected from the place of occurrence, examined by P.W.35 also revealed the presence of human blood of the blood group „B. On perusal of M.O.XXVI, 21 photographs of the dead body, it is clear that the victim was battered on his face with M.O.XX which evidently led to the blood splattering on the nearby tree. In ***Kishore Bhadke*** (*supra*) it was held as follows;

> **"24.** It was then contended that the circumstance of bloodstained clothes recovered at the instance of accused No.3 was questionable because no evidence regarding the blood group or the fact that the blood stains belonged to the blood group of deceased Raman is forthcoming. Further, the recovery itself was doubtful. Even this aspect has been considered by both the courts below and negatived. The absence of evidence regarding blood group cannot be fatal to the prosecution. The finding recorded by the courts below about the presence of human blood on the clothes recovered at the instance of accused No.3 has not been questioned. The Courts have also found that no explanation was

> offered by the accused No.3 in respect of presence of human blood on his clothes. Accordingly, we affirm the concurrent finding recorded by the courts below in that behalf including about the legality of such recovery at the instance of accused No.3.**"**

In the case at hand the blood group of the victim has been identified as „B and were found on M.O.XX, M.O.XXI, M.O.XXII and M.O.VIIA (collectively) thereby clinching the Prosecution case against the appellant.

(xi) An extended argument had ensued between the parties with regard to the time of death of the victim in view of contradictory documentary evidence. The point that was sought to be driven home by the appellant was that the error in the Inquest Report was writ large and pales into insignificance in the light of the Doctors expert opinion, which establishes that the death occurred around 06-12-2014. Consequently, the death of the victim could not be foisted on the appellant as it was too far in time when the victim was allegedly last seen together with the appellant. We have to differ with the submissions of the learned Senior Counsel on this point as all other evidence points to the death of the victim somewhere between 02-12-2014 and before 9 a.m. on 03-12-2014, his body having been discovered on 03-12-2014 at 10 a.m. It may relevantly be noted that in cross-examination the confusion pertaining to the time of death of the victim as reflected in Exhibit 42 was never put to the witness and for this reason also it cannot be raised for the first time in Appeal.

(xii) We also notice that there are two requests for Post-Mortem examination, both marked Exhibit 43. One is dated 04-12-2014, under Namchi P.S. U.D. Case FIR No.23/14, dated 03-12-2014 and, the second one is dated 07-12-2014, in Namchi P.S. Case FIR No.149/14, dated 05-12-2014, for the same victim. The request for Post-Mortem in the two different cases were made on two separate dates, but the body however was forwarded for autopsy only on 07-12-2014. The Doctor, P.W.42 has recorded that the brief history as per inquest papers as follows; **"**As per inquest, the deceased was found lying death (*sic*) as Samdong village, South Sikkim on **5/12/14**.**"**

This is erroneous. Exhibit 41 and Exhibit 45, both Inquest Forms reflect that the body was found on **03-12-2014**. It thus culminates that

Exhibit 42 is egregious to say the least, prepared without application of mind by P.W.43. The Report, Exhibit 42, thereby deserves no consideration whatsoever by this Court. While discussing expert evidence, the Supreme Court in ***Dayal Singh and Others*** vs. ***State of Uttaranchal***[40] observed as follows;

> **"40.** We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion. Such report is not binding upon the court. The court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. Just to illustrate this point of view, in a given case, there may be two diametrically contradictory opinions of handwriting experts and both the opinions may be well reasoned. In such case, the court has to critically examine the basis, reasoning, approach and experience of the expert to come to a conclusion as to which of the two reports can be safely relied upon by the court. The assistance and value of expert opinion is indisputable, but there can be reports which are, ex facie, incorrect or deliberately so distorted as to render the entire prosecution case unbelievable. But if such eyewitnesses and other prosecution evidence are trustworthy, have credence and are consistent with the eye-version given by the eyewitnesses, the court will be well within its jurisdiction to discard the expert opinion. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the court. A complete contradiction or inconsistency between the medical evidence and the ocular evidence on the one hand and the statement of the prosecution witnesses between themselves on the other, may result in seriously denting the case of the prosecution in its entirety but not otherwise.**"**

[40] (2012) 8 SCC 263

In the same vein, it may be stated that as far back as in 1960 the Supreme Court in ***Anant Chintaman Lagu*** vs. ***The State of Bombay***[41] held as follows;

> **"(68)** ..... To rely upon the findings of the medical man who conducted the post-mortem and of the chemical analyser as decisive of the matter is to render the other evidence entirely fruitless. While the circumstances often speak with unerring certainty, the autopsy and the chemical analysis taken by themselves may be most misleading. No doubt, due weight must be given to the negative findings at such examinations. But, bearing in mind the difficult task which the man of medicine performs and the limitations under which he works, his failure should not be taken as the end of the case, for on good and probative circumstances, an irresistible inference of guilt can be drawn.**"**

In ***Solanki Chimanbhai Ukabhai*** vs. ***State of Gujarat***[42] the Supreme Court observed as follows;

> **"13.** Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence.**"**

In ***Ram Swaroop and Others*** vs. ***State of U.P.***[43] the Supreme Court *inter alia* observed that the doctor can never be absolutely certain

[41] AIR 1960 SC 500
[42] (1983) 2 SCC 174
[43] (2000) 2 SCC 461

on the point of time so far as duration of injuries is concerned where a deceased died due to gunshot injuries and PWs sustained injuries on being assaulted. It thus concludes that it is not necessary to accept Exhibit 42 as the gospel truth fraught as it is with anomalies as already discussed. ***(xiii)*** The argument of the appellant that the existence of two Inquest Reports by itself vitiates the Prosecution case, does not stand to reason as Exhibit 41 the first Inquest Form is based on the report Exhibit 46 dated 03-12-2014 and bears "FIR/UD No.23/14" dated 04-12-2014. The second Inquest Form Exhibit 45 is based on Exhibit 1 registered as FIR No.149/14 dated 05-12-2014

(xiv) The argument that the injuries described in Exhibit 41 and Exhibit 45 bears no semblance to those in Exhibit 42 are not borne out by the documents. In the Inquest Report Exhibit 41 the injuries *inter alia* recorded are;

> *Head : Two cut injuries measuring 4" x 2" just above the left ear.*
>
> *Face : One punctured wound on the left temple region near the left eye, two cut injuries measuring 1½" each on the right temple region and above the left eyebrow.*
>
> *Right hand : Lacerated wound on right elbow.*

Exhibit 45 is a word to word copy of Exhibit 41 excluding the date which is shown as 04-12-2014 in Exhibit 41 and 05-12-2014 in Exhibit 45 as also different case numbers, which have been formerly explained *supra*. The Post-Mortem Report is Exhibit 42 which records the injuries as follows;

> *(1) Lacerated wound on the right parietal region of scalp - 4 x 3 cm in size bony deep.*
>
> *(2) Multiple puncture wound on the left and right temporal bone of skull measuring 0.1 x 0.1 cms muscle deep.*
>
> *(3) Fracture of left parietal bone of skull.*

It may be explained here that the parietal region is the region between the temple and the occipital scalp. On perusal of the wounds recorded on Exhibit 41, Exhibit 45 and Exhibit 42 no major differences emerge, the only difference being that the injury as recorded in Exhibit 41 and Exhibit 45 are a laymans version, having been recorded by a police personnel, while Exhibit 42 being that of P.W.43 contains medical jargon. Hence, this soundly addresses the apprehension raised by learned Senior Counsel for the appellant with regard to the discrepancies in the injuries mentioned in the Exhibits *supra*.

(xv) The alleged overwriting in Exhibit 1, the FIR, dated 05-12-2014, have been carefully examined by us and we find that the overwritings do not prejudice the Prosecution case at all as these are indications of human error and nothing else. The missing FIR of the Naya Bazar Police Station devoid in the records of this case is another instance of slipshod investigation, but can have no negative repercussions on the Prosecution case, which is based on Exhibit 1 the FIR. Another contentious point raised was the delay in forwarding of the FIR to the learned Magistrate. On perusal of the formal FIR, Exhibit 2, it is clearly recorded therein that the date of dispatch to the Court from the Police Station is 05-12-2014. The learned Magistrate has "seen" the document on 08-12-2014 and hence, the Prosecution cannot be held at ransom in this context. The non-matching of the hair samples collected from the vehicle with that of P.W.13 or the appellant is inconsequential to the Prosecution case. The role of the alleged two other occupants of M.O.XXVII have not been seriously contested by the appellant. During the cross-examination of the I.O. the response elicited in this context was that she had conducted investigation into their role. The evidence on record, reveals that the entire incident had its genesis in the appellant seeking to elope with P.W.13, sans material means, leading to the unfortunate death of the victim in order to fulfil the desires of the appellant.

10. It, therefore, concludes from the evidence on record and the discussions which have ensued hereinabove that the chain of circumstantial evidence is complete and leaves no ground to conclude that the appellant is innocent. It is established beyond a reasonable doubt that in all human probability the act was done by the appellant, the circumstantial evidence being of a conclusive nature.

11. We find no reason to interfere with the findings of the learned Trial Court.

12. Consequently, the Appeal fails and is dismissed.

13. No order as to costs.

14. Copy of this Judgment be sent to the Learned Trial Court along with Records of the Court.

SLR (2020) SIKKIM 458

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

Crl. A. No. 1 of 2018

Chandra Bahadur Rai and Another ….. APPELLANTS

Versus

State of Sikkim ….. RESPONDENT

For the Appellants: Mr. N. Rai, Senior Advocate.

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

With

Crl. A. No. 6 of 2018

Arun Rai ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Ms Gita Bista, Legal Aid Counsel.

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

Crl. A. No. 7 of 2018

Tshering Thendup Bhutia ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Ms Puja Lamichaney, Legal Aid Counsel.

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

Date of decision: 26th June 2020

A. Indian Evidence Act, 1872 – Courtroom Identification of Accused Persons – Necessity – There is no dock identification of any of the appellants by the victim – The victim's father 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 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 – 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.

(Para 7)

B. Protection of Children from Sexual Offences Act, 2012 – S. 2 (d) – Proof of Age – In a prosecution under the POCSO Act, the establishment of the age of the victim is crucial – It must be proved by cogent evidence that the victim was in fact a child as defined in S. 2(d) – 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.

(Para 9)

C. Indian Evidence Act, 1872 – Appreciation of Statements of Child Victims – 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.

(Para 16)

D. Protection of Children from Sexual Offences Act, 2012 – S. 29 – Presumption as to Certain Offences – When the deposition of the victim remained intact, S. 29 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.

(Para 20)

Criminal Appeal No. 01 of 2018 and 07 of 2018 are partly allowed.
Criminal Appeal No. 06 of 2018 is allowed.

Chronology of cases cited:

1. Bansi Lal and Another v. State of Jammu & Kashmir, 1999 Cri.L.J. 114.
2. Lall Bahadur Kami v. State of Sikkim, SLR (2017) SIKKIM 585.
3. Anish Rai v. State of Sikkim, SLR (2018) SIKKIM 889.
4. Mangala Mishra @ Dawa Tamang @ Jack v. State of Sikkim, SLR (2018) SIKKIM 1373.
5. State of Rajasthan v. Bhanwar Singh, (2004) 13 SCC 147.
6. Birad Mal Singhvi v. Anand Purohit, AIR 1988 SC 179.
7. Mahadeo S/o Kerba Maske v. State of Maharashtra and Another, (2013) 14 SCC 637.
8. Madan Mohan Singh and Others, v. Rajni Kant and Another, AIR 2010 SC 2933.
9. Sunil v. State of Haryana, (2010) 1 SCC 742.
10. Smt. Renu Meena v. State of Sikkim and Others, SLR (2019) SIKKIM 622.
11. Taraman Kami v. State of Sikkim, SLR 2017 SIKKIM 781.
12. Naval Kishore Singh v. State of Bihar, (2004) 7 SCC 502.

13. State of Punjab v. Gurmit Singh and Others, (1996) 2 SCC 384.

14. Hem Raj S/o Moti Ram v. State of Haryana, (2014) 2 SCC 395.

15. Rameshwar S/o Kalyan Singh v. State of Rajasthan, AIR (39) 1952 SC 54.

16. Vijender v. State of Delhi, (1997) 6 SCC 171.

JUDGMENT

The judgment of the Court was delivered by ***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, Chandra Bahadur Rai & Another vs. State of Sikkim, Arun Rai vs. State of Sikkim & Tshering Thendup Bhutia vs. State of Sikkim 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]***, 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].

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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
[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

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 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 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

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

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 Aamais (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 papas 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

[15] AIR (39) 1952 SC 54

> but that is a question of fact in every case. The only rule of law is that this rule of prudence must be 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

[16] (1997) 6 SCC 171

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:

> **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.

SLR (2020) SIKKIM 482

(Before Hon'ble the Chief Justice)

CRP No. 01 of 2019

Smt. Shanti Subba and Others ….. PETITIONERS

Versus

Shri Jashang Subba ….. RESPONDENT

For the Petitioners: Mr. Zangpo Sherpa and Ms. Mon Maya Subba, Advocates.

For the Respondent: Mr. N. Rai, Senior Advocate.

Date of decision: 26th June 2020

A. Code of Civil Procedure, 1908 – O. VII, R. 11 – Rejection of Plaint – Rejection of the plaint under Order VII Rule 11 is a drastic power conferred in the Court to terminate a civil action at the threshold. It is only if the averments in the plaint *ex facie* do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law, the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial. Averments in the plaint will have to be read as a whole and the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial – At the time of consideration of application under Order VII Rule 11, the Court is not required to go into the question as to whether the suit suffers from the defect of non-joinder of a necessary party – The averments made in the application under Order VII Rule 11 read with S. 151 CPC by defendant No. 2 that he executed the Gift Deed being the Karta cannot be taken into consideration at this stage – Reading the plaint as a whole, it discloses a cause of action.

(Paras 18 and 19)

Petition dismissed.

Chronology of cases cited:

1. Bhargavi Constructions and Another v. Kothakapu Muthyam Reddy and Others, (2018) 13 SCC 480
2. R. Kuppayee and Another v. Raja Gounder, (2004) 1 SCC 295.
3. Hanumantappa v. Bhimawwa and Another, AIR 2006 Karnataka 148.
4. Bhau Ram v. Janak Singh and Others, (2012) 8 SCC 701.
5. P.V. Guru Raj Reddy and Another v. P. Neeradha Reddy and Others, (2015) 8 SCC 331.
6. SNP Shipping Services Pvt. Ltd. and Others v. World Tanker Carrier Corporation and Another, AIR 2000 Bombay 34.
7. Madhyam Vargiya Grih Nirman Sahakari Sanstha v. Vasantrao and Another, AIR 1988 Madhya Pradesh 94.

JUDGMENT

Arup Kumar Goswami, CJ

Heard Mr. Zangpo Sherpa, learned counsel appearing for the petitioners and Mr. N. Rai, learned Senior Counsel appearing for the respondent.

2. This Revision Petition under Section 115 read with Section 151 of the Code of Civil Procedure, 1908 (for short, "CPC") is filed challenging the impugned order dated 11.03.2019 passed by the learned District Judge, East Sikkim at Gangtok rejecting three applications – one by petitioner no. 1 (defendant no.1), another by petitioner no. 2 (defendant no.2) and the third one, which is a joint application by petitioner nos. 3, 4 and 5 (defendant nos.3, 4 and5), filed under Order VII Rule 11 read with Section 151 CPC.

3. At the very outset, it will be appropriate to note that Mr. Sherpa has relied on the application of petitioner no. 2, who is the father of petitioner nos. 1, 3, 4, 5 and the respondent.

4. The respondent (plaintiff) herein had filed the suit for declaration, recovery of possession, injunction and other consequential reliefs. The case

of the plaintiff, as stated in the plaint, in short, is that according to the Survey Operation of 1979-80, plot nos. 212, 213, 216, 217, 218, 219 and 220 measuring 2.8666 Hectors at Tumlabong Block, Rumtek Circle at East Sikkim was recorded in the name of late Yakha Limboo, who is the grandfather of the plaintiff, being the father of defendant no.2. The aforesaid plots of land were mutated in the name of defendant no.2. The plaintiff came to learn that defendant no. 1, in connivance with defendant nos.2 to 5 had illegally obtained Parcha Khatian No. 105, bearing plot no. 216/474 measuring 0.0149 Hectors, which is the suit property, on the basis of Gift Deed dated 17.11.2017 and 27.11.2017. It is pleaded that the signature of the plaintiff in No Objection Certificate (NOC) dated 26.12.2017, which also contained the signatures of defendant nos.3 to 5, was forged by defendant no.1 and though in that connection the plaintiff had lodged a First Information Report (FIR) before the Station House Officer, Ranipool Police Station, the same having not been registered, a private complaint was filed which was registered as Private Complaint Case No. 11/2018 in the Court of learned Judicial Magistrate, First Class, East Sikkim at Gangtok. Subsequently, in view of order dated 22.05.2018 passed by the learned Magistrate, Ranipool Police Station Case No. 21/18 was registered under Sections 420, 468, 471/34 IPC against defendant no.1 and her husband. On an application for mutation of the suit property being filed by defendant no.1 and a notice having been issued to the plaintiff, the plaintiff had lodged objection, whereupon the Sub-Divisional Magistrate by an order dated 05.05.2018 directed the parties to approach the Civil Court for redressal. It is also pleaded that defendant no.1 and her husband, being Government employees, though not entitled to any benefit under Chief Minister's Rural Housing Mission Scheme, which is meant for people who are homeless and who are below the poverty line, had obtained benefit.

5. The prayers made by the plaintiff read as follows:

> **"**a. A decree for declaration declaring that the suit land is the ancestral property of the plaintiff.
>
> b. A decree for recovery of possession of the suit land.
>
> b. A decree for cancellation of the allotment of the house under the Chief Minister's Rural Housing Mission (CMRHM) Scheme in the name of the defendant No.1.

c. Decree for De-registration of the Gift deed dated 17.12.2017 and 27.12.2017 from the name of Shanti Subba, Defendant No.1 and restore the same in the name of Defendant No.2.

d. Decree for Demolition of the under construction house being illegally constructed upon the suit land.

e. A decree declaring that the suit property is an unpartitioned ancestral property of the legal heirs of late Yakha Limboo.

f. An order for ad-interim and temporary injunction in favour of the Plaintiff restraining the Defendants, their men, their agents and assigns from disturbing and interfering in peaceful passion and enjoyment of the suit land.

g. A permanent injunction in terms of the prayer f. above.

h. Cost of this suit and

i. Any relief or reliefs as this Hon'ble Court may deem fit in the circumstances of the matter.**"**

6. In the application of defendant no.2 under Order VII Rule 11 read with Section 151 CPC, it is stated that in the year 2017 he had decided to give a portion of land measuring "40/40'" (0.0149 Hectors) out of plot no. 216 by way of gift to defendant no.1, as she was taking his care and that such decision was approved by defendant nos. 3, 4, 5 and the plaintiff. It is stated that the Gift Deed was duly registered on 27.11.2017 after following due process of law. It is stated that defendant no.2 being the father (karta) can make a gift of ancestral property to a reasonable extent in favour of daughter (defendant no.1) and the Gift Deed conveys only a small portion of ancestral property. It is stated that there was no partition of the ancestral property.

7. Order VII Rule 11 CPC reads as follows:

"11. **Rejection of plaint**.- The plaint shall be rejected in the following cases: -

(a) where it does not disclose a cause of action; 5

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9;

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.**"**

8. It appears from the application filed by defendant no. 2 under Order VII Rule 11 CPC read with Section 151 CPC that prayer for rejection of the plaint was made on the grounds that there was no cause of action (Paragraph 14) and that the plaint is barred by law (Paragraph 15). Objections to the applications were filed by the plaintiff. In the objection to the application of defendant no.2, it was contended that the family is not a Hindu Undivided Family and that the defendant no.1 had been given the creamy property.

9. Learned trial Court had held that the facts as mentioned by the defendants in their applications cannot be looked into while deciding an application under Order VII Rule 11 CPC, as the plaint and the documents filed along with the plaint are only to be looked into while considering such applications. The trial Court, on the basis of the pleadings in the plaint, held that there was cause of action. It was observed that whether defendant no.2 could gift a portion of his ancestral property only to his daughter is a question to be decided in the trial of the suit.

10. With regard to the other plea that the suit is barred by law, the learned trial Court observed that the defendants had not elaborated as to

why the plaint is barred by law. It was, however, observed that the suit was filed well within the period of limitation. Accordingly, it was held that the plaintiff cannot be non-suited at the threshold and resultantly, the applications under Order VII Rule 11 read with Section 151 CPC were rejected.

11. Mr. Sherpa has submitted that in *Bhargavi Constructions and another vs. Kothakapu Muthyam Reddy and others*, reported in *(2018) 13 SCC 480*, the Hon'ble Supreme Court had approved the decisions of Allahabad, Gujarat, Bombay and Jharkhand High Courts that the expression "law" finding place in Rule 11 (d) of Order VII CPC includes law declared by the Hon'ble Supreme Court. He has submitted that the gifted property constitutes a small percentage of total ancestral property and though the case of *R. Kuppayee and another vs. Raja Gounder*, reported in *(2004) 1 SCC 295*, was pressed into service to buttress the point that a father can make a gift of ancestral immovable property within reasonable limits in favour of his daughter at the time of her marriage or even long after her marriage, the decision was not considered. Learned counsel submits that the suit property being a very small portion in comparison to the total ancestral property, in view of the law declared by the Hon'ble Supreme Court, the suit was clearly barred by law.

12. Placing reliance in the case of *Hanumantappa vs. Bhimawwa and another*, reported in *AIR 2006 Karnataka 148*, he submits that as the defendant no.2 had admitted the execution of the Gift Deed, there is no necessity of examination of attesting witnesses. It is submitted by him that question of cancellation of allotment of the house in the name of defendant no. 1 under the Chief Minister's Rural Housing Mission Scheme cannot be gone into in absence of necessary parties. He submits that averments made in the plaint do not disclose any cause of action also. Accordingly, it is contended by him that the impugned order cannot be sustained in law and the plaint is liable to be rejected.

13. Mr. N. Rai, learned Senior Counsel appearing for the respondent submits that while considering an application under Order VII Rule 11 CPC, the Court has to consider the averments made in the plaint and the documents relied upon in the plaint and the statements made and the factual matrix presented in the application under Order VII Rule 11 CPC cannot be looked into. In support of his submission, he has relied on *Bhau Ram vs. Janak Singh and others*, reported in *(2012) 8 SCC 701, P.V. Guru*

Raj Reddy and another vs. P. Neeradha Reddy and others, reported in *(2015) 8 SCC 331* and *SNP Shipping Services Pvt. Ltd. and others vs. World Tanker Carrier Corporation and another*, reported in *AIR 2000 Bombay 34*.

14. He has further submitted that if there is any requirement of investigation to find out whether a suit is barred by law, there would be no scope for passing an order of rejection of plaint under Order VII Rule 11 (d) CPC. In this connection he relied on a judgment in the case of *Madhyam Vargiya Grih Nirman Sahakari Sanstha vs. Vasantrao and another*, reported in *AIR 1988 Madhya Pradesh 94*. He contends that the arguments advanced by Mr. Sherpa on the basis of the judgment in *R. Kuppayee and another* (supra) that the suit is barred by law is not tenable as the decision itself points out that reasonableness or otherwise of the gift made is a question of fact, which necessarily has to be decided in a trial. It is submitted by him that the defendant no.1 had forged his signature in the No Objection Certificate dated 26.12.2017. That apart, the plaintiff had also prayed for cancellation of the allotment of house in the name of defendant no.1 under the Chief Minister's Rural Housing Mission Scheme. He submits that it cannot be said that there is no cause of action for filing the suit. Mr. Rai submits that at the stage of consideration of an application under Order VII Rule 11 CPC, the Court cannot proceed to consider the merit of the case as projected in the plaint. He has contended that the learned trial Court was justified in rejecting the applications under Order VII Rule 11 CPC and therefore, no interference is called for with the aforesaid order in exercise of power under revisional jurisdiction.

15. During the course of his submissions Mr. Rai had also drawn the attention of the Court to Article 13 of the Constitution of India and Section 3 (29) of the General Clauses Act, 1897 explaining the meaning of the term "law" and "Indian Law", respectively.

16. Article 141 of the Constitution of India categorically states that the law declared by Supreme Court shall be binding on all courts within the territory of India. It cannot be said that the term "barred by any law" appearing in clause (d) of Rule 11 Order VII CPC means only law codified in legislative enactments and not the law laid down by the Hon'ble Supreme Court. After the decision of the Supreme Court in *Bhargavi Constructions* (supra), the issue is no longer *res integra* and the expression "law" in

clause (d) of Rule 11 Order VII CPC includes law declared by the Hon'ble Supreme Court.

17. In paragraph 5 of the judgment of *P.V. Guru Raj Reddy* (supra), the Hon'ble Supreme Court held as under:

> "5. Rejection of the plaint under Order 7 Rule 11 of CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order 7 Rule 11, therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that have to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order 7 Rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the plaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial."

18. A perusal of the aforesaid extracted paragraph goes to show that rejection of the plaint under Order VII Rule 11 CPC is a drastic power conferred in the Court to terminate a civil action at the threshold. It is only if the averments in the plaint *ex facie* do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial. Averments in the plaint will have to be read as a whole and the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial.

19. The fundamental issue raised in the plaint is that the defendant no. 1 forged and fabricated the Gift Deed and that in the No Objection Certificate, the plaintiff's signature had been forged. The plaintiff had also questioned the allotment of house in the name of defendant no.1 under Chief

Minister's Rural Housing Mission Scheme. At the time of consideration of application under Order VII Rule 11 CPC, the Court is not required to go into the question as to whether the suit suffers from the defect of non-joinder of a necessary party, a point raised by Mr. Sherpa. The averments made in the application under Order VII Rule 11 CPC read with Section 151 CPC by defendant no.2 that he executed the Gift Deed being the Karta cannot be taken into consideration at this stage. Reading the plaint as a whole, I am of the considered opinion that the plaint discloses a cause of action.

20. In *R. Kuppayee and another* (supra), the Hon'ble Supreme Court had held that a father can make a gift of ancestral immovable property within reasonable limits, keeping in view, the total extent of the property held by the family in favour of his daughter at the time of her marriage or even long after her marriage. The Hon'ble Supreme Court had observed that the question of reasonableness or otherwise of the gift made has to be assessed vis-à-vis the total value of the property held by the family as such a question is basically a question of fact. Answer to the question, inevitably, will depend on evidence on record. Viewed in that context, it cannot be concluded at this stage that the suit is barred in view of the decision in *R. Kuppayee and another* (supra).

21. In view of the above discussions, I am of the considered opinion that no interference is called for with the impugned order and accordingly, the revision petition is dismissed.

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