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SUBJECT INDEX

petitioners were initially appointed pursuant to an advertisement issued. However, the advertisements were specific and it sought for temporary contractual employment. It is equally correct that the petitioners were selected after undergoing a selection procedure akin to the procedure prescribed in the Service Rules. Merely because the ATTC chose to follow the selection procedure as prescribed for regular employment also for contractual appointment; sought for self assessment reports and incorrectly projected the petitioners as regular employees, it cannot be held that their appointments were regular – During the entire period of service, the petitioners could not have also had a single doubt in their mind that they were not contractual employees bound by the terms of their contracts – Both the issues held against the petitioners.

Shri Naw Raj Bhattarai* v. *State of Sikkim and Others ***229A***

Constitution of India – Article 226 – The issue regarding *"honourable acquittal"*, *"acquitted of blame"* and *"fully acquitted"* are unknown to the Code of Criminal Procedure or the Indian Penal Code. It has been developed by judicial pronouncements. It is difficult to define what is meant by the expression *"honourably acquitted"* – When all the material evidence has been considered and charge, as alleged against the accused could not be proved, it is honorable acquittal – Otherwise, on account of technical flaw or due to non-production of important witnesses or the witnesses turning hostile, or due to settlement between the parties or otherwise, prosecution has failed to prove the charge beyond reasonable doubt, may not come within the purview of *"honourably acquitted"* – Such acquittal is otherwise than *"honourable"* to which the proceedings may be followed. The discretion of such proceedings would lie on the appointing authority to take a decision looking into the nature of job and suitability of propriety and probity of the candidate – Acquittal of the writ petitioner in G.R Case No. 644 of 2013 was not honourable but by giving him a benefit of doubt – As the acquittal of the writ petitioner was other than honourable, the proceedings of the Department may follow to judge his suitability looking into the credibility of the post – The writ petitioner would not *ipso facto* be entitled to continue to hold the post of Civil Judge-cum-Judicial Magistrate merely because he was acquitted.

Mr. Tara Prasad Sharma* v. *State of Sikkim and Others ***325A***

Constitution of India – Article 226 – The Full Court examined all the materials and was of the view that the conduct of the writ petitioner was not free from an element of doubt, therefore, he was not given the

assignment relating to administration of justice. Thus, it was resolved to withdraw the recommendation made earlier in his favour on 05.07.2017 for his appointment as Civil Judge-cum-Judicial Magistrate. It was further resolved that the next candidate in the merit list (Respondent No. 4) be recommended for appointment on the said post – It is clear that withdrawal of the previous recommendation was because the writ petitioner's acquittal was other than honourable and his conduct was found under a cloud to be assigned the work of judicial administration or as a Judge – Held: The High Court of Sikkim is competent to make recommendation for appointment to the post of Civil Judge – Employer has right to consider all relevant facts available and as to his antecedents, and may take appropriate decision as to continuation of the employee in the employment looking to the standard of propriety and probity. The employer cannot be compelled to appoint a candidate for holding civil post, if not acquitted clearly – The scope of interference is limited to the extent of *mala fide* or suffers from bias or arbitrariness, or if it is established that the decision taken by the appointing authority is based on perversity or irrationality.

Mr. Tara Prasad Sharma* v. *State of Sikkim and Others ***325B***

Indian Evidence Act, 1872 – Circumstantial Evidence – F.I.R dated 11.09.2018 lodged by the appellant's brother (PW-4) that his brother Randip Rai (deceased) was hit on the head by the youngest brother, the appellant, using a hammer in the *verandah* of their house around 7 p.m. and that he had been admitted to the Mangalbaria hospital – Randip Rai succumbed to his injuries on 12.09.2018 – Charge-sheet filed for the offence under S. 302, I.P.C – Charge framed under S. 302, I.P.C – Convicted under S. 304-II, I.P.C and sentenced to undergo simple imprisonment for seven years and fine of ₹ 10,000 – Held: The oral depositions have been made by natural witnesses who were present during the relevant time. Their evidence cannot be doubted except for the fact that the prosecution had not been able to prove that the hammer (MO-I) was the weapon of offence. The chain of circumstances proved by the prosecution as enumerated above does lead to the inevitable conclusion that it was the appellant and the appellant alone who had committed the offence. There is no manner of doubt that it could have been done by anybody else – Conviction and sentence upheld.

Sudeep Rai* v. *State of Sikkim ***250A***

Indian Evidence Act, 1872 – Circumstantial Evidence – Motive – In a case of direct evidence, "motive" is irrelevant whereas in a case of

circumstantial evidence, motive may indeed be an important link which completes the chain of circumstances. Besides, motive not being an explicit requirement as per the provisions of the Indian Penal Code, failure to attribute motive cannot be fatal to the prosecution case where eye witness account exists.

Lalit Rai* v. *State of Sikkim ***276B***

Indian Penal Code, 1860 – S. 302– F.I.R dated 23.01.2017 lodged by Panchayat of Megyong (PW-1) that around 4 p.m. he received a telephonic information from PW-5 that the appellant had murdered his wife. PW-1, accompanied by his friends visited the place of occurrence and found the body of the appellant's wife with multiple cut injuries on her person, caused by a sharp edged weapon. The appellant had absconded – Charge-sheet filed against the appellant under S. 302, I.P.C – Convicted under S. 302, I.P.C and sentenced to undergo rigorous imprisonment for life and to pay fine of 10,000 – Held: The evidence of eye witnesses are consistent and unwavering. They actually witnessed the appellant assaulting the deceased. Their evidence categorically establishes that the appellant was the perpetrator of the offence, being armed with MO-VIII (*Khukuri*) with which he assaulted the deceased. It cannot be said in these circumstances that he did not intend to inflict the injuries on the deceased which were sufficient in the ordinary course of nature to cause her death. The act complained of clearly does not fall within the ambit of the exceptions carved out in S. 300, I.P.C.

Lalit Rai* v. *State of Sikkim ***276A***

Protection of Children from Sexual Offence Act, 2012 – S. 3 – Penetrative Sexual Assault – To prove the allegation of penetrative sexual assault in terms of the provision of the POCSO Act, penetration of penis into vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person is necessary. Although the explanation to the meaning of vagina has not been given in the POCSO Act as given in S. 375, I.P.C, but looking to the legislative intent of the POCSO Act, the same explanation may be acceptable while dealing the cases of the POCSO Act – For the penetrative sexual assault for the purpose of S. 3 of the POCSO Act also, penetration of penis into vagina would include all the above specified parts of the female organ and if such evidence has been brought in the testimony of the victim, the charge of S. 3 would be proved otherwise it would come within the purview of S. 7 of the POCSO Act.

Mikal Bhujel alias Rubeen* v. *State of Sikkim ***287E***

Protection of Children from Sexual Offences Act, 2012 – Protection of the Victim's Identity – The fact that the prosecution chose only four friends of the victim as witnesses cannot be termed as cherry picking as the protection of the identity of the victim is of paramount importance in such offences and all efforts ought to be made to ensure confidentiality as done in the instant matter, to prevent stigmatization and ostracization of the victim for no fault of hers. Merely because the victim's friends were produced as witnesses, it cannot be said that their evidence is unreliable.
Maheshwar Singh* v. *State of Sikkim ***304B***

Indian Penal Code, 1860 – S. 354 A – Sexual Harassment – F.I.R registered against the appellant, a Mathematics Teacher in a Government School on 15.06.2019 under S. 354A, I.P.C read with S. 10 of the POCSO Act – Charge-sheet filed against the appellant S. 354A, I.P.C read with S. 10 of the POCSO Act alleging that he had touched the minor victim, a Science student, inappropriately several occasions and sentenced for the offence under S. 354 A(1)(i), I.P.C – Held: Evidence on record in the instant matter having been thoroughly examined, no contradictions appear therein to demolish or lend doubt to the prosecution case – The reasons for the delayed lodging of the F.I.R have been enumerated by the victim – No reason to disbelieve the victim that she was apprehensive of the outcome of such a step on her academics – Appeal fails and is dismissed.
Maheshwar Singh* v. *State of Sikkim ***304A***

Indian Penal Code, 1860 – Ss. 375 and 376 – Rape – The basic ingredient to prove the charge of rape is the accomplishment of the act with force. The other ingredient is penetration of the male organ within the labia majora or the vulva, or pudendum with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Ss. 375 and 376, I.P.C (In *re. Aman Kumar and Another,* and *State of U.P. v. Babul Nath* discussed).
Mikal Bhujel alias Rubeen* v. *State of Sikkim ***287C***

Motor Vehicles Act, 1988 – S. 166 – The provisions of the Motor Vehicles Act, 1998 makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The Court or the Tribunal shall have to assess the damages objectively and exclude

from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable – A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned (In *re. Raj Kumar* discussed).

Suja Khilingay* v. *Archana Chettri and Others ***345A***

Motor Vehicles Act, 1988 – S. 166 – Appellant aggrieved by the fact that although the Claims Tribunal had come to a finding that the injuries sustained by her due to the accident were *"serious/grievous"* in nature, it went on to hold that it was a case of *"routine personal injury"* and by holding so failed to award compensation under the other heads as per paragraph 6 of the judgment of the Supreme Court in the case of *Raj Kumar* – Held: Partial disablement is temporary but reduces the earning capacity of the person in the employment he was engaged at the time of the accident. The evidence on record suggests that the appellant was temporarily and partially disabled. It was for this reason that the Claims Tribunal awarded compensation of ₹ 1,62,000/-as loss of earning during the period of treatment. The oral evidence of the appellant corroborated by the medical evidence and medical reports leads to the inevitable conclusion that she had suffered grievous injury which cannot be, under any circumstance, termed as *"routine personal injury"* – The injuries so sustained by the appellant would amount to partial disability as defined under S. 2(g) of the Employees Compensation Act, 1923 – In cases involving partial disablement, the term *"compensation"* used in S. 166 of the Motor Vehicles Act, 1988 would include not only the expenses incurred for immediate treatment, but also amount likely to be incurred for future medical treatment/care necessary for a particular injury or disability caused by an accident. (In *re. Afnees* discussed) – Since there was no permanent disability, the appellant not entitled to compensation under the head *"loss of future earnings on account of permanent disability"* – Court to calculate compensation payable under three heads i.e. *"Future medical expenses"*, *"Loss of amenities (and/or loss of prospects of marriage"* and *"Loss of expectation of life (shortening of normal longevity)"*.

Suja Khilingay* v. *Archana Chettri and Others ***345B***

Motor Vehicles Act, 1988 – S. 166 (3) – Delay in Filing Claim Application – Accident involving a bus occurred on 17.08.2017 in which the appellant and others sustained injuries – Claim petition under S. 166 filed on 23.06.2020 – Petition seeking condonation of delay under S. 5 of the Limitation Act, 1963 filed by the appellant on 08.09.2020 – Application dismissed by the Claims Tribunal holding that sub-section (3) of S. 166 was enforced on 09.08.2019 and that the appellant had not shown sufficient cause to condone the delay in filing the petition – Held: The Motor Vehicles Act, 1988 came into force w.e.f. 01.07.1989. S. 166 (3) as originally brought into force was omitted by Act 53 of 1994 w.e.f. 14.11.1994 – After the omission sub-section (3) as it existed, there is no provision prescribing a period of limitation in S. 166 – The amendment Act notified vide notification dated 09.08.2019 was published in the Gazette of India on 09.08.2019 itself. It inserted sub-section (3) to S. 166 once again providing a period of limitation for preferring a claim petition – Although the amendment Act was notified on 09.08.2019, the provisions thereof would come into force on such dates as notified by the Central Government – As the accident is said to have occurred on 17.08.2017, the proposed amendment to S. 166 which is yet to be enforced would have no effect – The application for condonation of delay filed by the appellant and the impugned order dated 11.11.2020 were made and passed on a misconception of facts and law. Both the appellant as well as the Claims Tribunal seemed to have incorrectly believed that sub-section (3) of S. 166 as brought in by the amendment Act was enforced and therefore, applicable – Impugned order set aside and the claim petition preferred by the appellant restored back to its files.

Prethivi Raj Rai* v. *Secretary, SNT Department and Another ***319A***

Protection of Children from Sexual Offences Act, 2012 – S. 3 – Penetrative Sexual Assault – F.I.R registered on 25.05.2016 under S. 376, I.P.C read with S. 6 of the POCSO Act against one Jeewan Bhujel @ John based on a written complaint of the minor victim's mother that the said person of the same locality had sexually assaulted the minor victim on many occasions since 2014 because of which she was impregnated – Charge-sheet filed against the appellant and one Jeewan Bhujel @ John – The minor victim gave birth to a child on 07.01.2017 – Blood samples of the suspects, the minor victim and the baby collected and sent for DNA test – DNA report revealed Jeewan Bhujel @ John is the biological father and the minor victim to be the biological mother of the baby – Supplementary charge-sheet filed accordingly – Charge framed against under S. 5 (j) (ii)

and (l) of the POCSO Act – Jeewan Bhujel @ John convicted and sentenced under S. 6 of the POCSO Act while the appellant was convicted and sentenced under S. 4 of the POCSO Act – Held: As per the testimony of the minor victim, it is clear apart from removing her wearing apparels and that of the appellant, there is allegation of sexual assault – The minor victim's testimony does not satisfy the requirements of S. 3 of the POCSO Act – Conviction of the appellant relying upon the sole testimony of the victim under S. 3 of the POCSO Act and the sentence awarded set aside – Converted changed to S. 7 of the POCSO Act.

Mikal Bhujel alias Rubeen* v. *State of Sikkim ***287A***

Protection of Children from Sexual Offences Act, 2012 – S. 3 – Penetrative Sexual Assault – The ingredients for commission of rape under S. 375 (a) to (d), I.P.C is similar to S. 3 (a) to (d) of the POCSO Act – If those acts are committed in any of the seven descriptions specified in the definition of rape in S. 375, I.P.C with the aid of Explanation (1), it would amount to rape for which punishment is prescribed in S. 376, 376 (2) (a) (i) to (iii), 376 (2) (b), 376 (2) (c), 376 (2) (d) and 376 (2) (e) – In Explanation (1) to S. 375, I.P.C, it is clarified that "vagina" shall also include "labia majora". But in the POCSO Act, no such explanation has been given with respect to "vagina" what it includes or not.

Mikal Bhujel alias Rubeen* v. *State of Sikkim ***287D***

Sikkim Anti Drugs Act, 2006 – S. 18 – Code of Criminal Procedure, 1973 – S. 439 – Bail – Indiscriminate sale and consumption of controlled substances is a continuing bane of our society. Not only are the youth being led astray by consumption and sale of controlled substances they are dropping out of school or colleges thereby not only ruining their future prospects but also leading to a deterioration of their quality of life, both physical and mental. That apart, it also embroils the unsuspecting family of the substance abuser to a life of misery and travails which has a direct bearing on their mental health and happiness quotient. The sale of controlled substances fructifies in easy money sans effort and unconscionable people indulge in it with nary a care to the consequence it results in so long as it meets their objective. The negative impact of the sale and consumption of controlled substances also affects the society at large whose interests cannot be ignored or side lined. These points definitely need to be factored in while considering cases for bail under the SADA, 2006.

Rohit Tamang* v. *State of Sikkim ***268A***

Sikkim Anti Drugs Act, 2006 – S. 18 – Code of Criminal Procedure, 1973 – S. 439 – Bail – The quantity of controlled substances seized is large and would obviously not be for the personal consumption of the petitioner. The vehicle in which the controlled articles were found, was in the custody of the petitioner – In light of the facts and considering that the sale of controlled substances has proved detrimental to society inasmuch as children as young as eight years old are rampantly misusing such controlled substances due to the unconscionable sale by persons lacking social responsibility, the petition for bail deserves no consideration – That apart, S. 18 of the SADA, 2006 which is in consonance with S. 37 of the NDPS Act, 1985 provides that where the Public Prosecutor opposes the application for bail, the Court is to be satisfied that the petitioner is not guilty of such offence and he is not likely to commit any offence while on bail.

Bikash Rai alias Kalay Bikash* v. *State of Sikkim ***364A***

Sikkim Anti Drugs Act, 2006 – S. 18 – Bail – S. 18 of SADA, 2006, *inter alia*, provides that no person accused of an offence punishable under the Act shall be released on bail or on his own bond unless the Court is satisfied that there are reasonable grounds of believing that the applicant is not guilty of such offence and that he is not likely to commit any offence while on bail – The words *"reasonable grounds"* in S. 18 of SADA, 2006 would have the same meaning as has been explained by the Supreme Court while interpreting S. 37 of the NDPS Act, 1985 – It would connote substantial probable cause for believing that the accused is not guilty of the offences charged and that this reasonable belief contemplated in turn would point to the existence of such facts and circumstances as are sufficient to justify recording of satisfaction that the accused is not guilty of the offences charged – From a perusal of the probable evidence filed along with the charge-sheet, at this juncture, it cannot be said with certainty whether it was the appellant who had run away when Krishna Gopal Chettri was apprehended. There is no substantial material to connect the appellant to the alleged crime – There is reasonable ground for believing, at this stage, that the applicant is not guilty of the alleged offences.

Sagar Pradhan* v. *State of Sikkim ***367A***

SLR (2021) SIKKIM 229

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

WP (C) No. 29 of 2017

Shri Naw Raj Bhattarai ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

Petitioner in person.

For Respondent 1, 2, 3 & 5 : Dr. Doma T. Bhutia, Addl. Advocate General and Mr. S.K. Chettri, Government Advocate.

For Respondent No. 4 : Mr. D.K. Siwakoti, Advocate

With

WP (C) No. 30 of 2017

Shri Amosh Shanker ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

Petitioner in person.

For Respondent 1, 2, 3, 4 & 6: Dr. Doma T. Bhutia, Addl. Advocate General and Mr. S.K. Chettri, Government Advocate.

For Respondent No. 5 : Mr. D.K. Siwakoti, Advocate

Date of decision: 3rd April 2021

A. Constitution of India – Article 226 – Public Interest Litigation – Petitioner in WP(C) No. 29 of 2017 employed as lecturer (Mechatronics) in ATTC on contractual basis initially for the period 01.03.2013 to 31.12.2013 and thereafter till 31.12.2016 – Petitioner in WP(C) No. 30 of 2017 was also employed on contract basis as lecturer (Mechanical) initially from 07.07.2014 to 31.12.2014 and thereafter till 31.12.2016 – The terms and conditions specified that candidates selected for temporary posts will be for one year contract term – On each occasion when the contract was renewed, they accepted all the terms of contract including that they had no right to claim for regularization – Issue in both the writ petitions is whether the petitioners has a right to be taken back in service and absorbed in the regular establishment or in the alternative be considered by ATTC for regularization as per Rule 8(2) of the Service Rules? Held: The Supreme Court in *Umadevi* has recognized the State respondents' right to appoint persons on temporary basis – That there was nothing in the Constitution which prohibits such engaging of persons temporarily to meet the needs of the situations – Although the claim made by ATTC that the petitioners had been employed temporarily due to the exigency of some of its regular employees being sent for training may not sound appealing sans contemporaneous records, the fact that ATTC had in fact sought for temporary employment and that the petitioners were appointed purely on contract basis cannot be doubted – It is correct that the petitioners were initially appointed pursuant to an advertisement issued. However, the advertisements were specific and it sought for temporary contractual employment. It is equally correct that the petitioners were selected after undergoing a selection procedure akin to the procedure prescribed in the Service Rules. Merely because the ATTC chose to follow the selection procedure as prescribed for regular employment also for contractual appointment; sought for self assessment reports and incorrectly projected the petitioners as regular employees, it cannot be held that their appointments were regular – During the entire period of service, the petitioners could not have also had a single doubt in their mind that they were not contractual employees bound by the terms of their contracts – Both the issues held against the petitioners.

(Paras 25 26, 27, 31 and 32)

Both petitions dismissed.

Chronology of cases cited:

1. Union Public Service Commission v. Girish Jayanti Lal Vaghela and Others, 2006(2) SCALE115.
2. B.S. Minhas v. Indian Statistical Institute and Others, AIR 1984 SC 363.
3. Secretary, State of Karnataka v Umadevi, (2006) 4 SCC 1.
4. Malathi Das v. Suresh, (2014) 13 SCC 249.
5. Mandeep Sunwar v. State of Sikkim, SLR (2017) Sikkim 53.
6. Mani Subrat Jain and Others v. State of Haryana and Others, (1977) 1 SCC 486.
7. State of Maharashtra and Others v. Anita and Another, (2016) 8 SCC 293.
8. Union of India v. Arulmozhi Iniarasu, (2011) 7 SCC 397.
9. A. Umarani v. Registrar, Cooperative Societies, (2004) 7 SCC 112.
10. State of Madhya Pradesh v. Mohd. Abrahim, (2009) 15 SCC 214.
11. Nihal Singh v. State of Punjab, (2013) 14 SCC 65.
12. Sethi Auto Service Stations v. DDA, (2009) 1 SCC 180.

JUDGMENT

Bhaskar Raj Pradhan, J

1. As both W.P. (C) No 29 of 2017 and W.P. (C) No. 30 of 2017 raises similar issues this common judgment shall dispose both of them.

2. Heard the petitioners in person in both the writ petitions; Dr. Doma T. Bhutia, learned Additional Advocate General for respondent nos. 1, 2, 3 and 5 in W.P. (C) No 29 of 2017 and respondent nos. 1, 2, 3, 4 and 6 in W.P. (C) No. 30 of 2017 and Mr. D.K. Siwakoti, learned counsel for respondent no.4 in W.P. (C) No 29 of 2017 and respondent no.5 in W.P.(C) No. 30 of 2017.

3. The petitioners in person (Naw Raj Bhattarai) in W.P. (C) No. 29 of 2017 and (Amosh Shanker) in W.P. (C) No. 30 of 2017) submits that

although their appointment orders state that they had been appointed on contractual basis, the Advanced Technical Training Centre (ATTC) had always treated them as regular employees and its failure to regularise them in spite of various assurances violates their fundamental rights. It is also their case that the ATTC has failed to keep the student faculty ratio as per the requirements set by the All India Counsel for Technical Education (AICTE) and on that ground also a direction to regularise them would be maintainable. The petitioners submits that they are qualified to hold the regular posts and as their appointments were done in accordance with the constitutional scheme of appointments i.e. by advertising the posts in a newspaper; inviting eligible candidates; conducting written examination and viva voce and selecting eligible candidates for the advertised posts, they should be regularised. They have drawn the attention of this court to chapter III of the Service Rules of the Advanced Technical Centre, 2003 (Service Rules) which provide that all appointments shall be made on contract basis for one year and that based on an *"appraisal report"* they shall be considered for regular appointment on probation. It was submitted that the records would reveal that the ATTC had not expressed its dissatisfaction on their performance and therefore, considering them for regularisation ought to have been done. They drew the attention of this court to the specific pleading in W.P. (C) No.29 of 2017 i.e. paragraphs 14 and 13 in W.P. (C) No.29 of 2017 and W.P. (C) No. 30 of 2017 respectively in which they had stated that the ATTC had even made them fill up a form for self assessment during their service which assertion has been accepted as matter of record in the counter affidavits filed on behalf of the State respondents including ATTC. It is their case that they have been sent for various training programmes by ATTC and those training programmes were under the Carrier Advancement Scheme meant for movement to higher grades as the knowledge obtained from such training would be beneficial to the students. It is also their case that they had been in continuous service during the entire period and that they were employed against sanctioned posts and worked till 2016 in such capacity. The petitioners relied upon ***Union Public Service Commission v. Girish Jayanti Lal Vaghela & Ors.***[1]; ***B.S. Minhas v. Indian Statistical Institute & Ors.***[2]; ***Secretary, State of Karnataka v Umadevi (3)***[3]; ***Malathi Das v. Suresh***[4] and ***Mandeep Sunwar v. State of Sikkim***[5].

[1] 2006 (2) SCALE 115
[2] AIR 1984 SC 363
[3] (2006) 4 SCC 1
[4] (2014) 13 SCC 249
[5] SLR (2017) Sikkim 53

4. The learned Additional Advocate General (learned AAG) submitted that the perusal of the writ petitions as well as the records would reveal that there has been no violation of any right, leave alone any fundamental right of the petitioners. She relied upon ***Mani Subrat Jain & Ors. v. State of Haryana & Ors.***[6] to submit that no one can ask for mandamus without a legal right.

5. The learned A.A.G. submits that the appointment orders are clear and unambiguous and that the petitioners were appointed on contract basis on specific terms and conditions. It is her case that the terms and conditions of contract specifically provided that they shall have no right to claim for regularisation. It was further submitted that once the contractual period came to an end that was the end of the service and the petitioners could have no grievance just because ATTC did not continue their service. She relied upon ***State of Maharashtra & Ors. v. Anita & Anr.***[7]; ***Umadevi (3) (supra); Union of India v. Arulmozhi Iniarasu***[8]. In addition, in so far as Amosh Shanker is concerned, the learned AAG also pointed out that he had applied for the sanctioned post advertised on 22.09.2016 but had failed to qualify for the same and as such he was estopped from challenging his discontinuance from contractual service. The learned AAG also argued that the Service Rules are meant for regular employees of ATTC and that contractual employees like the petitioners would be governed by the terms and conditions of the contracts entered into.

6. Mr. D. K. Siwakoti, learned counsel for AICTE submits that there is no prayer sought by the petitioner against AICTE and as such their role in the present litigation is limited. Nevertheless, the learned counsel guided this Court through the various documents relating to the student to lecturer ratio issue raised by the petitioners in person. The learned counsel also relied upon certain judgments to assist this court. They are: ***A. Umarani v. Registrar, Cooperative Societies***[9]***; State of Madhyapradesh v. Mohd. Abrahim***[10]***; Mani Subrat Jain (supra)*** and ***Nihal Singh v. State of Punjab***[11]**.**

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[6] (1977) 1 SCC 486
[7] W.P. (C) No.29 of 2017
[7] (2016) 8 SCC 293
[8] (2011) 7 SCC 397
[9] (2004) 7 SCC 112
[10] (2009) 15 SCC 214
[11] (2013) 14 SCC 65

7. Before this court examines the facts it would be relevant to consider the various judgment cited at the bar. In ***Uma Devi (3) (supra)*** the Constitutional Bench of the Supreme Court considered the legality of the action of the State in resorting to irregular appointments without following the procedure for appointment contemplated by the Constitution of India.

8. In ***Nihal Singh (supra)*** the Supreme Court examined whether it could compel the State to create posts and absorb the appellants therein into the service of the State on a permanent basis consistent with the decision in ***Umadevi (3) (supra)***. While doing so the Supreme Court also noted that in ***Umadevi (3) (supra)*** the Supreme Court while recognising the authority of the State to make temporary appointments declared that the regularisation of the employment of such persons which was made without following the procedure conforming to the requirement of the scheme of the Constitution in the matter of public employments cannot become an alternative mode of recruitment to public appointment. The Supreme Court further noted that it had in ***Umadevi (3) (Supra)*** declared that the jurisdiction of the Constitutional Courts under Article 226 or Article 32 cannot be exercised to compel the State or to enable the State to perpetuate an illegality. The Supreme Court noted that in ***Umadevi (3) (supra)*** the Constitution Bench had held that compelling the State to absorb persons who were employed by the State as casual workers or daily wage workers for a long period on the ground that such a practice would be an arbitrary practice and violative of Article 14 and would itself offend another aspect of Article 14 i.e. the State chose initially to appoint such persons without any rational procedure recognized by law thereby depriving vast number of other eligible candidates who were similarly situated to compete for such employment.

9. In ***Nihal Singh (supra)*** the Supreme Court found that the initial appointments of the appellants could have never been categorised as an irregular appointment as their initial appointment were made in accordance with the statutory procedure contemplated under the act. Thus it was held that even going by the principles laid down in ***Umadevi (3) (supra)*** the State cannot be heard to say that the appellants therein were not entitled to be absorbed into the services of the State on permanent basis as their appointments were purely temporarily and not against any sanctioned posts created by the State.

10. In ***Malati Das (supra)*** the Supreme Court held on facts that since similarly placed employees had been regularised by State and in some cases such regularisation was effected even after decision in ***Umadevi (3) (Supra)***, stand taken by the appellants in refusing regularisation on ground that claimants do not fulfil conditions for regularisation as laid down in ***Umadevi (3) (supra)*** was not sustainable.

11. In ***Mandip Sunwar (supra)*** a Single Judge of this court held that the Constitutional philosophy of employment is enshrined in Article 14 read with Article 16 of the Constitution of India and that public employment has to be made after a proper competition among qualified persons on the basis of invitation through wide publicity, enabling all required candidates to make application for the same; selection is required to be made in accordance with statutory provisions, on merit, in the spirit of the constitutional mandate of equality of opportunity without discrimination.

12. In ***Mani Subrat Jain (supra)*** the Supreme Court *held:*

> ***"****It is elementary though it is to be restated that no one can ask for a mandamus without a legal right. There must be a judicially enforceable right as well as a legally protected right before one suffering a legal grievance can ask for a mandamus. A person can be said to be aggrieved only when a person is denied a legal right by someone who has a legal duty to do something or to abstain from doing something.****"***

13. In ***Anita (supra)*** the Supreme Court examined the appointments of 471 posts of legal advisors, law officers and law instructors on contractual basis pursuant to government resolutions. It was found that the intention of the government was to fill up the said posts on contractual basis and that the respondents therein at the time of appointment had entered into agreement in terms of which the appointment was purely contractual creating no right, interest or benefit of permanent service in respondent's favour. It was held that having accepted contractual appointment, the respondents were estopped from challenging terms of their appointment and when the government had taken a policy decision to fill up post on contractual basis, the Tribunal and High Court ought not to have interfered with it to hold that appointments were permanent in nature.

14. In ***Arulmozhi (supra)*** the Supreme Court examined its various decisions on the doctrine of legitimate expectations and its impact in administrative law. It noted that in ***Sethi Auto Service Stations v. DDA***[12] the Supreme Court had held:

> ***"32.*** *An examination of the aforenoted few decisions shows that the golden thread running through all these decisions is that a case for applicability of the doctrine of legitimate expectation, now accepted in the subjective sense as part of our legal jurisprudence, arises when an administrative body by reason of a representation or by past practice or conduct aroused an expectation which it would be within its powers to fulfil unless some overriding public interest comes in the way. However, a person who bases his claim on the doctrine of legitimate expectation, in the first instance, has to satisfy that he has relied on the said representation and the denial of that expectation has worked to his detriment. The Court could interfere only if the decision taken by the authority was found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and not taken in public interest. But a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles.***"***

15. In ***A. Umarani (supra)*** it was held by the Supreme Court that when appointments were made in contravention of mandatory provisions of the Act and statutory rules framed thereunder and in ignorance of essential qualifications, the same would be illegal and cannot be regularised by the State.

16. In ***Mohd. Abrahim (Supra)*** the Supreme Court held that it was necessary for the State to follow the constitutional scheme laid down in Article 14 and Article 16 and relevant recruitment rules and appointment through side door being appointment in violation of the said Articles would be illegal.

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[12] (2009) 1 SCC 180

Pleadings in W.P. (C) No 29 of 2017

17. Naw Raj Bhattarai filed a writ petition on 06.06.2017 seeking an appropriate writ directing the respondents to take him back in service and other reliefs. It was contended that he had been appointed as lecturers as per the constitutional mandate following the issuance of an advertisement and thereafter being selected after a selection process as per the Service Rules.

18. Respondent nos.1, 2, 3 and ATTC filed their composite counter-affidavits on 26.07.2017 opposing the writ petition and asserting that he was a contractual employee; his employment would thus be governed by the terms and conditions agreed upon and further after his term expired he would have no right to claim regularisation. It was also asserted that the recruitment and service condition of the lecturers and all the employees of ATTC is governed by the Service Rules which came into force on 01.04.1999. The State respondents have highlighted the provisions of the Service Rules as enumerated in chapter III. It has been asserted that a selection committee was constituted vide notification dated 07.03.2015 as per All India Council for Technical Education (Carrier Advancement Schemes) (CAS) for the Teachers and other Academic Staff in Technical Institutions (Diploma) Regulations, 2012 notified on 08.11.2012. According to the State respondents there are altogether 19 posts of lecturers in ATTC including 4 posts of lecturers in the department of mechatronics and 1 post of the head of the department. The State respondents assert that in the month of June, 2012, two regular lecturers in mechatronics department were sent for further studies. They completed it in June, 2015 and thereafter, joined duties. It is asserted that it was on account of their absence that Naw Raj Bhattarai was appointed on contract basis on 28.02.2013 and continued till 31.12.2016.

19. Naw Raj Bhattarai filed his rejoinder on 21.08.2017. He countered the State respondent's assertion regarding him being appointed due to the absence of the 2 regular lecturers in mechatronics department by stating that if it had been so then he should have been terminated in the year 2015 itself. It was submitted that the very fact that even for the session 2016 his service was renewed till December, 2016 would belie the assertion.

20. On 01.11.2017 the AICTE filed an affidavit in opposition against the writ petition. The AICTE asserted that it had not issued any notification nor

is there any provision under their Acts and rules for appointment of temporary faculty by their institutions. AICTE stated that as per the information projected by ATTC student to faculty ratio was adequate.

21. On 12.10.2017 Naw Raj Bhattarai filed his rejoinder to the reply filed by AICTE disputing that the ATTC had complied with the student lecturer ratio. On 15.05.2018 an additional affidavit was filed by AICTE in which AICTE asserted that on inquiry it was found that the infrastructure and faculty members of ATTC were in order. On 26.05.2018 Naw Raj Bhattarai filed his response to the additional affidavit filed by AICTE disputing the claim made by AICTE. On 19.06.2018 the AICTE filed another additional affidavit pursuant to the order dated 29.11.2017 passed by this court permitting AICTE to inspect ATTC and submit a report as to whether the terms and conditions or guidelines are being complied by it. It was stated that an Expert Visiting Committee (EVC) was constituted by the competent authority that visited the ATTC and after conducting inspection submitted its report. Various deficiencies had been pointed out in the report pursuant to which a show cause notice was issued dated 06.03.2018. The ATTC was allowed to file a reply and was also heard. Thereafter, the Standing Hearing Committee of the AICTE accepted the documents submitted by ATTC in respect of each of the deficiencies pointed out except one.

Pleadings in W.P. (C) No 30 of 2017

22. Amosh Shanker filed a writ petition on 13.06.2017 also seeking directions upon the State respondents to take him back in service, to regularize him and for other reliefs on the ground that he had been appointed under the constitutional scheme and as such had a right to be regularized.

23. The respondent nos.1, 2, 3, 4 and ATTC (State respondents) has filed a composite counter-affidavit on 21.08.2017 disputing Amosh Shanker's claim. It is the case of the State respondents that he was a contractual appointee and as such under the terms and conditions agreed upon he has no right to claim for regularization. It is further submitted that as Amosh Shanker had taken his chance to be considered for selection to the two regular posts of lecturer (mechanical) and failed to be selected he is estopped from claiming for regularization. The State respondents had made

identical assertion regarding the Service Rules as in the counter-affidavit filed by them in Writ Petition (C) No. 29 of 2017.

24. Amosh Shanker has filed a rejoinder dated 18.10.2017 to the counter-affidavit filed by the State respondents as well. In the rejoinder he has sought to rely upon the approval process hand book of the AICTE for penal action in case of violation of its regulation for providing false information while applying for approval of extension. He has disputed all the assertions made by the State respondents in the counter-affidavit.

(i) The AICTE has filed an affidavit in opposition dated 25.11.2015 asserted that it had not issued any notification nor is there any provision under their acts and rules for appointment of temporary faculty by their institutions. AICTE stated that as per the information projected by ATTC the faculty student ratio was adequate.

(ii) An additional affidavit was filed by State respondents on 23.04.2019 clarifying that altogether ten candidates were called for viva voce as per the marks obtained in the written test and thereafter final select list were prepared. Copy of the list of qualified candidates who appeared for written test held on 26.11.2016 was annexed along with a notice dated 05.01.2017 showing the list of three candidates declared qualified in order of merit and recommended for appointment. Amosh Shanker does not feature in either of the two lists. It transpires that on 26.09.2016 two posts of lecturer (mechanical) were advertised for appointment on regular basis. A written examination and viva voce was also conducted. Amosh Shanker had applied for the said post and had appeared in the written examination held on 26.11.2016. Amosh Shanker was however, placed at serial no.14 of the merit list of successful candidates and those two posts were filled by two other persons.

The issue and its considerations.

25. The issue that needs to be determined in both the writ petitions is whether on the facts stated above the petitioners had a right to be taken back in service and absorbed in the regular establishment or in the alternative be considered by ATTC for regularization as per rule 8(2) of the Service Rules?.

26. The record reveals that Naw Raj Bhattarai first applied for employment in response to an advertisement issued by ATTC on 03.02.2013 pursuant to which he was employed as lecturer (mechatronics) on contractual basis for the period 01.03.2013 to 31.12.2013 after a selection process. A perusal of the advertisement reflects that the ATTC had sought appointment for temporary contractual posts. The appointment letter also made it clear that the post was temporary and contractual and that Naw Raj Bhattarai would have no right to claim for regularization. Yet another advertisement was issued on 30.10.2013 pursuant to which Naw Raj Bhattarai was employed again on contract basis from 01.01.2014 to 31.12.2014. This advertisement was for both temporary as well as regular posts. In the case of lecturer (mechanical), however, only one temporary post for lecturer (electronics) was advertised pursuant to which Naw Raj Bhattarai was once again offered and appointed on contract basis for a period of another year. Thereafter, pursuant to an interview held on 07.11.2013 Naw Raj Bhattarai was once again appointed on contract basis for a period of one year w.e.f. 01.01.2014. After the expiry of the last contract period, the ATTC issued two appointment letters dated 17.12.2014 and 01.12.2015 extending Naw Raj Bhattarai's contractual employment till 31.12.2016. On each occasion when his contract was renewed he accepted all the terms of contract including that he had no right to claim for regularization.

27. In the case of Amosh Shanker also it is noticed that he was selected on contract basis pursuant to an advertisement issued on 30.10.2013. The advertisement for various posts of lecturers and other officers were for both temporary and regular employment. Three temporary posts and two regular posts for lecturer (mechanical) were advertised. The terms and conditions specified that candidates selected for temporary posts will be for one year contract term. It also specified that the top two candidates as per merit lists of lecturer (mechanical) would be employed initially for one year contract. Based on work performance after completion of contract period they would be considered for regularization. The first appointment letter dated 07.07.2014 was for the period 07.07.2014 to 31.12.2014. It was contractual with no right to claim for regularization. On 17.12.2014 Amosh Shanker's contractual appointment was extended from 03.01.2015 to 31.12.2015. This contract period was renewed by ATTC by offering him the post once again on 01.12.2015 for the period 11.01.2016 to

31.12.2016. On each occasion of renewal of contract period he submitted a joining report without a protest. Even Amosh Shanker accepted all the terms of contract including that he would have no claim for regularization.

28. Both the petitioners' contract came to an end on 31.12.2016.

29. It transpires that during the period of their contractual service the petitioners were sent for various training programmes to the National Institute of Technical Teachers' Training & Research Centre (NITTTR) Kolkatta. It is their case that the short term training programme recognised by AICTE and conducted by NITTTR is meant for movement to higher grades under Carrier Advancement Scheme for regular staff of the institute only, not for temporary faculty. It is also their case that the ATTC has always projected them as regular lecturers which is seen while browsing the official website of AICTE. They further contend that they were also made to fill up a *"self assessment report"* during their service with ATTC and therefore, they ought to be considered for regularisation.

30. In ***Umadevi (3) (supra)*** the Supreme Court held:-

> *"**11.** In addition to the equality clause represented by Article 14 of the Constitution, Article 16 has specifically provided for equality of opportunity in matters of public employment. Buttressing these fundamental rights, Article 309 provides that subject to the provisions of the Constitution, Acts of the legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of a State. In view of the interpretation placed on Article 12 of the Constitution by this Court, obviously, these principles also govern the instrumentalities that come within the purview of Article 12 of the Constitution. With a view to make the procedure for selection fair, the Constitution by Article 315 has also created a Public Service Commission for the Union and the Public Service Commissions for the States. Article*

320 deals with the functions of the Public Service Commissions and mandates consultation with the Commission on all matters relating to methods of recruitment to civil services and for civil posts and other related matters. As a part of the affirmative action recognised by Article 16 of the Constitution, Article 335 provides for special consideration in the matter of claims of the members of the Scheduled Castes and Scheduled Tribes for employment. The States have made Acts, rules or regulations for implementing the above constitutional guarantees and any recruitment to the service in the State or in the Union is governed by such Acts, rules and regulations. The Constitution does not envisage any employment outside this constitutional scheme and without following the requirements set down therein.

12. *In spite of this scheme, there may be occasions when the sovereign State or its instrumentalities will have to employ persons, in posts which are temporary, on daily wages, as additional hands or taking them in without following the required procedure, to discharge the duties in respect of the posts that are sanctioned and that are required to be filled in terms of the relevant procedure established by the Constitution or for work in temporary posts or projects that are not needed permanently. This right of the Union or of the State Government cannot but be recognised and there is nothing in the Constitution which prohibits such engaging of persons temporarily or on daily wages, to meet the needs of the situation. But the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment. Nor can a court say that the Union or the State Governments do not have the right to engage*

persons in various capacities for a duration or until the work in a particular project is completed. Once this right of the Government is recognised and the mandate of the constitutional requirement for public employment is respected, there cannot be much difficulty in coming to the conclusion that it is ordinarily not proper for the Courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who have been engaged without following a due process of selection as envisaged by the constitutional scheme.

13. *What is sought to be pitted against this approach, is the so-called equity arising out of giving of temporary employment or engagement on daily wages and the continuance of such persons in the engaged work for a certain length of time. Such considerations can have only a limited role to play, when every qualified citizen has a right to apply for appointment, the adoption of the concept of rule of law and the scheme of the Constitution for appointment to posts. It cannot also be forgotten that it is not the role of the courts to ignore, encourage or approve appointments made or engagements given outside the constitutional scheme. In effect, orders based on such sentiments or approach would result in perpetuating illegalities and in the jettisoning of the scheme of public employment adopted by us while adopting the Constitution. The approving of such acts also results in depriving many of their opportunity to compete for public employment. We have, therefore, to consider the question objectively and based on the constitutional and statutory provisions. In this context, we have also to bear in mind the exposition of law by a Constitution Bench in State*

of Punjab v. Jagdip Singh [(1964) 4 SCR 964 : AIR 1964 SC 521] . It was held therein: (SCR pp. 971-72)

"In our opinion where a government servant has no right to a post or to a particular status, though an authority under the Government acting beyond its competence had purported to give that person a status which it was not entitled to give he will not in law be deemed to have been validly appointed to the post or given the particular status." x x x x x x

"43. *Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the*

strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

x x x x x x

***"45.** While directing that appointments, temporary or casual, be regularised or made*

permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain—not at arm's length—since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned

*knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution.***"***

x x x x x x x

"47. *When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally*

*make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.***"**

31. The Supreme Court in ***Umadevi (3) (supra)*** has clearly recognized the State respondents' right to appoint persons on temporary basis. In spite of the constitutional scheme, the Supreme Court held, there may be occasions when the sovereign State or its instrumentalities will have to employ persons, in posts which are temporary as additional hands or taking them in without following the required procedure, to discharge the duties in respect of the posts sanctioned. The Supreme Court held that there was nothing in the Constitution which prohibits such engaging of persons temporarily to meet the needs of the situations. A reading of the Service Rules makes it clear that it does not contemplate appointment of any person on contract basis besides what is contemplated in Rule 8(2). A reading of Rules, 5, 6, 7 and 8 makes it clear that the provisions are meant for regular appointments. However, there is no manner of doubt that the State respondent did posses the right to appoint persons on temporary basis to meet its exigencies. Although the claim made by ATTC that the petitioners had been employed temporarily due to the exigency of some of its regular employees being sent for training may not sound appealing sans contemporaneous records, the fact that ATTC had in fact sought for temporary employment and that the petitioners were appointed purely on contract basis cannot be doubted. It is also clear that both the petitioners accepted the terms of contract and therefore, they were bound by it. It is correct that the petitioners were initially appointed pursuant to an advertisement issued. However, the advertisements were specific and it sought for temporary contractual employment. It is equally correct that the petitioners were selected after undergoing a selection procedure akin to the procedure prescribed in the Service Rules. However, merely because the ATTC chose to follow the selection procedure as prescribed for regular employment also for contractual appointment; sought for self assessment reports and incorrectly projected the petitioners as regular employees it cannot be held that their appointments were regular. Further, their continuation beyond the periods as per the advertisements was ad hoc. The State respondents were certain that they were seeking temporary employees. During the entire period of service, the petitioners could not have also had a single doubt in their mind that they were not contractual employees bound by the terms of their contracts.

32. The petitioners' grievance about the State respondents not keeping the student to lecturer ratio even if proved may lead to other consequences upon ATTC. In a writ of this nature were the petitioners are seeking relief for regularization of contractual service it may not be correct to examine the failure of the ATTC to keep the student to lecturer ratio. However, it definitely cannot be a reason for this court to direct regularization of contractual employees. The petitioners' contentions that they were regularly sent for training under the Carrier Advancement Scheme is responded to by the State respondents stating that they were so trained keeping in mind its benefit upon the students. It is quite certain that their training and experience would have greatly benefited the State respondents, the students as well as the petitioners themselves. However, this also cannot be a factor for this court to direct the State respondents to do, what has been held illegal by the Supreme Court. Consequently, both the issues are held against the petitioners.

33. The writ petitions fails and are accordingly dismissed. In the circumstances, no order as to cost.

SLR (2021) SIKKIM 250

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

Crl. A. No. 1 of 2020

Sudeep Rai ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Ms. Tshering Palmoo Bhutia, Advocate (Legal Aid).

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

Date of decision: 5th April 2021

A. Indian Evidence Act, 1872 – Circumstantial Evidence – F.I.R dated 11.09.2018 lodged by the appellant's brother (PW-4) that his brother Randip Rai (deceased) was hit on the head by the youngest brother, the appellant, using a hammer in the *verandah* of their house around 7 p.m. and that he had been admitted to the Mangalbaria hospital – Randip Rai succumbed to his injuries on 12.09.2018 – Charge-sheet filed for the offence under S. 302, I.P.C – Charge framed under S. 302, I.P.C – Convicted under S. 304-II, I.P.C and sentenced to undergo simple imprisonment for seven years and fine of 10,000 – Held: The oral depositions have been made by natural witnesses who were present during the relevant time. Their evidence cannot be doubted except for the fact that the prosecution had not been able to prove that the hammer (MO-I) was the weapon of offence. The chain of circumstances proved by the prosecution as enumerated above does lead to the inevitable conclusion that it was the appellant and the appellant alone who had committed the offence. There is no manner of doubt that it could have been done by anybody else – Conviction and sentence upheld.

(Paras 1, 7, 25 and 31)

Appeal dismissed.

Chronology of cases cited:

1. Vithal Tukaram More and Others v. State of Maharashtra, (2002) 7 SCC 20.
2. Umakant and Another v. State of Chhattisgarh, (2014) 7 SCC 405.
3. Binod Pradhan and Another v. State of Sikkim, (2019) SCC online Sik 227.
4. State of U.P. v. Dr. Ravindra Prakash Mittal, (1992) 3 SCC 300.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The appellant convicted by the learned Sessions Judge, West Sikkim at Gyalshing (the learned Sessions Judge) under section 304-II of the Indian Penal Code, 1860 (the IPC) seeks to challenge both the judgment of conviction and order on sentence, dated 23.09.2019, in Sessions Trial Case No. 07 of 2018 (*State of Sikkim vs. Sudeep Rai*). The learned Sessions Judge has sentenced the appellant to undergo simple imprisonment for a term of seven years and to pay a fine of Rs.10,000/-.

2. Heard Ms Tshering Palmoo Bhutia, learned counsel for the appellant and Mr. S.K. Chettri, learned Additional Public Prosecutor for the respondent.

3. The learned counsel for the appellant submits that there are no eye witnesses in the present case and therefore, it is a case based on circumstantial evidence. She submits that the circumstantial evidence has not been proved in the manner required and there are broken links in the chain of circumstances. It is submitted that the learned Sessions Judge while appreciating the evidence of the prosecution witnesses have taken note of the examination-in-chief but ignored the cross-examination. It is further submitted that even the learned Sessions Judge has discarded the purported disclosure statement (Exhibit-3). The learned counsel took this Court through the various depositions of the prosecution witnesses pointing out various discrepancies which would, according to her, seriously dent the prosecution case. The judgment of the Supreme Court in ***Vithal Tukaram More and Others vs. State of Maharashtra***[1] and ***Umakant and Another vs. State***

[1] (2002) 7 SCC 20

of Chhattisgarh[2] were relied upon. The judgment of this Court in ***Binod Pradhan and Another vs. State of Sikkim***[3] was also referred to.

4. In ***Vithal Tukaram More*** (supra), the Supreme Court noted its earlier judgment in ***State of U.P. vs. Dr. Ravindra Prakash Mittal***[4], in which it was held,

> *"**11.** ..... that the essential ingredients to prove guilt of an accused by circumstantial evidence are: (a) the circumstances from which the conclusion is drawn should be fully proved; (b) the circumstances should be conclusive in nature; (c) all the facts so established should be consistent only with the hypothesis of guilt and inconsistent with innocence; (d) the circumstances should to a moral certainty, exclude the possibility of guilt of any person other than the accused."*

5. In ***Umakant*** (supra), the Supreme Court held, *interalia*, that the burden of proof in criminal law is beyond all reasonable doubt and if the views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other towards his innocence, the view which is favourable to the accused should be adopted. The judgment of this Court in ***Binod Pradhan*** (supra) which dealt with an allegation of rape is not found relevant.

6. The learned Additional Public Prosecutor on the other hand submits that the learned Sessions Judge had rightly convicted the appellant. He pointed out the various circumstances taken note of by the learned sessions Judge in paragraph 36 of the impugned judgment and submitted that each of these circumstances were proved beyond reasonable doubt and they form an unbroken chain of circumstances leading to the only hypothesis that it is the appellant and the appellant alone who is guilty for the offence.

7. The FIR dated 11.09.2018 was lodged by Sandeep Rai (PW-4) alleging that his brother Randip Rai was hit on the head by the youngest brother, the appellant, using a hammer and that he had been admitted to the

[2] (2014) 7 SCC 405
[3] (2019) SCC online Sik 227
[4] (1992) 3 SCC 300

Mangalbaria hospital. It was also asserted that his brother Randip Rai was hit on the varandah of his house at around 7:00 p.m. As per the prosecution, Randip Rai succumbed to his injuries on 12.09.2018. The investigation was conducted by Police Inspector Bimal Gurung (PW-16) (Investigating Officer), who, on the closure of the investigation filed the charge-sheet dated 14.11.2018 alleging that an offence under section 302 IPC had been made out. On 28.12.2018, the learned Sessions Judge framed a charge against the appellant under section 302 IPC. The appellant pleaded not guilty and claimed trial. During the trial, the prosecution examined 16 witnesses. The appellant was examined under section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.) on 12.08.2019. He denied the allegations. In his defence, he stated that it is true that he and his deceased brother had an argument that night. However, as the deceased came to assault him he had run away from home. He asserted that he had not assaulted the deceased.

8. Sandeep Rai (PW-4) identified the appellant as his younger brother. He deposed that on 11.09.2018, both the appellant and the deceased had gone to Mangalbaria bazaar and consumed alcohol. At around 5:00 p.m., the appellant returned home while the deceased, at around 7:00 p.m. According to Sandeep Rai (PW-4), the appellant and the deceased had quarrelled with each other at around 7:30 to 8:00 p.m. When he went to the courtyard of their house, he saw the deceased lying on the ground with cut injuries on his head. He also noticed blood on the head of the deceased. He deposed that the appellant was not at the place of occurrence when he saw the deceased lying on the courtyard. He along with the villagers evacuated the deceased to the Mangalbaria PHC. On the following day, the deceased succumbed to his injuries. During cross-examination, Sandeep Rai (PW-4) admitted that the deceased and the appellant shared cordial relationship with each other. He also admitted that on the relevant day, the deceased and the appellant had gone to Mangalbaria bazaar and when they returned, they were intoxicated. He further admitted that he had heard discussions between the appellant and the deceased when he was inside his room and that he had not seen the appellant assaulting the deceased.

9. Chandrakala Chettri (PW-3) also identified the appellant as her brother-in-law and deposed that even the deceased was her brother-in-law. According to her, on 11.09.2018 at around 7:30 p.m., when they were

watching television she heard a discussion between the appellant and the deceased. After some time, she heard some noises and saw the deceased lying on the ground in a pool of blood. She noticed that there was some wound on his head. According to her, the appellant was not there. The same evening, the deceased succumbed to his injuries. During cross-examination, she admitted that the deceased and the appellant shared a cordial relation prior to the incident. At the relevant time, there was no electricity and as such it was very dark and that she had not witnessed the incident.

10. Lalita Manger (PW-5) identified the appellant as her co-villager. According to her, on 11.09.2018 at around 7:00 p.m., the appellant came to her house and told her that he had hit someone six times with his fist and thereafter, left. During cross-examination, she admitted that she did not know anything about the case.

11. Ramesh Rai (PW-2) identified the appellant as his cousin. He deposed that on 11.09.2018, at around 7:30 to 8:00 p.m., the appellant came to their house and told them that he had assaulted the deceased with his fist on his head. According to Ramesh Rai, he took the appellant to Mangalbaria Outpost and handed him over to L/Nk Jas Man Subba (PW-1). Thereafter, the appellant was taken to Nayabazaar Police Station. During his cross-examination, Ramesh Rai (PW-2) admitted that he was not an eyewitness to that incident.

12. L/Nk Jas Man Subba (PW-1) identified the appellant in court. He received information from the Mangalbaria Primary Health Centre (PHC) stating that one assaulted patient was admitted there. He along with another officer went there and saw Randip Rai and noticed that he had three-four wounds on his head. According to L/Nk Jas Man Subba (PW-1), he asked Randip Rai as to who had assaulted him, to which he had replied that it was the appellant who had done so with the weapon. He also inquired and found out that the appellant was hiding in the house of Ramesh Rai (PW-2). He requested Ramesh Rai (PW-2) to bring the appellant to Mangalbaria Outpost. Thereafter, the appellant was taken to Nayabazaar Police Station. In cross-examination, he admitted that when he met Randip Rai at the PHC, he was fine and could converse properly. He also admitted that when he inquired from Randip Rai that if any weapon was used he did not say anything to him.

13. Sub Inspector Pranay Chettri (PW-11) deposed that on 13.09.2018, he had seized the clothes of the deceased as well as the blood sample at the STNM Hospital vide seizure memo (Exhibit-6). He identified the material objects, i.e, the white vest (M.O.II) and black pant (M.O.III).

14. Diwash Rai (PW-12) was the seizure witness to seizure memo (Exhibit-6) who identified his signature thereon. According to him, the police had seized the white vest (M.O.II) and black pant (M.O.III) at STNM Hospital, Gangtok. During cross-examination, he admitted that the seizure memo (Exhibit-6) had not been read over to him.

15. Dr. Uma Adhikari (PW-13) had examined the deceased on 11.09.2018, when he was brought to the emergency department at around 8:00 p.m. with a history of fall. She had noticed cut injuries on the forehead. The deceased had a history of alcohol intake. Dr Uma Adhikari (PW-13) also volunteered to state that when the deceased was brought to the PHC she was given the history that he had fallen and accordingly attended to him. Thereafter, around 11:30 p.m., she was telephonically informed by the sister on duty that the condition of the deceased had deteriorated. When she went to see the deceased, she found that he was quite serious and therefore she made arrangements for a referral to a higher centre at Gangtok. As there were no escort available for the deceased at that time, he was to be taken the next morning. However, at 4:00 a.m., the Doctor in-charge was informed that the deceased had succumbed to his injuries. During her cross-examination, she admitted that the deceased was brought to the PHC by the parties and was not forwarded by the police. She also admitted that no Medical Legal Case (MLC) was forwarded when the deceased was brought to the hospital. She admitted that the patient was walking by himself and that he did not tell her that he was hit by a hammer.

16. Dhan Kumar Tamang (PW-6) and Bishnu Manger (PW-7) are witnesses to the recording of the statement of the appellant under Section 27 of the Indian Evidence Act, 1872 (Exhibit-3). Both of them identified Exhibit-3 and their signatures thereon. They deposed that after the recording of the statement, they accompanied the police team and the appellant to the place of occurrence where the appellant took out one hammer (M.O.I) from the bushes which was concealed by him. According to them, the hammer (M.O.I) was seized vide seizure memo (Exhibit-4). During cross-examination, Dhan Kumar Tamang (PW-6) admitted that the police had

already recorded Exhibit-3 when he reached the Nayabazar Police Station. Bishnu Manger (PW-7) admitted that the police had already recorded Exhibit-3 when he reached the Mangalbaria Police Outpost. Dhan Kumar Tamang (PW-6) admitted that after he had affixed his signature in the seizure memo (Exhibit-4), they went to the place of occurrence and recovered the hammer (M.O.I) from the place of occurrence. Exhibit-3 is undated. The learned Sessions Judge noted these glaring inconsistencies caused by the depositions of Dhan Kumar Tamang (PW-6) and Bishnu Mangar (PW-7) and concluded that it would not be safe to rely upon the purported disclosure statement (Exhibit-3) or the seizure memo (Exhibit-4).

17. Milan Rai (PW-9) and Binod Rai (PW-10) are witnesses to the seizure of one stone with blood stains weighing 2 kgs (M.O. IV), black plastic with blood stains (M.O.V) and one piece of cloth with blood stains (M.O.VI) on 13.09.2018 from Sandeep Rai (PW-4). Both the witnesses identified their signatures on the seizure memo (Exhibit-8) as well as the material objects. During cross-examination, Milan Rai (PW-9) admitted that the contents of the seizure memo (Exhibit-8) was not read over to him. Binod Rai (PW-10) admitted during cross-examination that the material objects were common objects and easily available and that he had not affixed his signature on the material objects.

18. The inquest was conducted by the Investigating Officer (PW-16) on 12.09.2018 in the presence of Man Bdr. Rai (PW-8). The Investigating Officer (PW-16) deposed that he had conducted the inquest and prepared the inquest report (Exhibit-5), in which he had mentioned the details of the injuries seen on the dead body of the deceased. Man Bdr. Rai (PW-8) deposed that the police had taken the body of the deceased to Gangtok Hospital for post-mortem. According to him, the police had prepared the inquest report in which he had affixed his signature. He also deposed that at the Gangtok Hospital, police had seized one blood stained white vest and black pants with blood stains of the deceased vide seizure memo (Exhibit-6). During cross-examination, he admitted that the contents of the inquest report (Exhibit-5) was not read over to him.

19. Dr. O.T. Lepcha (PW-15), the Chief Medico Legal Consultant at the STNM Hospital, Gangtok, conducted the post-mortem examination of the deceased on 13.09.2018 along with one Dr. Karma Mingur (Assistant

Professor, Manipal College of Medical Sciences) and prepared the autopsy report (Exhibit-13) and noted the following:

> "On examination I found the following:-
>
> 1. Rigor mortis was present, post mortem staining was present faintly over the back and was fixed. There was presence of cyanosis with pallor.
>
> Ante mortem injuries:
>
> 1. There was multiple abraded laceration (surgically repaired) over the different areas of the scalp.
> 2. – lacerated injury (with two nos. of stitches) 2.8x1.5 cm over the vertex.
> 3. — Grazed lacerated wound (surgically repaired with two stiches).
> 4. Abraded lacerated wound 1.8x0.8 over the midline at the occipital bone.
> 5. Lacerated injury 2.3x2 placed over the occipital bone with underline fracture of occipital bone.
> 6. Depressed (patterned) fracture 2.5cm diameter over the occipital bone.
> 7. Fissure fracture extending from the left parietal eminence to the left temporal bone measuring 10 cm.
> 8. Fissure fracture extending from the parietal eminence upto the external protuberance over the back of skull measuring 16 cms.
>
> Head and neck:
>
> 1. The scalp showed widespread scalp haematoma with bilateral temporal haematoma. There was presence of subdural haematoma 4x3x2 cms placed over the occipital lobe.

There was diffuse subarchnoid haemorrage with features of intra-cerebral haemorrage.

Chest:

1. Both the lungs were congested and oedematous.

2. The stomach contained around 800 ml of digested food with fluid (alcohol smell present)."

20. Dr. O.T. Lepcha (PW-15) opined that the approximate time since death was more than 24 hours and the cause of death to the best of his knowledge and belief was due to intra-cranial haemorrhage as a result of fractured skull due to multiple blunt force injury, homicidal in nature.

21. Prem Kumar Sharma (PW-14), a Junior Scientific Officer, Biology Department, posted at RFSL Saramsa, deposed that on 03.10.2018, their Department received one sealed cloth containing blood sample of the deceased (M.O.VII), one black plastic pouch with reddish stains (M.O.V), one big stone weighing 2 kgs (approx.) with reddish stain (M.O.IV), one hammer (M.O.I), one small green and white coloured piece of cloth with reddish stain (M.O.VI). The said material objects were examined by him by serological/biological techniques. The sample blood of the deceased gave positive tests for Blood Group „AB. Human blood was also detected in the small black pouch (M.O.V), small green and white piece of cloth (M.O.VI) and the big stone weighing 2 kgs (M.O.IV), which tested positive for blood group „AB, which was the blood group of the deceased. However, no blood could be detected on the hammer (M.O.I).

22. The learned Sessions Judge has enumerated the following circumstances proved against the appellant on the basis of which he was convicted.

"**36.** In the case at hand, based on the evidence adduced by prosecution, I find the following circumstances have been established:-

a) On 11.09.2018 the deceased and the accused go to the market and return home in the evening in a state of intoxication;

b) both the brothers are under the influence of alcohol and they begin quarrelling soon after;

c) the elder brother PW-4 and his wife PW-3 are in their room in the same house at the time and hear the two younger brothers quarrelling. PW-4 even advises them to stop quarrelling;

d) following the quarrel PW-4 and his wife PW-3 go out to look only to find the deceased brother lying in a pool of blood with head injuries in the courtyard of the house;

e) the accused is nowhere to be seen;

f) the injured deceased is taken to Mangalbaria PHC by PW4 and others;

g) the same night immediately thereafter (between 07:00 to 8:00 pm) accused flees to the house of PW-5 Lalita Mangar and tells her he "*hit six times to somebody with his fist*" after which the accused leaves;

h) the accused then goes to the house of PW-2 Ramesh Rai and informs PW-2 that he has hit the deceased on his head;

i) around 08:30pm PW-1 receives information about the patient being admitted at the PHC. PW-1 goes to the PHC and finds deceased Randip Rai admitted with "3-4 wounds on his head";

j) PW-1 asks Randip Rai who inflicted the injury on him. PW-1 says Randip Rai (deceased) replied "*his own youngest brother Sudeep Rai, the accused assaulted him with a weapon*";

k) PW-1 comes to know accused is in the house of PW2 and instructs him to bring accused to the police out-post;

l) PW-2 then takes the accused to the Mangalbaria Out Post and hands him over to PW-1;

m) accused is taken to Nayabazar Police station where PW-2 says the accused "*stated to the Police that he assaulted the deceased with a hammer (martol)*";

n) The deceased succumbs to his injuries in the early hours of 12.09.2018 at the Mangalbaria P.H.C.;

o) Accused is unable to explain how the deceased brother came to sustain the injuries when they were quarrelling; or why he failed to come to the assistance of his injured brother; or even why he was missing from the house at the time soon after the quarrel;

p) On 13.09.2018 a hammer (MO-I) is recovered by the police from the bushes near the PO at Segeng, West Sikkim in the presence of PW-6 and 7;

q) The autopsy by PW-15 reveals the death was caused due to intra-cranial hemorrhage as a result of fractured skull due to multiple blunt force injury."

23. The identity of the appellant and the deceased are proved. They were brothers. Their brother - Sandeep Rai (PW-4), and sister-in law - Chandrakala Chettri (PW-3), identified the appellant in court. Even Ramesh Rai (PW-2) identified the appellant.

24. Sandeep Rai (PW-4) established that on 11.09.2018, the deceased and the appellant had gone to the Mangalbaria bazaar and returned home in the evening in a state of intoxication. Sandeep Rai (PW-4) and Chandrakala Chettri (PW-3) deposed that they were in the house at the relevant time when they heard the deceased and the appellant quarrel with each other. Their depositions established the presence of the appellant in the house at

the relevant time when the deceased was assaulted. When Chandrakala Chettri (PW-3) and Sandeep Rai (PW-4) went to the corridor/courtyard of their house they saw the deceased lying on the ground in a pool of blood. Both of them noticed that the appellant was not there. Sandeep Rai (PW-4) along with the villagers evacuated the deceased to the Mangalbaria PHC. The appellant thereafter, went to Lalita Mangar s (PW-5) house and told her that he had hit somebody on his head six times with his fist. Immediately thereafter, the appellant went to his cousin - Ramesh Rais (PW-2) house, and told them that he had assaulted the deceased with his fist on his head. The Mangalbaria PHC gave information to L/Nk Jasman Subba (PW-1) from the Mangalbaria Police Outpost that one patient who had been assaulted was admitted to the Mangalbaria PHC. He visited the PHC and found the deceased had been admitted with three-four wounds on his head. He asked the deceased about the assault. The deceased told him that he had been assaulted by the appellant with a weapon. Ramesh Rai (PW-2), thereafter, took the appellant to Mangalbaria Police Outpost and handed him over to L/Nk Jasman Subba (PW-1) who took him to Nayabazaar Police Station where he was arrested.

25. The above facts stand proved. It has been held so by the learned Sessions Judge who had also correctly discarded the evidence relating to the disclosure statement (Exhibit-3) purportedly recorded under section 27 of the Indian Evidence Act, 1872. The oral depositions have been made by natural witnesses who were present during the relevant time. Their evidence cannot be doubted except for the fact that the prosecution had not been able to prove that the hammer (M.O.I) was the weapon of offence. The chain of circumstances proved by the prosecution as enumerated above does lead to the inevitable conclusion that it was the appellant and the appellant alone who had committed the offence. There is no manner of doubt that it could have been done by anybody else.

26. The learned Sessions Judge has convicted and sentenced the appellant under section 304-II IPC, which reads as under:-

> "**304. Punishment for culpable homicide not amounting to murder.** - Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to

ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

Or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

.....

Part II: Punishment – Imprisonment for 10 years, or fine, or both – Cognizable- Non-bailable – Triable by Court of Session – Non-compoundable."

27. To make out an offence punishable under section 304-II IPC, the prosecution is required to prove the death of a person and such death was caused by the act of the accused and further that he knew that such act of his was likely to cause death.

28. Sandeep Rai (PW-4) – the brother of the deceased and Chandrakala Chettri (PW-3) – his sister-in-law; Man Bahadur Rai (PW-8) - who took the body of the deceased to Gangtok Hospital for post mortem along with the police; Dr. Uma Adhikari (PW-13) – who attended to the deceased at the Mangalbaria PHC; Dr. O.T. Lepcha (PW-15) - who conducted the post mortem examination of the deceased on 13.09.2018 and the Investigating Officer (PW-16) – who conducted the autopsy of the deceased, all established his death. The prosecution evidence as discussed above, also establishes that such death was caused by the act of the appellant. The ante mortem injuries noted by Dr. O.T. Lepcha (PW-15) in his post mortem report (Exhibit-15), leads to the only hypothesis that the appellant knew that such act of his which caused multiple injuries on the head of the deceased was likely to cause his death. Dr. O.T. Lepchas (PW-15) opinion that the cause of death was due to intra-cranial haemorrhage as a result of fractured skull due to multiple blunt force injury and it was homicidal in nature, is convincing and backed by the post-mortem examination.

29. The punishment prescribed for the offence under section 304-II IPC is imprisonment for ten years, or fine or both. The learned Sessions Judge has sentenced the appellant to undergo simple imprisonment for a term of seven years and pay a fine of Rs.10,000/-, which is found perfectly justifiable in the facts of the present case.

30. Resultantly, the appeal fails and is dismissed.

31. The judgment of conviction and order on sentence passed by the learned Sessions Judge in Sessions Trial Case No. 07 of 2018, both dated 23.09.2019, are upheld. The direction for simple imprisonment in default of payment of fine is also upheld.

32. The compensation awarded to the father of the deceased under section 357 Cr.P.C. is maintained.

33. The records of the learned Trial Court be sent back. Certified copy of this judgment be sent to the learned Trial Court and a copy also be furnished free of charge to the appellant.

SLR (2021) SIKKIM 264

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

Bail Appln. No. 6 of 2021

Lopsong Lama Yolmo ….. **PETITIONER**

Versus

State of Sikkim ….. **RESPONDENT**

For the Petitioner: Mr. B. Sharma, Senior Advocate with
Mr. B.N. Sharma, Mr. Bhupendra Gri and
Mr. Charles L. Lucksom, Advocates.

For the Respondent: Mr. Yadev Sharma, Addl. Public Prosecutor.

Date of decision: 16th April 2021

A. Code of Criminal Procedure, 1973 – S. 439 – Bail – The cricumstances which are to be factored in while considering an application for bail are; (i) existance of *prima facie* case against the accused, (ii) the nature and gravity of the accusations, (iii) the penalty likely to be imposed, (iv) chances of the accused absconding on being enlarges on bail, (v) the antecedents and stadning of the accused in society; (vi) likelihood of repetition of the affence, (vii) reasonable apprehension of evidence being tampered with and witnesses being influenced; and (viii) the course of justice being defeater by grant of bail.

(Para 5)

Application dismissed.

ORDER

Meenakshi Madan Rai, J

1. The Petitioner, Principal of a School, aged about 58 years, is accused of the offence under Section 354 of the Indian Penal Code, 1860, Section 8 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act") and Section 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015. He was arrested on 03.03.2021 in connection with Namchi Police Station Case bearing FIR No.07/2021 of the same date.

2. Learned Senior Counsel for the Petitioner, apart from submitting that the Petitioner is innocent and falsely implicated in the instant case urged that he is a responsible person running a well established Private School and is also a Politician having been elected as a Councillor and given the responsibility of Vice Chairman of the Gorkha Territorial Administration. That, he is a well reputed Social Worker and owns large property in South Sikkim. That, the investigation in the matter has been completed and he is no longer required in custody. That, the FIR was lodged on 03.03.2021 and he has been hospitalized from 04.03.2021 (forty four days) on account of his numerous ailments. On this count, reliance was placed on the medical document addressed by the Medical Superintendent, Namchi Hospital to the Assistant Superintendent of Police (Prison), Namchi, South Sikkim, dated 01.04.2021. It was urged by Learned Senior Counsel that the Petitioner is suffering from Diabetes Mellitus, Heart disease, Dyslipidemia, Hypertension, Hyperuricemia and Renal Calculus. That, the Doctor has observed that a Hypoglycemic attack may occur at any time of the night and has to be tackled urgently, this ground alone suffices for grant of bail. That, the Statement of the victim was recorded under Sections 164 and 161 of the Code of Criminal Procedure, 1973 wherein an effort has been made by her to improve her case. The Petitioner is also responsible for the education of his niece and nephew for whom he bears the financial burden besides which, he is the caregiver to his 86 year old mother who lives with him. That, the previous application for bail filed by the Petitioner before the Court of the Learned Special Judge, POCSO Act, 2012 at Namchi, South Sikkim was rejected vide Order dated 15.03.2021 without due consideration of the grounds put forth. That, should the Petitioner be enlarged on bail, he is willing to abide by all conditions imposed by this Court.

3. Opposing the petition for bail, Learned Additional Public Prosecutor put forth the contention that the victim is a child of 17 (seventeen) years studying in the School run by the Petitioner as the Principal. That, the Petitioner while paying personal attention to the victim touched her inappropriately and gave indirect hints seeking sexual favours from her. He also verbally abused her, made her do household chores and give him massages. That, since the date of his arrest, the Petitioner has remained in the Hospital with the purpose of defeating the law. That, Charge-Sheet is yet to be submitted and further investigation in the matter is being continued during the course of which, it has come to light that the mother of the victim who was the Complainant, is being pressurized to change her Statements against the Petitioner and also that he had perpetrated the same acts on other girl

Students as he did on the victim. Succour on this point was drawn from the Letter addressed by the Complainant to the concerned Chief Judicial Magistrate on 11.03.2021. That, should this Court exercise its discretion in favour of the Petitioner, in all likelihood, he will abscond as not only is he an influential person by his own admission in the submissions made by his Counsel but being a resident of West Bengal, it would be difficult to secure his presence at the trial. Moreover in all likelihood, he would return to run his School in which there are many girl Students therefore repetition of the offence cannot be ruled out for the aforementioned reasons. Hence the Petition for bail be rejected.

4. I have duly considered the submissions of Learned Counsel for the parties and perused all documents on record.

5. It is now well settled that the circumstances which are to be factored in while considering an application for bail are; (i) existence of *prima facie* case against the accused, (ii) the nature and gravity of the accusations, (iii) the penalty likely to be imposed, (iv) chances of the accused absconding on being enlarged on bail, (v) the antecedents and standing of the accused in society; (vi) likelihood of repetition of the offence, (vii) reasonable apprehension of evidence being tampered with and witnesses being influenced; and (viii) the course of justice being defeated by grant of bail. On the anvil of these factors, I have given due consideration to the FIR and the medical documents on record.

6. The FIR lodged by the victim's mother reveals that her child was a boarder studying in the Private School of the Petitioner. She was inappropriately touched by the Petitioner, mentally harassed and verbally abused by him. That, the Petitioner also told the victim, his Student, that he wanted to marry her and when she refused his overtures, he leaked their photographs by editing it and putting the victim's reputation in jeopardy.

7. The Doctor vide his Communication *supra*, has observed that the Petitioner has been on medication for his ailments reflected therein, for many years. He has also recorded that the Petitioner's condition is stable. The Doctor apprehends a Hypoglycemic attack which, according to him, requires to be managed immediately on its occurrence. It is worth observing here that presently there is no immediate threat to his life. All his ailments are under control and well managed by medication. The gravity of the offence is necessarily to be taken into consideration by this Court and the acts of the Petitioner are indeed heinous having been perpetrated on a minor under his care and guidance. The next consideration would be the likelihood of the Petitioner fleeing from justice

and his tampering with the Prosecution evidence. There was no denial of the allegation that efforts were being made to influence the Complainant by people from various walks of life known to the Petitioner. Moreover, his efforts at tampering with the witnesses is writ large in the form of the copy of the Letter placed before this Court, discussed hereinabove. No one however high he may be, is above the law and merely by stating that he is a Politician and an elected Councillor, does not entitle him to be enlarged on bail sans consideration of the offence alleged to have been committed by him. These considerations weigh directly for ensuring a fair trial in the concerned Court, thus due and proper weight ought to be bestowed on the two factors reflected *supra*. Considering the nature and seriousness of the offence, the evidence furnished at this stage and circumstances peculiar to the Petitioner in terms of his position in society, a reasonable possibility exists of the presence of the Petitioner not being secured at the trial, besides, likelihood of the offence being repeated. It is also noted that he has been in Hospital from 04.03.2021, a day after lodging of the FIR which is about forty four days as on today i.e. 16.04.2021. He cannot attempt to thwart the course of justice by staying in the Hospital endlessly.

8. In view of the discussions hereinabove, I am of the considered opinion that there is a *prima facie* case against the Petitioner, although I make it clear that at this stage, elaborate examination of evidence has not been embarked upon nor are the merits of the case being touched upon, this is to avoid any prejudice to the Petitioner. The Bail Application thus deserves to be and is accordingly rejected and disposed of.

9. Before parting with the matter, it is essential to direct the Medical Superintendent who has issued the Communication dated 01.04.2021 to the Assistant Superintendent of Police (Prison) regarding the medical condition of the Petitioner, to brief the Jail authorities in this context. All necessary medications of the Petitioner shall be made available for him in the Jail. The Medical Superintendent shall send a Doctor for the Petitioner's medical examination on every Monday and Thursday of the week or as and when deemed necessary by the Medical Superintendent.

10. Copy each of this Order be sent to the Medical Superintendent, Namchi District Hospital and the Senior Superintendent of Police (Prison), District Prison, Boomtar, South Sikkim, for information and compliance.

11. Copy of this Order also be sent to the Learned Trial Court, for information.

SLR (2021) SIKKIM 268

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

Bail Appln. No. 8 of 2021

Rohit Tamang ….. **PETITIONER**

Versus

State of Sikkim ….. **RESPONDENT**

For the Petitioner: Mr. Leonard Gurung, Advocate.

For Respondent 1-3: Mr. Yadev Sharma, Addl. Public Prosecutor with S.I Manish Gurung, Investigating Officer.

Date of decision: 16th April 2021

A. Sikkim Anti Drugs Act, 2006 – S. 18 – Code of Criminal Procedure, 1973 – S. 439 – Bail – Indiscriminate sale and consumption of controlled substances is a continuing bane of our society. Not only are the youth being led astray by consumption and sale of controlled substances they are dropping out of school or colleges thereby not only ruining their future prospects but also leading to a deterioration of their quality of life, both physical and mental. That apart, it also embroils the unsuspecting family of the substance abuser to a life of misery and travails which has a direct bearing on their mental health and happiness quotient. The sale of controlled substances fructifies in easy money sans effort and unconscionable people indulge in it with nary a care to the consequence it results in so long as it meets their objective. The negative impact of the sale and consumption of controlled substances also affects the society at large whose interests cannot be ignored or side lined. These points definitely need to be factored in while considering cases for bail under the SADA, 2006.

(Para 4)

Application dismissed.

Chronology of cases cited:

1. Union of India v. Ram Samujh and Another, (1999) 9 SCC 429.
2. State of Kerala and Others v. Rajesh and Others, (2020) 12 SCC 122.

ORDER (ORAL)

Meenakshi Madan Rai, J

1. The Petitioner, aged about 36 years, is accused of the offence under Section 7, 9(1)(c) and 14 of the Sikkim Anti Drugs Act, 2006 (SADA, 2006) read with Section 506 of the Indian Penal Code. Jorethang PS FIR Case No.7 of 2021, dated 31-01-2021, was registered against him on the basis of a Complaint lodged by the SHO, Jorethang Police Station. The Petitioner was arrested on 17-02-2021 and is presently in judicial custody, hence the instant Bail Petition.

2. Learned Counsel for the Petitioner submits that the Prosecution allegation is that the Petitioner was seen with the controlled substances, seized vide Annexure 6, the Property Seizure Memo, by two Police personnel on an abandoned road at „Bharikhola, Jorethang. No photographs of the Petitioner or the controlled substances were taken by the two Police personnel to substantiate this allegation. Stones allegedly pelted at the Police personnel and the *khukhuri* with which the Petitioner was said to have threatened them have not been seized. Annexure 6 reveals the location from where seizure of the controlled substances were made but the Petitioners name finds no mention therein. In such circumstances, the Petitioner cannot be foisted with the offences reflected in the FIR. The SHO had taken the witnesses along with him for the purposes of seizure of the controlled substances rendering the seizure suspicious as the witnesses could well have been tutored by the Prosecution. Two persons, namely, Sanjay Subba and Padam Bahadur Sanyasi, were found roaming at the place where the seizures were made. They were accordingly arrested and their vehicle was seized. The vehicle does not belong to the Petitioner, consequently none of the circumstances enumerated by the Prosecution connects the Petitioner to the offence. The allegation that the Petitioner was absconding is preposterous as in fact on 03-02-2021 he had taken his family and gone to Delhi. No intimation was made to the Petitioner requiring his presence

before the Police either on 03-02-2021 or any other date prior in time. The Petitioner who is innocent, is a Carpenter by profession, belongs to a respectable family and has no criminal antecedents. He is the only earning member of his family comprising of his wife and minor sons aged 7 years and 18 months respectively and his incarceration would adversely affect them, besides, his sons are presently unwell and he is required to facilitate their treatment. That, the Petitioner may be enlarged on bail in consideration of the above circumstances, on any terms and conditions.

3. Repudiating the contention of Learned Counsel for the Petitioner, it is submitted by Learned Additional Public Prosecutor that the Petitioner was at the place of occurrence with the controlled substances from where he absconded on being seen by the two Police personnel, leaving behind the controlled substances, which were subsequently seized by the Police. The arrest of the Petitioner took place only on 17-02-2021, on account of the fact that there were three other persons involved in the offence with the Petitioner for which steps were taken simultaneously by the concerned Investigating Officer (I.O.). On 03-02-2021, on enquiry, the I.O. was informed by the Petitioners sister that he had left for Delhi. Upon ascertaining his exact movements and location he was traced in Delhi from where he was arrested on 17-02-2021. That, the offence is grave and the controlled substances are valued at approximately Rs.22,00,000/- (Rupees twenty two lakhs) only, in the open market. That, the Learned Trial Court considering the facts and circumstances had correctly disallowed the Bail Applications of the Petitioner. That, now the Charge-Sheet has been submitted before the Learned Trial Court on 29-03-2021. The RFSL Report which was awaited has been received yesterday and shall be filed before the Learned Trial Court by tomorrow. Should the Petitioner be enlarged on bail the Prosecution apprehends that he will abscond as he is a permanent resident of West Bengal. Besides which, not only would it thwart the course of justice but enlarging him on bail would send a wrong message to society at large when he is found indulging in activities deleterious to the society.

4. Having given due consideration to the rival submissions of Learned Counsel for the parties, it is to be reiterated here that indiscriminate sale and consumption of controlled substances is a continuing bane of our society. Not only are the youth being led astray by consumption and sale of controlled substances they are dropping out of school or colleges thereby

not only ruining their future prospects but also leading to a deterioration of their quality of life, both physical and mental. That apart, it also embroils the unsuspecting family of the substance abuser to a life of misery and travails which has a direct bearing on their mental health and happiness quotient. The sale of controlled substances fructifies in easy money sans effort and unconscionable people indulge in it with nary a care to the consequence it results in so long as it meets their objective. The negative impact of the sale and consumption of controlled substances also affects the society at large whose interests cannot be ignored or sidelined. These points definitely need to be factored in while considering cases for bail under the SADA, 2006, as is the instant one.

5. The Supreme Court while being concerned with the menace of dangerous drugs flooding the market observed as follows in ***Union of India*** vs. ***Ram Samujh and Another***[1];

> **"7.** It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. **It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved.** .....
>
> **8.** To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

[1] (1999) 9 SCC 429

(i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail are satisfied.

The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the release of the respondent-accused on bail. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement the law in the spirit with which Parliament, after due deliberation, has amended.**"**

[emphasis supplied]

6. Further, in ***State of Kerala and Others*** vs. ***Rajesh and Others***[2] the Supreme Court held as follows;

"17. The jurisdiction of the court to grant bail is circumscribed by the provisions of Section 37 of the NDPS Act. **It can be granted in case there are reasonable grounds for believing that the accused is not guilty of such offence, and that he is not likely to commit any offence while on bail. It is the mandate of the legislature which is required to be followed.** At this juncture, a reference to Section 37 of the Act is apposite. That provision makes the offences under the Act cognizable and non-bailable. It reads thus:

"**37.** ***Offences to be cognizable and non-bailable***.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

(*a*) every offence punishable under this Act shall be cognizable;

[2] (2020) 12 SCC 122

(*b*) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(*i*) the Public Prosecutor has been 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 (2 of 1974), or any other law for the time being in force on granting of bail."

(emphasis supplied)

.....

19. <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 CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The 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</u>

> **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.**
>
> **20. 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.**"**
>
> **[emphasis supplied]**

The observations made and extracted *supra* explicitly apply to the matter at hand, the principles of Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) being embodied in Section 18(1)(ii) of the SADA, 2006.

7. Having considered the facts and circumstances placed before me and having examined all documents on record, it must be mentioned firstly that the medical report of the children of the Petitioner is of no assistance to him as it is evidently flu that they were suffering from which required no hospitalisation. It is now almost a month since the medical reports were prepared and no untoward incidents have occurred. It needs no reiteration that apart from the above circumstances, the nature and gravity of the offence, the penalty likely to be imposed on the Petitioner if convicted of

the offence charged with, apprehension of the accused absconding and thereby thwarting the course of justice, previous criminal antecedents, if any, of the accused and his position and standing in society as well as apprehension of the offence being committed and witnesses being influenced are required to be extended due consideration.

8. As already discussed the offence is grave and heinous as it deals with selling of controlled substances. The penalty, if found guilty, is high. There is an apprehension that the Petitioner could abscond being a resident of West Bengal, making it difficult for the Prosecution to secure his presence at the trial. Over and above these points, the quantity of the controlled substances recovered is gargantuan which is deleterious to the interest of society at large. Resultant, I am of the considered opinion that the Petitioner does not deserve to be enlarged on bail.

9. However, in view of the fact that the Charge-Sheet has already been submitted, let the trial commence after the RFSL Report is filed in the relevant Court. The Learned Trial Court shall made all efforts to dispose of the matter within eight months from the date of filing of the RFSL report.

10. The Bail Appln. stands rejected and disposed of accordingly.

11. The observations made herein above are only for the purposes of this Bail Application and shall have no bearing on the merits of the case.

12. Copy of this Order be sent to the Learned Trial Court for information.

SLR (2021) SIKKIM 276

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

Crl. A. No. 5 of 2020

Lalit Rai ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. Jorgay Namka, Advocate (Legal Aid).

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

Date of order: 16th April 2021

A. Indian Penal Code, 1860 – S. 302– F.I.R dated 23.01.2017 lodged by Panchayat of Megyong (PW-1) that around 4 p.m. he received a telephonic information from PW-5 that the appellant had murdered his wife. PW-1, accompanied by his friends visited the place of occurrence and found the body of the appellant's wife with multiple cut injuries on her person, caused by a sharp edged weapon. The appellant had absconded – Charge-sheet filed against the appellant under S. 302, I.P.C – Convicted under S. 302, I.P.C and sentenced to undergo rigorous imprisonment for life and to pay fine of 10,000 – Held: The evidence of eye witnesses are consistent and unwavering. They actually witnessed the appellant assaulting the deceased. Their evidence categorically establishes that the appellant was the perpetrator of the offence, being armed with MO-VIII (*Khukuri*) with which he assaulted the deceased. It cannot be said in these circumstances that he did not intend to inflict the injuries on the deceased which were sufficient in the ordinary course of nature to cause her death. The act complained of clearly does not fall within the ambit of the exceptions carved out in S. 300, I.P.C.

(Paras 1, 2 and 11)

B. Indian Evidence Act, 1872 – Circumstantial Evidence – Motive – In a case of direct evidence, "motive" is irrelevant whereas in a case of circumstantial evidence, motive may indeed be an important link which completes the chain of circumstances. Besides, motive not being an explicit requirement as per the provisions of the Indian Penal Code, failure to attribute motive cannot be fatal to the prosecution case where eye witness account exists.

(Para 12)

Appeal dismissed.

Chronology of cases cited:

1. Shivaji Chintappa Patil v. State of Maharashtra, 2021 SCC OnLine SC 158.
2. Stalin v. State, represented by the Inspector of Police, (2020) 9 SCC 524.
3. Thaman Kumar v. State of Union Territory of Chandigarh, (2003) 6 SCC 380.
4. Virsa Singh v. State of Punjab, AIR 1958 SC 465.
5. Polamuri Chandra Sekhararao *alias* Chinna *alias* Babji v. State of Andhra Pradesh, (2012) SCC 706.
6. V.D. Chavan v. Sambaji and Chandrabai (Smt.) and Others, (2006) 9 SCC 210.
7. Gurdip Singh v. The State of Punjab, (1971) 3 SCC 425.
8. Paramjit and Another v. State of Haryana, (1996) 11 SCC 143.
9. Raja *alias* Rajinder v. State of Haryana, (2015) 11 SCC 43.

JUDGMENT

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

1. This Appeal questions the Judgment and Order on Sentence, both dated 26.12.2019, of the Learned Sessions Judge, West Sikkim at Gyalshing, in Sessions Trial Case No.03 of 2017 *(State of Sikkim vs. Lalit Rai)*, by which the Appellant was convicted for the charge under Section

302 of the Indian Penal Code, 1860 (for short, "IPC") and sentenced to undergo Rigorous Imprisonment for life and to pay a fine of Rs.10,000/- (Rupees ten thousand) with a default clause of imprisonment.

2. Before dealing with the merits of the Appeal, we may briefly advert to the Prosecution case for clarity. Exhibit 1, the First Information Report (for short, "FIR") dated 23.01.2017, was lodged by P.W.1, Panchayat of Megyong, West Sikkim, informing that at around 4 p.m., he received telephonic information from P.W.5 stating that one Lalit Rai (Appellant) had murdered his wife. That, P.W.1, accompanied by his friends, visited the Place of Occurrence (for short, "P.O.") at Gaucharan, Amaley, Saagbari, Megyong, West Sikkim and found the body of the Appellants wife with multiple cut injuries on her person, caused by a sharp edged weapon. The Appellant had absconded from the P.O. On the basis of Exhibit 1, FIR bearing No.04/2017, dated 23.01.2017, was registered against the Appellant under Section 302 IPC by Kaluk Police Station. The investigation revealed that the deceased was earlier married to one Krishna Bahadur Gurung and had three children from the said wedlock. She later developed relations with the Appellant who was also from the same neighbourhood and living with his aged parents. In the month of June, 2016, Krishna Bahadur Gurung caught the Appellant and the deceased in a compromising position upon which he asked his wife to leave his home. The Appellant took the deceased as his wife and constructed a separate house where he lived with her but the deceased often used to taunt the Appellant due to their financial problems and wished to return to her former husband. The Appellant thus became insecure and suspected her of having an extra marital affair. On the relevant day, both the Appellant and the victim had gone to the *"dhara"* (water source) to fetch water. The Appellant had carried a backpack with documents and a torch light as well as a *"khukuri"* (sharp edged weapon) in its scabbard. On reaching the P.O., they met P.Ws.2, 3 and 4. The Appellant spoke to P.W.3 who, upon questioning, remarked that she liked the deceased who often gave her sweets. An altercation broke out between the Appellant and the deceased as to how the deceased had obtained the sweets to give P.W.3 as the Appellant had not given such articles to the deceased. In a fit of rage, the Appellant assaulted the deceased with the *"khukuri"* he was carrying, which proved to be fatal. On completion of investigation, Charge-Sheet came to be filed against the Appellant under Section 302 of the IPC before the Court of the Learned Chief Judicial Magistrate, West Sikkim at Gyalshing which was committed to the Court of

Sessions. The Learned Sessions Court framed Charge against the Appellant under Section 302 of the IPC. On his plea of "not guilty," twenty Prosecution Witnesses were examined, on closure thereof, the Statement of the Appellant under Section 313 of the Code of Criminal Procedure, 1973, was recorded in which he denied any involvement in the offence. On due consideration of the evidence and materials furnished, the Learned Trial Court convicted and sentenced the Appellant as aforestated.

3. Before this Court, the arguments advanced by Learned Counsel for the Appellant was that the case was one of circumstantial evidence as P.Ws.2, 3 and 4, who were alleged to be eye witnesses by the Prosecution had, in fact, not witnessed the alleged incident. P.W.2, as per her evidence, only heard the sound of the Appellant assaulting his wife but did not witness it. P.W.3 was a six year old minor whose evidence merits no consideration apart from which, she failed to support the Prosecution case. P.W.4 had hearing and speech impediment making her evidence suspicious and unreliable. P.Ws.13 and 14 both failed to fortify the Prosecution case regarding the disclosure made by the Appellant. The Report of the Central Forensic Science Laboratory (for short, "CFSL"), Kolkata, Exhibit 17, is of no assistance to the Prosecution case as the weapon of offence did not contain the blood stains of the deceased. There were only four injuries on the body of the deceased which were insufficient in the ordinary course of nature, to cause her death. The Prosecution also failed to establish any motive for the offence or to prove its case beyond a reasonable doubt. Hence, the impugned Judgment and Order on Sentence be set aside and the Appellant be acquitted of the Charge. To buttress his submissions, Learned Counsel placed reliance on the decisions of the Honble Supreme Court in ***Shivaji Chintappa Patil vs. State of Maharashtra***[1] and ***Stalin vs. State, Represented by the Inspector of Police***[2].

4. Learned Additional Public Prosecutor, repudiating the contentions of Learned Counsel for the Appellant, submitted that the Prosecution has indeed proved its case beyond a reasonable doubt, as established by the evidence of P.Ws.2, 3 and 4 who witnessed the incident. P.W.2 clearly stated she saw the Appellant had suddenly assaulted his wife with an object that he was carrying. The evidence of P.W.3 also reveals that she had gone

[1] 2021 SCC OnLine SC 158
[2] (2020) 9 SCC 524

to the *"dhara"* and saw the Appellant killing his wife. That, P.W.4 despite her physical challenges, was able to state that the Appellant was carrying a bag and was with his wife in the field where he killed her with a *"khukuri"* MO VIII. That, the evidence of all three witnesses have not been decimated in crossexamination. P.W.5 also deposed that on the same day, the Appellant arrived at his courtyard and shouted that he had killed his wife and threatened to kill the wife of P.W.5 as well. That, the Appellant in his Statement under Section 27 of the Indian Evidence Act, 1872 (for short, "Evidence Act") revealed that he could disclose the location where he had thrown the *"khukuri."* That, the Statement was recorded by the Investigating Officer (for short, "I.O.") in the presence of two witnesses *viz.* P.Ws.13 and 14, who have testified as much. MO VIII was recovered from the place as disclosed by the Appellant. That, the CFSL Report, Exhibit 17, indicates that human blood was detected on MO VIII which was of female human origin, duly buttressed by the evidence of P.W.17 who examined the articles thus establishing that MO VIII was the weapon of offence which fatally injured the victim. That, MO X the black Jacket and MO XI the black Track Pants, the wearing apparels of the Appellant were seized from his possession in the presence of P.Ws.15 and 16 as substantiated by Exhibit 16, the Seizure Memo. That, as per P.W.17, blood found on MO VIII was of female human origin. Although the Appellant claims that he had no motive to kill the deceased and that there were no eye witnesses to the incident, he has failed to explain the circumstance as to how the blood of the deceased, as supported by Exhibit 17, was found on MO VIII, MO X and MO XI. That, the Post Mortem Report of the deceased, Exhibit 5, which was prepared by P.W.8, the Medico Legal Consultant of STNM Hospital, Gangtok on 25.01.2017, reveals that there were multiple injuries on the person of the deceased which was the cause of her death, having been inflicted by a sharp heavy weapon. To fortify his submissions, reliance was placed on ***Thaman Kumar vs. State of Union Territory of Chandigarh[3], Virsa Singh vs. State of Punjab[4], Polamuri Chandra Sekhararao alias Chinna alias Babji vs. State of Andhra Pradesh[5], V.D. Chavan vs. Sambaji and Chandrabai (Smt.) and Others[6], Gurdip Singh vs. The State of Punjab[7], Paramjit and Another vs. State of***

[3] (2003) 6 SCC 380
[4] AIR 1958 SC 465
[5] (2012) SCC 706
[6] (2006) 9 SCC 210
[7] (1971) 3 SCC 425

Haryana[8] and ***Raja alias Rajinder vs. State of Haryana***[9]. That, the Prosecution has proved its case beyond a reasonable doubt and the impugned Judgment and Order on Sentence requires no interference. Hence the Appeal be dismissed.

5. Learned Counsel for the parties were heard *in extenso* and due consideration accorded to their submissions. The evidence and documents on record have been meticulously examined and the impugned Judgment and citations made at the Bar perused. It is thus appropriate to assess whether the Judgment of conviction and Order on Sentence of the Learned Trial Court were justified.

6. Section 300 of the IPC deals with the offence of murder which carves out five Exceptions to the offence and explains when culpable homicide is not murder. Learned Counsel for the Appellant has placed reliance on ***Stalin vs. State*** *(supra).* The Accused/Appellant therein was accused of the death of the victim on account of a single knife blow inflicted by him. It was contended that Section 302 of the IPC would not be attracted and the case would fall under Section 304 Part II of the IPC. The Honble Supreme Court, after hearing the matter, dealt with Exception 4 to Section 300 of the IPC, which provides that culpable homicide is not murder if it is committed without premeditation, in a sudden fight, in the heat of passion, upon a sudden quarrel and without the offender having taken undue advantage and not having acted in a cruel or unusual manner. It was concluded that the case would fall under Section 304 Part I of the IPC and not Section 304 Part II of the IPC. It is not the argument of the Appellant herein that his case falls within the parameters of Exception 4 to Section 300 of the IPC, hence this ratio is of no assistance to him. Learned Counsel had also garnered strength from the ratiocination in ***Shivaji Chintappa Patil*** *(supra).* In the said case, the Honble Supreme Court was dealing with a matter in which the High Court of Judicature at Bombay had dismissed the Appeal of the Appellant and maintained the conviction of sentence passed by the Learned Additional Sessions Judge for the offence under Section 302 of the IPC. The matter therein pertained to circumstantial evidence. The Honble Supreme Court, after examining the evidence on record, was of the considered opinion that the chain of events which were to be so interwoven to each other leading to no other conclusion than the

[8] (1996) 11 SCC 143
[9] (2015) 11 SCC 43

guilt of the accused, as required in cases of circumstantial evidence, was missing and the Prosecution even failed even to prove a single incriminating circumstance beyond a reasonable doubt. This ratio also lends no succour to the Appellants case for the reason that the instant matter does not pertain to circumstantial evidence. P.W.2, in her testimony, has categorically stated that at the relevant time, she was collecting water at the village *"dhara"* when she saw the accused and his wife nearby. As she was walking, she heard a sound "*chaak*" and when she looked, she "saw" the accused had suddenly assaulted his wife with an object he was carrying. This evidence withstood cross-examination. P.W.3, although six years old, was found to be a competent witness, the Learned Trial Court having questioned her prior to recording her evidence and concluded that she gave rational answers to the questions put to her. She also deposed that she had witnessed the Appellant killing his wife. Her cross-examination did not decimate her evidence-inchief. P.W.4 was the third eye witness to the incident and although speech and hearing impaired, she deposed that she had seen the Appellant with his wife on the field and that the Appellant killed his wife with a *"khukuri."*

7. The evidence of P.Ws.13 and 14 discloses their presence at the time when the Statement of the Appellant under Section 27 of the Evidence Act, Exhibit 14, was recorded by the I.O. P.W.18. They identified their signatures as Exhibit 14 (a) and Exhibit 14 (b) respectively, on Exhibit 14. On the disclosure made by the Appellant, recovery and seizure of the weapon of offence MO VIII, was made by the I.O. in the presence of the two witnesses vide Exhibit 15, the Seizure Memo. P.W.13 also identified his signature on the scabbard of MO VIII. Consequently, no error emanates in Exhibit 14 as recorded by the I.O. and recovery of MO VIII.

8. P.W.17 was the Examiner-cum-Reporting Officer of CFSL, MHA, Government of India. She examined MO VIII, MO X, MO XI, MO XII, MO XIII T-shirt, MO XIV Pyjama, MO XV Brassiere, MO XVI Slacks, MO XVII, MO XVIII blood sample and Soil samples MO XXI and MO XXII. According to this witness, human blood could be detected on the Material Objects enumerated hereinabove. She also found that the blood on MO VIII, MO X, MO XII and MO XXI were of female human origin due to the presence of „XX peaks in amelogenin (sex determination marker). The blood sample of the deceased MO XVIII matched with the genetic profile recovered from the human blood stains present on MO X and MO XI. Thus, it is evident from Exhibit 17 and the evidence of P.W.17 that the

blood of the deceased not only matched the blood stains on MO X and MO XI, articles of clothing of the Appellant but also on MO VIII the weapon of offence. No explanation was forthcoming from the Appellant as to how the blood of the deceased was found on his wearing apparels and MO VIII, neither did the Appellant take recourse to the provisions of Section 106 of the Evidence Act.

9. The evidence of P.W.8, Medico Legal Consultant, STNM Hospital is to the effect that the body of the deceased was forwarded for autopsy on 24.01.2017 at 4.30 p.m. Autopsy was conducted by him on 25.01.2017 at 10 a.m. to 11.30 a.m. The body was found with multiple injuries near *"pani dhara."* The following findings were *inter alia* recorded by P.W.8 in his Report, Exhibit 5;

"Antemortem Injuries:

1. *Amputation of left index finger of the hand.*
2. *Incised wound (red, bleeding) measuring 3.8 X 1.3 cm over lateral extensor aspect of left forearm.*
3. *Multiple linear abrasion over an area of 18X5 cm, at the lateral extensor surface of left forearm.*
4. *Incised chop would (8X4X2.8 cm) over the front of face involving the bridge of nose, left and right cheek.*
5. *Linear incised wound (8X0.5 cm) situated just below the right angle of mandible extending from the midline to the right side of neck.*
6. *Incised injury (4X1.2X0.8 cm) situated 2 cm below injury 5 nos.*
7. *Incised chop injury with underlying fracture of frontal skull bone involving right-eyebrow. The injury measuring 7X2 cm with underlying comminuted fracture of parietotemporal bone (right)*

8. Stellate shaped wound incised injury 5X1.6Xbone over the occiput

9. Chop wound 18 X 5.5 X bone placed over the back of the neck at the level of C-7. Spine with tailing of the would (sic) *measuring 4 cm placed even the right side, just below the right ear. The injury involves the skin, cervical vertebrae, spinal cord, muscle and arteries (Vertebrae).*

10. Chop injury (8X1.8 cm X 3 cm) extending from left side of mid mandible and extending posteriorly till the hairline posteriorly and involves the lower lobe of ear which has been cut off.

Head and neck :- Subdural haematoma 6X4X2 cm over the right parietotempral region. Diffuse Sub- Arachnoid haemorrhage present.

.....

The Opinion as to the approximate time since death was 12 – 24 hrs and the cause of death, to the best of my knowledge and belief was due to multiple injuries associated with 85-90% transaction of the spinal cord, as a result of sharp heavy weapon homicidal in nature. ..."

His evidence establishes that multiple injuries were inflicted on the deceased by a sharp heavy weapon which resulted in her death. In other words, it emanates that the injuries that were sustained by the deceased, were sufficient in the ordinary course of nature to cause her death. The ocular evidence of P.Ws.2, 3 and 4 are found trustworthy and credible and finds due corroboration in the medical evidence and Exhibit 17.

10. In ***Virsa Singh*** *supra*, the Honble Supreme Court, speaking through Vivian Bose, J., held *inter alia* as follows;

> "**(12)** To put it shortly, the prosecution must prove the following facts before it can bring a case under S. 300 "thirdly".;

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

(13) Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under Section 300 "thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be

shown, or reasonably deduced, that the injury was accidental or otherwise unintentional."

The observations of the Honble Supreme Court *supra* squarely apply to the facts and circumstances in the instant matter.

11. The evidence of the eye witnesses are consistent and unwavering. They actually witnessed the Appellant assaulting the deceased. Their evidence categorically establishes that the Appellant was the perpetrator of the offence, being armed with MO VIII with which he assaulted the deceased. It cannot be said in these circumstances that he did not intend to inflict the injuries on the deceased which were sufficient in the ordinary course of nature to cause her death. The act complained of clearly does not fall within the ambit of the Exceptions carved out in Section 300 of the IPC.

12. It may relevantly be noted here that in a case of direct evidence, "motive" is irrelevant whereas in a case of circumstantial evidence, motive may indeed be an important link which completes the chain of circumstances. Besides, motive not being an explicit requirement as per the provisions of the Indian Penal Code, failure to attribute motive cannot be fatal to the Prosecution case where eye witness account exists. Resultant, the argument of Learned Counsel for the Appellant that no motive was established by the Prosecution, cannot be countenanced as ocular testimony of witnesses have rightly been considered by the Trial Court to bring home the charge against the Appellant.

13. Hence, in light of the discussion made hereinabove, the findings of the Learned Trial Court proving the guilt of the Appellant is just and proper and thereby the impugned Judgment and Order on Sentence warrants no interference.

14. Consequently, we find no merit in the Appeal which fails and is accordingly dismissed.

15. No order as to costs.

16. Copy of this Judgment be transmitted to the Learned Trial Court, for information.

17. Records be remitted forthwith.

SLR (2021) SIKKIM 287

(Before Hon'ble the Chief Justice)

Crl. A. No. 31 of 2018

Mikal Bhujel *alias* Rubeen ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. B. Sharma, Sr. Advocate with Mr. B.N. Sharma, and Mr. Safal Sharma, Advocates.

For the Respondent: Ms. Pema Bhutia, Asst. Public Prosecutor.

Date of decision: 17th April 2021

A. Protection of Children from Sexual Offences Act, 2012 – S. 3 – Penetrative Sexual Assault – F.I.R registered on 25.05.2016 under S. 376, I.P.C read with S. 6 of the POCSO Act against one Jeewan Bhujel @ John based on a written complaint of the minor victim's mother that the said person of the same locality had sexually assaulted the minor victim on many occasions since 2014 because of which she was impregnated – Charge-sheet filed against the appellant and one Jeewan Bhujel @ John – The minor victim gave birth to a child on 07.01.2017 – Blood samples of the suspects, the minor victim and the baby collected and sent for DNA test – DNA report revealed Jeewan Bhujel @ John is the biological father and the minor victim to be the biological mother of the baby – Supplementary charge-sheet filed accordingly – Charge framed against under S. 5 (j) (ii) and (l) of the POCSO Act – Jeewan Bhujel @ John convicted and sentenced under S. 6 of the POCSO Act while the appellant was convicted and sentenced under S. 4 of the POCSO Act – Held: As per the testimony of the minor victim, it is clear apart from removing her wearing apparels and that of the appellant, there is allegation of sexual assault – The minor victim's testimony does not satisfy the requirements of S. 3 of the POCSO Act – Conviction of the appellant relying upon the sole testimony of the

victim under S. 3 of the POCSO Act and the sentence awarded set aside – Converted converted to S. 7 of the POCSO Act.

(Paras 2, 24 and 26)

B. Code of Criminal Procedure, 1973 – S. 154 – F.I.R – F.I.R is not supposed to be an encyclopedia on the entire evidence and cannot contain the minutest details of the events. The plea of impleading a person afterthought must be judged having regard to the entire factual scenario in each case (In *re. Kirender Sarkar and Others* discussed).

(Para 10)

C. Indian Penal Code, 1860 – Ss. 375 and 376 – Rape – The basic ingredient to prove the charge of rape is the accomplishment of the act with force. The other ingredient is penetration of the male organ within the labia majora or the vulva, or pudendum with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Ss. 375 and 376, I.P.C (In *re. Aman Kumar and Another,* and *State of U.P. v. Babul Nath* discussed).

(Para 20)

D. Protection of Children from Sexual Offences Act, 2012 – S. 3 – Penetrative Sexual Assault – The ingredients for commission of rape under S. 375 (a) to (d), I.P.C is similar to S. 3 (a) to (d) of the POCSO Act – If those acts are committed in any of the seven descriptions specified in the definition of rape in S. 375, I.P.C with the aid of Explanation (1), it would amount to rape for which punishment is prescribed in S. 376, 376 (2) (a) (i) to (iii), 376 (2) (b), 376 (2) (c), 376 (2) (d) and 376 (2) (e) – In Explanation (1) to S. 375, I.P.C, it is clarified that "vagina" shall also include "labia majora". But in the POCSO Act, no such explanation has been given with respect to "vagina" what it includes or not.

(Para 21)

E. Protection of Children from Sexual Offences Act, 2012 – S. 3 – Penetrative Sexual Assault – To prove the allegation of penetrative sexual assault in terms of the provision of the POCSO Act, penetration of penis into vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person is necessary. Although the explanation to the meaning of vagina has not been given in the POCSO Act as given in

S. 375, I.P.C, but looking to the legislative intent of the POCSO Act, the same explanation may be acceptable while dealing the cases of the POCSO Act – For the penetrative sexual assault for the purpose of S. 3 of the POCSO Act also, penetration of penis into vagina would include all the above specified parts of the female organ and if such evidence has been brought in the testimony of the victim, the charge of S. 3 would be proved otherwise it would come within the purview of S. 7 of the POCSO Act.

(Para 23)

Appeal partly allowed.

Chronology of cases cited:

1. State of Sikkim v. Sashidhar Sharma, SLR (2019) SIKKIM 717.
2. Kirender Sarkar and Others v. State of Assam, AIR 2009 SC 2513.
3. Aman Kumar and Another v. State of Haryana, (2004) 4 SCC 379.
4. State of U.P. v. Babul Nath, (1994) 6 SCC 29.
5. Tarkeshwar Sahu v. State of Bihar (now Jharkhand), (2006) 8 SCC 560.

JUDGMENT

Jitendra Kumar Maheshwari, CJ

This appeal has been filed under Section 374 of the Code of Criminal Procedure, 1973, hereinafter referred to as "Cr. P.C.", by the accused/ appellant Mikal Bhujel @ Rubeen, challenging the judgment dated 21.08.2018 and the findings of conviction recorded in S.T. (POCSO) Case No.14 of 2016 by the learned Special Judge, Protection of Children from Sexual Offences Act, 2012, hereinafter referred to as "POCSO Act". The sentence awarded on 22.08.2018 directing the accused to undergo 7 years Rigorous Imprisonment has also been assailed with fine of Rs.5,000/-, in default, three months Rigorous Imprisonment.

2. The case of the prosecution, in brief, is that on 25.05.2016 at 13.30 hrs., a written complaint was submitted by the mother of the minor victim to Rhenock Police Station. It is alleged that on complaining stomach ache by the victim, she consulted the Doctor and found that her minor daughter is

pregnant. On enquiring with the victim, she revealed that one Jeewan Bhujel @ John of the same locality had sexually assaulted her on so many occasions since the year 2014. On receiving the complaint of mother of victim, Rhenock Police Station registered FIR No. 04/2016 on the same date, i.e. 25.05.2016, against Jeewan Bhujel @ John under Section 376 of the Indian Penal Code, 1860, hereinafter referred to as "IPC" read with Section 6 of the POCSO Act. Thereafter, it was endorsed for investigation to Sub-Inspector Jigme W. Bhutia. On recording the statement of the victim under Section 161 of the Cr. P.C., it transpired that the son of the accused Jeewan Bhujel, namely, Mikal Bhujel @ Rubeen (appellant), had also sexually assaulted her on 3 to 4 occasions, therefore, the appellant was also made accused. Accused persons and the victim were sent for medical examination to Rhenock PHC, wherefrom she was referred to STNM Hospital, Gangtok for further examination. The Investigating Officer seized the birth certificate of the victim from her stepfather in the presence of two independent witnesses. Both the accused persons were arrested, thereafter sketch-map was prepared. The victim was found pregnant as per the report of the Doctor of STNM Hospital. The radiological report as well the forensic report regarding pregnancy has also been obtained. The statement of the victim was recorded under Section 164 of the Cr. P.C. by the Judicial Magistrate, East Sikkim. The seized articles were sent to the Forensic Science Laboratory, Tripura. Intimation has also been given to the Member Secretary, Sikkim Commission for Protection of Child Rights. With the aforesaid prima facie material the Investigating Officer closed the investigation and filed charge-sheet against both the accused persons Jeewan Bhujel @ John and Mikal Bhujel @ Rubeen (appellant) under Section 376 of the IPC read with Section 6 of the POCSO Act. The victim gave birth to a boy child on 07.01.2017. Thereafter, the blood samples of the suspects were collected along with the blood samples of the victim as well as the newly born child and sent for DNA test. The DNA report has been received on 03.05.2017. As per the said report it was found that the accused no.1 Jeewan Bhujel @ John is the biological father and the victim is the biological mother of the newly born baby (boy). However, supplementary challan has been filed after further investigation.

3. On completion of the investigation, charge-sheet was submitted before the competent Court, wherefrom it was transmitted to the Court of Sessions having jurisdiction for trial, where charges were framed against the appellant and the co-accused under Section 5 (j) (ii) and (l) of the POCSO

Act. The accused persons have abjured their guilt and demanded trial. During trial, the accused Jeewan Bhujel @ John has admitted his guilt of alleged sexual assault taking defence that it was with consent, while the accused/appellant Mikal Bhujel @ Rubeen has taken a defence of his false implication.

4. The prosecution has examined as many as 14 witnesses to prove the charges levelled. In defence, the appellant examined himself and his wife as a defence witness.

5. Learned Trial Court after considering the evidence, recorded the finding that the allegation of commission of rape to prove the charge under Section 5 of the POCSO Act, i.e. aggravated penetrative sexual assault has been proved against Jeewan Bhujel @ John accused no.1 who was convicted and sentenced under Section 6 of the POCSO Act, while the accused/appellant Mikal Bhujel @ Rubeen was found guilty of charge of penetrative sexual assault under Section 3 of the POCSO Act, accordingly, convicted and sentenced under Section 4 of the POCSO Act, as described hereinabove. It is relevant to state that the accused Jeewan Bhujel @ John has not filed any appeal against the judgment of his conviction and sentence and the present appeal has been filed by the appellant Mikal Bhujel @ Rubeen only questioning the impugned judgment.

6. Mr. B. Sharma, learned Senior Counsel appearing on behalf of the appellant, has contended that in the FIR lodged by the mother of the victim on enquiring her, the name of the appellant has not been mentioned. Therefore, initially, the offence was registered only against Jeewan Bhujel @ John. The victim, in her statement under Section 161 Cr. P.C. implicated the appellant which is based on afterthought. It is urged in the statement of the victim under Sections 161 and 164 Cr. P.C. the allegation of rape/sexual assault has not been alleged but, in the Court statement, only the allegation of sexual assault indicating the incident has been alleged. The testimony of prosecutrix, PW-1 and the case of prosecution cannot be relied upon in particular when the said allegation has not been supported by medical and forensic evidence collected against the appellant. It is also urged that if we see the statement of the prosecutrix under Sections 161 and 164 Cr. P.C., she said “chara garyo” to her while, in the Court statement, it is stated that she was sexually assaulted and it would not cause a commission of offence as per the judgment of this Court in the case of State of Sikkim vs.

Sashidhar Sharma reported in SLR (2019) SIKKIM 717. It is also contended that as per DNA report, the victim is the biological mother of the newly born baby boy, and the co-accused Jiwan Bhujel @ John is the biological father. Thus, the allegation of rape as alleged did not find support from the DNA report. It is urged that if this Court is of the opinion that the testimony of the victim is worthy to rely in such a case looking to her testimony, the finding and conviction under Section 3 of the POCSO Act and the sentence under Section 4 of the POCSO Act are not tenable, hardly it may be a case of Section 7 of the POCSO Act and punishment under Section 8 of the POCSO Act is specified. Therefore, considering the alternative argument, the finding and conviction may be set aside and the sentence may be reduced as per Section 8 of the POCSO Act.

7. Per contra, Ms. Pema Bhutia, learned Assistant Public Prosecutor, contends that as per the allegation alleged by the prosecutrix, the Trial Court has considered the testimony of the prosecutrix which remain withstand to the allegation and there is no cross-examination of those allegation, therefore, the testimony of the victim has been rightly relied upon. The story of commission of rape as alleged by the prosecutrix has been proved and the appellant as well as co-accused, both have been convicted though for separate charges, believing the story of the prosecution, relying the testimony of the prosecutrix. Therefore, such findings do not warrant any interference. On the alternative contention, it is urged that looking to the testimony of the prosecutrix, the Trial Court has rightly convicted the appellant under Section 3, i.e. penetrative sexual assault, although the charge was under Section 5, i.e. aggravated penetrative sexual assault. The said finding of fact is just, to which interference in this appeal either on conviction or on sentence is not warranted.

8. After hearing learned counsel for the parties and in the facts of the case while adverting the arguments so advanced, the following two questions are posed for answer:

(i) Whether the Trial Court committed an error in convicting the appellant relying upon the testimony of the prosecutrix warranting interference in this appeal?

(ii) Whether the alternative argument of appellant-counsel is having some force, in the facts and circumstances of the case?

9. The said question can be answered on consideration of the allegation and the evidence brought to prove such allegation and the charges. As per the prosecution narration, about 3-4 days after committing the rape by John Bhujel, the appellant Rubeen Bhujel called the mother of the victim to send tobacco and surf buying from the shop asking the victim. It is further alleged that the appellant committed sexual assault 2-3 times. As per the testimony of the prosecutrix, the mother told her that the appellant Rubeen Bhujel requested to ask her for buying some tobacco and surf from nearby shop and send to his residence. On instruction of the mother, she bought tobacco and surf and reached to the residence of the appellant. He was alone at home and his family members had gone to the church. The appellant called her inside the room where he was watching Television. She had asked to sit down on the bed and the accused bolted the door. After forcibly pushing her on his bed, the accused removed her apparels. The victim tried to free from the clutches of the accused but the accused prevented though she had screamed and cried for help. Thereafter, the accused removed his clothes which he was wearing and committed sexual assault. On the basis of the said testimony, it is clear that slight deviation from allegation was there in the Court statement with respect to committing sexual assault 2-3 times but, the allegation of sexual assault is re-stated by the said testimony and the said allegation remain withstand and there is no cross-examine of it. Therefore, the victim withstands to the allegation by her in ocular version. The counsel for the appellant contended that the name of his client has not been mentioned in the FIR lodged by the mother of the victim and later in her statement, the allegation of commission of rape has been brought against him because the appellant refused to marry the victim, those possibilities of false implication may be ruled out because her statement was recorded by the Investigating Officer on the same day as of lodging the FIR, in which name of appellant with the allegation has come on record.

10. In this regard the judgment of the Hon'ble Apex Court in the case of Kirender Sarkar & Ors. vs. State of Assam reported in AIR 2009 SC 2513 is relevant. By which it is clear that FIR is not supposed to be an encyclopedia on the entire evidence and cannot contain the minutest details of the events. The plea of impleading the person afterthought must be judged having regard to the entire factual scenario in each case. In this context on lodging FIR on 25.05.2016, the statement of the prosecutrix was recorded on the same day in the presence of the mother and father of the victim in which she levelled allegation of commission of rape against the

appellant also. The SHO applied to the Magistrate for recording her statement under Section 164 Cr. P.C. on 26.05.2016, however, the Magistrate gave the date for recording such statement on 14.06.2016. In the said statement, allegation of "chara garyo" has been alleged and in the Court statement, as narrated hereinabove, the allegation of sexual assault has remained withstand, therefore, in the opinion of this Court, if the mother of the victim has not specified the name of the accused/appellant in FIR, it does not give any benefit because, at the earliest occasion, when the statement of the victim was recorded by police on the same day, the allegation against the appellant has been brought by her. In view of the above, the testimony of the victim remains in ocular so far as the sexual assault made by the appellant. Therefore, the allegation of sexual assault by the appellant has been proved by the prosecution beyond reasonable doubt.

11. It is not out of place to observe that in the present case, there are two accused persons, Accused No.1, Jeewan Bhujel, father of the appellant has sexually abused the victim first. As per DNA report, the baby boy born on 07.01.2017, the child is the biological son of the victim and Jeewan Bhujel @ John. Jeewan Bhujel @ John has not filed any appeal challenging the finding of conviction. Thus, it can safely be said that the testimony of the victim cannot be doubted proving the allegation of prosecution with respect to rape. The sole testimony of the victim proving allegation of commission of rape is sufficient so far as it relates against the appellant is concerned. Therefore, the finding of guilt recorded by the Trial Court does not warrant interference.

12. Now, reverting to the alternative argument of the appellant that as per the testimony of the prosecutrix, conviction under Section 3 of the POCSO Act is not in accordance with law, required to be adverted to. In the present case, charge has been framed against the appellant under Section 5 of the POCSO Act alleging aggravated penetrative sexual assault. The Trial Court had not convicted the appellant for the said charge but altered it to the lesser punishment under Section 3 (a) and 4 of the POCSO Act for penetrative sexual assault. In terms of the testimony of the prosecutrix if accepted on its face, the arguments advanced is that such testimony may fall within the purview of the sexual assault as specified under Section 7, to which punishment thereto under Section 8 of the POCSO Act is prescribed.

13. The charge against the appellant was under Section 5 (j) and (l), therefore, the relevant provision as required to be reproduced, which reads as under:

> **"5. Aggravated penetrative sexual assault.-** (a) xxxxxxx
>
> x x x
>
> (j) whoever commits penetrative sexual assault on a child, which-
>
> (i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (b) of section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently;
>
> (ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;
>
> (iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or Infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks;
>
> (iv) causes death of the child; or
>
> x x x
>
> (l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or"

14. Section 3 of the POCSO Act deals with penetrative sexual assault, which is reproduced as thus:

> **"3. Penetrative sexual assault.-** A person is said to commit "penetrative sexual assault" if -
>
> (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
>
> (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
>
> (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
>
> (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

The punishment for penetrative sexual assault has been prescribed under Section 4 of the POCSO Act.

15. Section 7 of the POCSO Act deals with sexual assault, which is also relevant, therefore, reproduced as thus:

> "7. **Sexual assault.-** Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

The punishment for Section 7 has been prescribed under Section 8 of the POCSO Act.

16. On perusal of the aforesaid provisions, it is clear that Section 5 applies for aggravated penetrative sexual assault but the said charge has not been found prove as per allegation and the testimony of the victim against the appellant. The Trial Court convicted for lesser charge of Section 3 and punished under Section 4 of the POCSO Act. On perusal thereto it is clear that in case a person commits a penetrative sexual assault by penetrating his penis, to any extent, into vagina, mouth, urethra or anus of a child or makes the child to do so vice-a-versa with him or any other person, therefore, by the evidence, the element of penetration of penis to any extent into the vagina, mouth, urethra or anus is necessary. As per the testimony of the victim so far as it relates to the appellant is concerned, it is said that when she entered into the room where the appellant was watching Television, she was asked to sit on bed and he bolted the door. After pushing her forcibly, he removed her apparels. Thereafter, the accused removed his clothes that he was then wearing and committed sexual assault. As per the testimony of the Doctor or in the scientific report, no evidence has been brought by the prosecution corroborating the said allegation against the appellant. Therefore, looking to the said testimony, the penetration of penis into vagina has not been proved except to alleging the sexual assault. In the said context, if we see the aforesaid provision of Section 7 of the POCSO Act then it is clear that when a person with sexual intent does any other act which involves physical contact without penetration is said to commit sexual assault. Therefore, to analyze the said testimony it is to be seen that what is the meaning of penetration of the penis.

17. In the above context, the judgment of the Hon'ble Supreme Court in the case of Aman Kumar & Another vs. State of Haryana reported in (2004) 4 SCC 379 is relevant. The Apex Court in the said case in paragraph 7 held as thus:

> "7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see Joseph Lines, IC&K 893).

It is well known in the medical world that the examination of smegma loses all importance after twenty-four hours of the performance of the sexual intercourse. [See S.P. Kohli (Dr) v. High Court of Punjab and Haryana [(1979) 1 SCC 212 : 1979 SCC (Cri) 252] .] In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma around the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty-four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to

> hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora, are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the female for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC."

18. The said judgment is based upon the judgment of State of U.P. vs. Babul Nath reported in (1994) 6 SCC 29, wherein the difference of sexual assault or indecent assault has been clarified observing that complete penetration is not essential even partial or slightest penetration with or without emission of semen and rupture of hymen or even an attempt to penetration is sufficient, as per medical jurisprudence.

19. The Apex Court in the case of **Tarkeshwar Sahu vs. State of Bihar (now Jharkhand)** reported in **(2006) 8 SCC 560** has observed and relevant portion of the judgment is reproduced as thus:

> **"10.** ..... The important ingredient of the offence under Section 375 punishable under Section 376 IPC is penetration which is altogether missing in the instant case. No offence under Section 376 IPC can be made out unless there was penetration to some extent. In the absence of penetration to any extent, it would not bring the offence of the appellant within the four corners of Section 375 of the Penal Code. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act

with force. The other important ingredient is penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Section 375 and 376 IPC. ……..”

x x x

13. In order to constitute rape, what Section 375 IPC requires is medical evidence of penetration, and this may occur and the hymen remain intact. In view of the Explanation to Section 375, mere penetration of penis in vagina is an offence of rape. Slightest penetration is sufficient for conviction under Section 376 IPC.

x x x

21. In view of the catena of judgments of the Indian and English Courts, it is abundantly clear that slight degree of penetration of the penis in the vagina is sufficient to hold the accused guilty for the offence under Section 375 IPC punishable under Section 376 IPC.”

20. On perusal of the aforesaid, it is clear that the basic ingredient to prove the charge of rape is the accomplishment of the act with force. The other ingredient is penetration of the male organ within the labia majora or the vulva or pudendum with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Sections 375 and 376 IPC.

21. It is not out of place to observe here that all the aforesaid judgments are interpreting the provisions of Sections 375 and 376 of the IPC. The ingredients as specified for commission of rape under Section 375 (a) to (d) IPC is similar to Section 3 (a) to (d) of the POCSO Act. If those act has been committed in any of the seven descriptions as specified in the definition of rape in Section 375 IPC with the aid of Explanation one, it would amounting to committing of rape to which punishment has been

prescribed in Section 376, 376 (2) (a) (i) to (iii), 376 (2) (b), 376 (2) (c), 376 (2) (d) and 376 (2) (e). It is to observe here that in Explanation of Section 375 IPC, it is clarified that "vagina" shall also include "labia majora". But in the POCSO Act, no such explanation has been given with respect to "vagina" what it includes or not. In the said context, the evidence of the victim has to be seen by which the offence of Section 3 would be made out or Section 7 of the POCSO Act.

22. But prior to see the said discussion, the explanation of certain words describing male or female organs and its parts is essential. 'Penetration' means as used in the rule that penetration only is necessary to be proved on a trial for rape, is a limitation upon and qualification of the meaning of the term 'carnal knowledge'. In limiting the 'carnal knowledge' mentioned in the definition of 'rape' to 'penetration' only, the Legislature intended to eliminate the question of 'emission' in such cases. The word 'penetrate' would mean to access into or through, pass through [Tarakeshwar Sahu (supra)]. The 'penetration' is the sine qua non for an offence of rape as observed in Aman Kumar (supra). The 'penetrative sexual assault' may be in a situation as prescribed in Section 3 (a) to 3 (d) of POCSO Act. The 'sexual assault' includes rape and other forms of physical assault of a sexual nature including sodomy. Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration, is said to commit sexual assault, as specified in Section 7 of the POCSO Act. The word 'Virile', means having male qualities; pertaining to the male sex; able to procreate. With respect to female organ, 'pudendum', means the external genital organs of a woman. 'Labia' are part of the female genitalia, they are the major externally visible portions of the 'vulva'. Two parts of 'labia' are (i) 'labia majora (the outer labia)' are larger and fattier, (ii) 'labia minora (folds of skin between the out labia'. 'Vulva', means the external parts of the female genital organs. The 'Vagina' means any structure resembling a sheath. Specifically, a passage directed downwards and forwards from the external os uteri to open at the vulva (vaginal orifice) immediately posterior to the external urethral orifice. Its anterior wall [paries anterior (NA)] is related to the bladder and the uterus; its posterior wall [paries posterior (NA)] to the lower part of the rectum and the anal canal. It accommodates the penis during sexual intercourse.

23. In the above said definitions of the male organs and female organs and to prove the allegation of penetrative sexual assault in terms of the provision of POCSO Act, the penetration of penis into vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person is necessary. Although the explanation to the meaning of vagina has not been given in the POCSO Act as given in Section 375 of the IPC, but looking to the legislative intent of the POCSO Act the same explanation may be acceptable while dealing the cases of the POCSO Act. Therefore, it is concluded that for the penetrative sexual assault for the purpose of Section 3 of the POCSO Act also the penetration of penis into vagina would include all the above specified parts of the female organ and if such evidence has been brought in the testimony of the victim, the charge of Section 3 would prove otherwise it would come within the purview of Section 7 of the POCSO Act.

24. In the above discussion and as per the testimony of the victim referred above, it is clear that except of removing of wearing apparels of the victim and the removing of the apparels of the accused, the allegationof sexual assault has come. The aforesaid testimony does not testify the requirement of Section 3 of the POCSO Act in the light of the above discussions. Therefore, in the opinion of this Court the conviction of the appellant relying upon the sole testimony of the victim for the charge under Section 3 of the POCSO Act and the sentence so awarded stands set aside.

25. As per the testimony of the victim, the sexual assault has been committed by the accused/appellant with her and to such extend her testimony is in ocular and withstand to those allegations. Therefore, the testimony of the victim cannot be disbelieved to such extent. Simultaneously, it cannot be ignored that in her testimony the allegation of penetration of virile to the pudendum has not come. However, it is only said that the appellant has sexually assaulted her. In absence of having the ingredient in the Court testimony of the victim regarding penetrative sexual assault, finding of conviction for the charge under Section 3 of the POCSO Act as recorded by the Trial Court is not justified. Hence, looking to the testimony of the victim and its contents the charge of Section 7, sexual assault can be found proved. Therefore, the alternative argument as advanced by the counsel for the appellant is acceptable and the findings proving the charge of

Section 3 of the Trial Court cannot be countenanced. With the said discussions, both the questions are answered.

26. Accordingly, this appeal is hereby allowed in part. The conviction of the appellant for the charge under Section 3 and the sentence so awarded by the impugned judgment is hereby set aside. As per the discussion made hereinabove, the appellant is held guilty for the charge under Section 7 of the POCSO Act and he is directed to undergo the sentence of three years Rigorous Imprisonment with fine of Rs.5000/-, in default, one month Rigorous Imprisonment. The judgment of the Trial Court stands modified in above terms.

27. The appellant is on bail, therefore, he shall surrender to the custody within a period of one month from the date of pronouncement of the judgment and shall undergo the sentence as directed hereinabove. On failure to surrender by the appellant, the Trial Court shall take appropriate step to take him into custody for serving the sentence. It is needless to observe that the period of sentence already undergone by him during trial shall be set off from the sentence directed hereinabove, as per Section 428 of the Cr. P.C.

28. The record of the Trial Court be sent back forthwith.

SLR (2021) SIKKIM 304

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

Crl. A. No. 6 of 2020

Maheshwar Singh ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mr. N. Rai, Sr. Advocate with Ms. Malati Sharma, Advocate.

For the Respondents: Ms. Pema Bhutia, Assistant Public Prosecutor.

Date of decision: 20th April 2021

A. Indian Penal Code, 1860 – S. 354 – A – Sexual Harassment – F.I.R registered against the appellant, a Mathematics Teacher in a Government School on 15.06.2019 under S. 354A, I.P.C read with S. 10 of the POCSO Act – Charge-sheet filed against the appellant S. 354A, I.P.C read with S. 10 of the POCSO Act alleging that he had touched the minor victim, a Science student, inappropriately several occasions and sentenced for the offence under S. 354 A(1)(i), I.P.C – Held: Evidence on record in the instant matter having been thoroughly examined, no contradictions appear therein to demolish or lend doubt to the prosecution case – The reasons for the delayed lodging of the F.I.R have been enumerated by the victim – No reason to disbelieve the victim that she was apprehensive of the outcome of such a step on her academics – Appeal fails and is dismissed.

(Paras 7, 8, 19, 20 and 24)

B. Protection of Children from Sexual Offences Act, 2012 – Protection of the Victim's Identity – The fact that the prosecution chose only four friends of the victim as witnesses cannot be termed as cherry picking as the protection of the identity of the victim is of paramount importance in such offences and all efforts ought to be made to ensure

confidentiality as done in the instant matter, to prevent stigmatization and ostracization of the victim for no fault of hers. Merely because the victim's friends were produced as witnesses, it cannot be said that their evidence is unreliable.

(Para 22)

Appeal dismissed.

Chronology of cases cited:

1. Mohd. Ali *alias* Guddu v. State of Uttar Pradesh, (2015) 7 SCC 272.
2. Rajesh Patel v. State of Jharkhand, (2013) 3 SCC 791.
3. Lakhi Ram Takbi v. State of Sikkim, 2019Cri.LJ 2667.
4. Vijay *alias* Chinee v. State of Madhya Pradesh, (2010) 8 SCC 191.
5. State of Sikkim v. Sashidhar Sharma, (2020) 209 AIC 635 (SIK.H.C.).
6. Ajahar Ali v. State of West Bengal, (2013) 10 SCC 31.
7. State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550.
8. Karnel Singh v. State of Madhya Pradesh, (1995) 5 SCC 518.
9. State of Karnataka v. K. Yarappa Reddy, (1999) 8 SCC 715.
10. Gangabhavani v. Rayapati Venkat Reddy and Others, (2013) 15 SCC 298.
11. State of Himachal Pradesh v. Prem Singh, (2009) 1 SCC 420.

JUDGMENT

Meenakshi Madan Rai, J

1. The Appellant is aggrieved by the impugned Judgment and Order on Sentence, both dated 26.02.2020, of the Learned Special Judge, Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act"), West Sikkim at Gyalshing, in Sessions Trial (POCSO) Case No.09 of 2019 *(State of Sikkim vs. Maheshwar Singh)*, by which the Appellant was

convicted for the offence under Section 354A(1)(i) of the Indian Penal Code, 1860 (for short, "IPC") and sentenced to undergo Rigorous Imprisonment for a period of one year and six months and to pay a fine of Rs.25,000/- (Rupees twenty five thousand) only. No default clause of imprisonment is reflected.

2. Before this Court, Learned Senior Counsel for the Appellant advanced the argument that Exhibit 3, the First Information Report (for short, "FIR") is suspicious as there are unexplained subsequent insertions on it pertaining to the age of the victim and the period of offence. As per Exhibit 3, the offence purportedly took place between June, 2018 to May, 2019 but the Charge specifies the date of offence as "28.05.2019" on which date the Appellant was on Casual Leave, hence the alleged offence cannot be foisted on him. Exhibit 5, the Medical Report of the victim reveals no injuries on her person while the evidence of P.W.20 is unreliable as he bore animosity towards the Appellant having been caught cheating in Class by the Appellant when he was a Student. P.Ws.13, 14, 17 and 18 are four close friends of the victim and therefore interested witnesses, rendering their evidence unreliable. P.Ws.14 and 15 are minor witnesses whose competence to testify was not considered by the Learned Trial Court. P.Ws.2 and 4, the parents of the victim neither witnessed the incident nor were they informed of it by the victim, as their evidence is hearsay it ought to be ignored. That, the Prosecution alleges that Minutes were drawn up after a Meeting took place between the Teachers, victim's parents, the victim and her friends following the incident. The Minutes being unavailable in the records casts doubts on such a Meeting having been convened. P.W.21, the Investigating Officer (for short, "I.O.") failed to explain this shortcoming. The Attendance Register of 28.05.2019 has also not been submitted by the Prosecution to fortify the presence of the victim in School on that day. P.W.4 was disinterested in the matter as reflected in the evidence of the School Principal, P.W.10 and the delay in lodging the FIR is unexplained. On this count, reliance was placed on ***Mohd. Ali alias Guddu vs. State of Uttar Pradesh***[1] and ***Rajesh Patel vs. State of Jharkhand***[2]. The Scribe of the FIR was not examined making the contents suspicious. That, the victim falsely implicated the Appellant as she was weak in Physics, the Appellant's subject and his constant monitoring irked her. That, the victim having earlier obtained the benefits of compensation in a

[1] (2015) 7 SCC 272
[2] (2013) 3 SCC 791

POCSO matter is attempting to obtain an identical benefit herein. That, the Learned Trial Court failed to appreciate the evidence in its proper perspective and erroneously convicted the Appellant. Hence the impugned Judgment and Order on Sentence be set aside.

3. Vehemently repudiating the arguments set forth by Learned Senior Counsel for the Appellant, Learned Assistant Public Prosecutor contended that the evidence of P.Ws.13, 14, 17 and 18, colleagues of the victim duly corroborate her evidence pertaining to the Appellant's conduct towards her. The victim has revealed that he was luring her with the promise of good marks and under such guise, touching her inappropriately. P.W.20, a Teacher of the School, who was informed about the incident, substantiated the Prosecution case. That, the delay in lodging of the FIR was on account of the victim harbouring the anxiety that it would adversely affect her studies, the Appellant having threatened to give her low marks. Such threat held out is corroborated by the evidence of P.Ws.7, 11 and 12. The other reason for the delay was that on her complaint at the Parent Teacher Meeting of her inability to understand the Appellant's teaching, the School authorities had leaned in his favour, therefore, she assumed that they would take a similar stand. The emotional and mental trauma on account of the conduct of the Appellant towards her was another relevant issue for the delay. That, it is now settled law that delay in lodging the FIR in such matters ought not to adversely affect the Prosecution case. To buttress this submission, reliance was placed on the Judgment of this High Court in ***Lakhi Ram Takbi vs. State of Sikkim***[3]. That, it is unexplained as to why the Students used to be called individually to the Physics Laboratory by the Appellant if he was taking classes. That, non-filing of the Minutes of the Meeting does not adversely affect the Prosecution case as the persons who were present at the Meeting have been duly examined as witnesses and have supported the Prosecution case. That, the admission of the Appellant that he had touched the victim inappropriately was buttressed by the evidence of P.W.10. The Appellant's family made concerted efforts through cell phone calls to amicably compromise the matter which was refused by the victim. That, the victim has given consistent evidence and minor discrepancies, if any, will not affect the Prosecution case. To fortify this submission, reliance was placed on ***Vijay alias Chinee vs. State of Madhya Pradesh***[4]. That, it is now well established that a Teacher should be like a parent and not harass the

[3] 2019 Cri.LJ 2667
[4] (2010) 8 SCC 191

Student, this submission was buttressed by the ratio in ***State of Sikkim vs. Sashidhar Sharma***[5]. That, outraging modesty is a heinous crime, as laid down by the Hon'ble Supreme Court in ***Ajahar Ali vs. State of West Bengal***[6]. Hence, the Learned Trial Court was justified in convicting and sentencing the Appellant, accordingly the Appeal merits a dismissal.

4. In rebuttal, Learned Senior Counsel for the Appellant posited that the evidence of P.W.10 regarding the admission of the Appellant at the Meeting that he had touched the victim cannot be relied on as it traverses beyond his Section 161 Cr.P.C. Statement and his apology to P.W.4 is unproved. The allegation that the Appellant's family tried to compromise the matter with the victim is also unsubstantiated, devoid as it is of documents or call details.

5. The rival submissions canvassed by Learned Counsel for the parties were heard at length and due consideration afforded thereof. All evidence and documents on record were thoroughly examined and the impugned Judgment and citations made at the Bar perused.

6. The question that falls for consideration before this Court is whether the Learned Trial Court was in error in having convicted the Appellant and sentencing him as per the impugned Judgment and Order on Sentence.

7. In this context, it is relevant to advert briefly to the facts of the case. On 15.06.2019, the Station House Officer (for short, "SHO"), Naya Bazaar Police Station, West Sikkim, received Exhibit 3, lodged jointly by P.Ws.2 and 4, parents of the victim, informing therein that their minor daughter, P.W.1, the victim, aged 17 years, studying in a Government Secondary School, in Class XII was molested by the Appellant from June, 2018 to May, 2019. Zero FIR of the same date under Section 354A of the IPC read with Section 10 of the POCSO Act was registered against the Appellant and forwarded to Soreng Police Station which had territorial jurisdiction in the matter. Soreng P.S. Case bearing FIR No.07(06)2019, dated 15.06.2019, under the same provisions of law *supra* was registered. Investigation revealed that the Appellant, a resident of Bihar, was appointed as a Mathematics Teacher in a Government Senior Secondary School on 10.05.1988. The victim was a Science Student in the same School. That,

[5] (2020) 209 AIC 635 (SIK.H.C.)
[6] (2013) 10 SCC 31

the Appellant had inappropriately touched the victim on several occasions. Consequently, Charge-Sheet came to be filed against him under Section 354A of the IPC read with Section 10 of the POCSO Act.

8. The Learned Trial Court framed Charge under Section 354 A(1)(i) of the IPC and Section 9(f) of the POCSO Act. On his plea of "not guilty," the Prosecution proceeded to examine twenty one witnesses including the I.O. of the case on closure of which, the Appellant was examined under Section 313 Cr.P.C. where he claimed to have been falsely implicated in the case by the victim with the help of P.W.20 and other Teachers of the School. The Learned Trial Court, after considering the entire evidence on record, concluded that the Prosecution had established its case under Section 354A(1)(i) of the IPC. It also observed that the Prosecution failed to prove that the victim was a minor as defined under Section 2(1)(d) of the POCSO Act. Consequently, the Appellant was acquitted of the offence under Section 9(f) of the POCSO Act and convicted and sentenced for the offence under Section 354 A(1)(i) of the IPC, as per the impugned Judgment and Order on Sentence.

9. The offence of sexual harassment and penalty thereof find place in Section 354A of the IPC. Section 354A(1)(i) of the IPC with which we are presently concerned *inter alia* provides that a man committing any of the following acts, *"(i) physical contact and advances involving unwelcome and explicit sexual overtures; ....."* shall be guilty of the offence of sexual harassment. Section 354A(2) *inter alia* lays down that any man who commits the offence specified in Clause (i) of Section 354A(1) shall be punished with Rigorous Imprisonment for a term which may extend to three years, or with fine, or with both. It is imperative to carefully walk through the evidence of the Prosecution Witnesses to assess whether the Prosecution has indeed established its case beyond a reasonable doubt.

10. The evidence of P.W.1, the victim, that her father had complained at a Parent Teacher Meeting in 2018 that she did not understand Physics, the subject taught by the Appellant was corroborated by the evidence of P.W.15 and investigation conducted by P.W.21, the I.O., revealed as much. This fact withstood the cross-examination of the witnesses.

11. Now to deal with the incident alleged to have taken place on 28.05.2019. The Defence Counsel submitted that the Appellant was absent

on the date of the alleged incident i.e. 28.05.2019. Since the Appellant asserts that he was absent on 28.05.2019, the date of the alleged incident, the onus falls on him to establish the assertion. He failed to buttress the assertion by any documentary or other evidence save his verbal claim under Section 313 Cr.P.C. A suggestion was made to P.W.20 under cross-examination that on the relevant day, P.W.20 was in charge of teaching Physics Practicals to insinuate that the Appellant was absent. The witness denied this suggestion. In the absence of proof, the claim of the Appellant cannot be countenanced. According to P.W.1, the Appellant made her bolt the door from inside when she was alone with him attending tuitions in the Physics Laboratory where he fondled her breasts, rested his head on her chest and kissed her despite her protests. That, on 27.05.2019, the Appellant had taunted her for sitting with some boys of her Class while doing Maths. On the next date i.e. 28.05.2019 during the fourth period, when they had a Chemistry Class with the Appellant, he called the Students to the Physics Laboratory. He enquired from her whether she was offended with his reprimanding her the day before and told her not to sit with other boys as that made him jealous. He also told her that he gave her good marks because he cared for her and promised to give her very good marks in her Practical Lessons. Thereafter he began rubbing her thighs, touching her body and kissing her cheeks. She crossed her arms across her chest to protect herself but he forcefully tried to remove her arms with the assurance that nothing would happen. She collected her books, left the room and told her four friends *viz.* P.Ws.13, 14, 17 and 18 of the incident. These four witnesses deposed that she came out of the Physics Laboratory crying and narrated to them that the Appellant had touched her inappropriately. On the next date i.e. 29.05.2019, she informed P.W.20 of the incident, who told her that the matter ought to be reported. Their Examinations started soon after in which she was engrossed. On 13.06.2019, she was asked by P.W.20, P.W.10 and a lady Teacher to report to the Reading Corner, which she accordingly complied with and narrated all the incidents to them. On enquiry by P.W.10 as to why she had not informed them earlier, she told them that earlier when she had complained about not understanding the way the Appellant taught, P.W.10 and the School authorities had leaned in his favour and she anticipated the same response. P.W.10 suggested transferring the Appellant to solve the problem but she insisted on making a complaint against the Appellant. She informed her mother who told her to take steps as advised by the School. On the next date i.e. 14.06.2019, P.W.10 again asked her to rethink about her complaint whereupon she requested that her

father be called. P.W.10 extended to her the option of calling all the Science Students or only her four friends who were familiar with the incident, she opted for the latter. At the Meeting held in the Auditorium on the same day i.e. 14.06.2019, the Teachers, the Appellant, her father and her four friends were present in whose presence she narrated the incident. That, although at the Meeting, the Appellant initially denied the allegations, he finally admitted he had made a mistake and asked to be forgiven for his acts. She then called the Child Helpline and furnished all details to them. She also stated that the wife and daughter of the Appellant requested her not to lodge the Complaint and the father of P.W.13 also discouraged her from lodging a Report as it would damage her reputation but she was insistent in her stand of lodging a Complaint. The cross-examination conducted did not decimate any of the evidence of the victim reflected *supra.*

12. P.W.2, the victim's mother, stated that she was informed of the incident by her daughter. That, the victim, out of fear, did not disclose the matter to anyone. P.W.1 had also informed P.W.2 that the Appellant had told her that he would favour her with good marks in her Practical Classes to enable her in her College admissions. Her evidence stood the test of crossexamination. P.W.4, the victim's father, attended the Meeting convened on 14.06.2019. His evidence supported that of P.Ws.1 and 2. He also stated that the Principal reprimanded the Appellant for his behaviour upon which he apologized to P.W.4. P.W.7 was the Social Worker under the District Child Protection Unit of the relevant area who was informed by the victim that she had been molested by the Appellant from June-July, 2018 when she was studying in Class XI. She was apprehensive and crying when brought to the Counselling Centre and worried about the impact of the incident on her academics after the inappropriate acts of the Appellant perpetrated on her. Her evidence was not demolished under cross-examination. P.W.8, the Principal of the Senior Secondary School which the victim had earlier attended, testified that she was a brilliant Student. P.W.10, while supporting the evidence of P.Ws.1, 2 and 4 regarding the inappropriate acts of the Appellant as informed by P.W.1, stated that towards the end of the Meeting, the Appellant admitted that he had touched the victim. His evidence remained unscathed by cross-examination. P.Ws.11, 12, 15, 16 and 20 are Teachers of the same School, who were present at the Meeting held on 14.06.2019. They were given an inkling of the offence committed by the Appellant on the victim by P.W.20 to whom P.W.1 had narrated the incident in the company of P.W.13, her friend. The evidence of

the Prosecution Witnesses corroborated the evidence of P.W.1. The evidence of the Prosecution Witnesses that the Appellant had admitted to committing a mistake by touching the victim inappropriately has not been demolished. The evidence of P.W.20 corroborates and substantiates the evidence of P.Ws.1, 11, 12, 13, 15, 16, 17 and 18. Nothing inconsistent was stated in the cross-examination of the Prosecution Witnesses to cast doubts on the veracity of their evidence, nor was their evidence-in-chief decimated.

13. Although the Appellant had sought to make out a case that P.W.20 had acrimonious relations with him and stated as much in his Statement under Section 313 Cr.P.C., elaborating that P.W.20 used to be a Student in the same School in 2009. That, the Appellant had caught him cheating in Class upon which P.W.20 had threatened him, and after Examinations he saw him on the road with two-three boys. He continued to threaten the Appellant thereafter. It is not the Appellant's case that he reported the misbehaviour of P.W.20 to the Principal or to his colleagues at any point in time nor did he report the matter to the Police. His allegation being devoid of evidence fails to inspire the confidence of this Court.

14. The argument of the Appellant that Exhibit 3 is unproved as the Scribe was not examined holds no water for the fact that P.Ws.2 and 4 who have signed on Exhibit 3 have not only identified their signatures on the document but have also vouched for and proved the contents thereof. The insertions on Exhibit 3 with regard to the age of the victim and the period of molestation does not prejudice the Appellant.

15. The allegation that the victim falsely implicated the Appellant as she was weak in his subject is not garnered by any evidence. Furnishing of Answer Sheets of the victim of two dates i.e. 16.02.2019 and 25.03.2019 by the Appellant, does not suffice to establish that she was either weak in the subject or that she would falsely implicate him only for this purpose.

16. The argument raised by Learned Senior Counsel that P.Ws.14 and 15 are minors and their competence to testify was not examined by the Court, is a rather frail argument apart from which even if their evidence is blindsided, the evidence of the other Prosecution Witnesses have withstood cross-examination and substantiate the Prosecution case with regard to the

inappropriate acts perpetrated by the Appellant on the victim by touching her private parts.

17. While observing that the evidence of the victim herein is cogent, consistent and cannot be said to be untruthful or motivated, it is appropriate to refer to the decision of the Hon'ble Supreme Court in ***State of Maharashtra vs. Chandraprakash Kewalchand Jain***[7] wherein it was held *inter alia* as follows;

> "**16.** A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (*b*) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown

[7] (1990) 1 SCC 55

> to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. ……"

18. The argument that the Attendance Register was not submitted to establish that the victim was present in School on the relevant day, is preposterous in the face of the evidence given by the victim herself that she was present on that day. The Appellant has failed to furnish any evidence in contradiction thereof. It was also contended that no injuries were found on the victim's body as per the Medical Report. This is an incongruous argument as the victim has nowhere stated that there was use of physical force on her save to the extent that he made efforts to remove her arms from across her chest.

19. The non seizure of the Minutes of the Meeting may be a shortcoming committed by the I.O. but it in no way demolishes the Prosecution case as the participants to the Meeting have deposed as Prosecution Witnesses unravelling what transpired at the Meeting. In this context, relevant reference may be made to the ratio in ***Karnel Singh vs. State of Madhya Pradesh***[8]**,** wherein the Hon'ble Supreme Court, while expressing dissatisfaction at the investigation conducted, observed *inter alia* as follows;

> "**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. ....."

[8] (1995) 5 SCC 518

In ***State of Karnataka vs. K. Yarappa Reddy***[9], it was held *inter alia* as under;

> "**19.** .....even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinized independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case. ....."

The evidence on record in the instant matter having been thoroughly examined, no contradictions appear therein to demolish or lend doubt to the Prosecution case.

20. The reasons for the delayed lodging of the FIR have been enumerated by the victim. I find no reason to disbelieve the victim that she was apprehensive of the outcome of such a step on her academics. The Hon'ble Supreme Court in ***Gangabhavani vs. Rayapati Venkat Reddy and Others***[10] has *inter alia* observed as under;

> "**19.** The case of the prosecution cannot be rejected solely on the ground of delay in lodging the FIR. The court has to examine the explanation furnished by the prosecution for explaining the delay. There may be various circumstances particularly the number of victims, atmosphere prevailing at the scene of incidence, the complainant may be scared and fearing the action against him in pursuance of the incident that has taken place. If the prosecution explains the delay, the court should not reject the

[9] (1999) 8 SCC 715
[10] (2013) 15 SCC 298

> case of the prosecution solely on this ground. Therefore, the entire incident as narrated by the witnesses has to be construed and examined to decide whether there was an unreasonable and unexplained delay which goes to the root of the case of the prosecution and even if there is some unexplained delay, the court has to take into consideration whether it can be termed as abnormal. ....."

21. The allegation that the victim's father did not take the matter seriously is only a perception of the Appellant, besides, this Court has oft referred to the ratio in ***State of Himachal Pradesh vs. Prem Singh***[11], wherein the Hon'ble Supreme Court *inter alia* laid down as follows:

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

22. The fact that the Prosecution chose only four friends of the victim as witnesses cannot be termed as cherry picking as the protection of the identity of the victim is of paramount importance in such offences and all efforts ought to be made to ensure confidentiality as done in the instant matter, to prevent stigmatization and ostracization of the victim for no fault of hers. Merely because the victim's friends were produced as witnesses, it cannot be said that their evidence is unreliable. Their evidence consistently supports that of P.W.1. Apposite reference on this aspect may be made to the ratiocination of the Hon'ble Supreme

[11] (2009) 1 SCC 420

Court in ***State of Rajasthan vs. Kalki and Another***[12] wherein it was held *inter alia* as under;

> "**7.** As mentioned above the High Court has declined to rely on the evidence of PW 1 on two grounds: (1) she was a "highly interested" witness because she "is the wife of the deceased", and (2) there were discrepancies in her evidence. With respect, in our opinion, both the grounds are invalid. For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True, it is, she is the wife of the deceased; but she cannot be called an "interested" witness. She is related to the deceased. "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eyewitness in the circumstances of a case cannot be said to be "interested". In the instant case PW 1 had no interest in protecting the real culprit, and falsely implicating the respondents. ....."

23. In the light of discussions that have emanated above, in my considered opinion, no reason emerges to disturb the conclusion arrived at by the Learned Trial Court vide its impugned Judgment and Order on Sentence.

24. Consequently, the Appeal fails and is accordingly dismissed.

25. The Appellant shall surrender before the Court of the Learned Special Judge, Protection of Children from Sexual Offences Act, 2012, West Sikkim at Gyalshing, today i.e. 20.04.2021, to undergo the Sentence imposed on him by the impugned Order on Sentence, duly setting off the period of imprisonment, if any, already undergone by him during investigation

[12] AIR 1981 SC 1390

and as an Under Trial Prisoner. The Learned Special Judge shall take appropriate steps should the Appellant fail to appear as directed hereinabove.

26. No order as to costs.

27. Copy of this Judgment be transmitted to the Learned Trial Court, for information and compliance.

28. Records of the Learned Trial Court be remitted forthwith.

SLR (2021) SIKKIM 319

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

M.A.C. Appeal No. 4 of 2021

Prethivi Raj Rai ….. APPELLANT

Versus

Secretary, SNT Department and Another ….. RESPONDENTS

For the Petitioner: Mr. B.K. Gupta, Advocate (Legal Aid).

For Respondent No. 1: Mr. Sudesh Joshi, Additional Advocate General and Mr. Yadev Sharma, Government Advocate.

For Respondent No. 2: Ms. Phurba Diki Sherpa, Advocate.

Date of decision: 23rd April 2021

A. Motor Vehicles Act, 1988 – S. 166 (3) – Delay in Filing Claim Application – Accident involving a bus occurred on 17.08.2017 in which the appellant and others sustained injuries – Claim petition under S. 166 filed on 23.06.2020 – Petition seeking condonation of delay under S. 5 of the Limitation Act, 1963 filed by the appellant on 08.09.2020 – Application dismissed by the Claims Tribunal holding that sub-section (3) of S. 166 was enforced on 09.08.2019 and that the appellant had not shown sufficient cause to condone the delay in filing the petition – Held: The Motor Vehicles Act, 1988 came into force w.e.f. 01.07.1989. S. 166 (3) as originally brought into force was omitted by Act 53 of 1994 w.e.f. 14.11.1994 – After the omission sub-section (3) as it existed, there is no provision prescribing a period of limitation in S. 166 – The amendment Act notified vide notification dated 09.08.2019 was published in the Gazette of India on 09.08.2019 itself. It inserted sub-section (3) to S. 166 once again providing a period of limitation for preferring a claim petition – Although the amendment Act was notified on 09.08.2019, the provisions thereof would

come into force on such dates as notified by the Central Government – As the accident is said to have occurred on 17.08.2017, the proposed amendment to S. 166 which is yet to be enforced would have no effect – The application for condonation of delay filed by the appellant and the impugned order dated 11.11.2020 were made and passed on a misconception of facts and law. Both the appellant as well as the Claims Tribunal seemed to have incorrectly believed that sub-section (3) of S. 166 as brought in by the amendment Act was enforced and therefore, applicable – Impugned order set aside and the claim petition preferred by the appellant restored back to its files.

(Paras 2, 6, 8, 9, 11 and 18)

Appeal allowed.

Chronology of cases cited:

1. Shailendra Tripathi and Another v. Dharmendra Yadav and Others, 2020 SCC OnLine All 1360.

2. Mukesh Patle v. Shailendra Verma, 2021 SCC OnLine Chh 466.

JUDGMENT

Bhaskar Raj Pradhan, J

1. It transpires that on 17.08.2017 an accident occurred when a Sikkim Nationalised Transport bus plying from Gangtok carrying passengers tumbled 250 feet below the road due to which the appellant and others sustained injuries. The appellant therefore, preferred a claim petition under Section 166 of the Motor Vehicles Act, 1988 on 23.06.2020.

2. On 08.09.2020 the appellant filed a petition seeking condonation of delay under Section 5 of the Limitation Act, 1963. The Claims Tribunal dismissed the application vide impugned order dated 11.11.2020 holding that sub-section (3) of section 166 was enforced on 09.08.2019 and that the appellant had not shown sufficient cause to condone the delay in filing the petition. The appellant is aggrieved by the impugned order dated 11.11.2020 passed by the Claims Tribunal and has therefore, preferred this appeal under section 173 of the Motor Vehicles Act, 1988.

3. Heard Mr. B.K. Gupta, learned Legal Aid Counsel for the appellant, Mr. Sudesh Joshi, learned Additional Advocate General for the respondent no.1 and Ms. Phurba Diki Sherpa, learned counsel for the respondent no.2.

4. It appears that the appellant had filed the application for condonation of delay presuming that section 53 of the Motor Vehicles (Amendment) Act, 2019 (Amendment Act) amending section 166 and inserting sub-section (3) therein had been enforced. The proposed sub-section (3) of section 166 provided that no application for compensation shall be entertained unless it is made within six months of the occurrence of the accident. As the accident had occurred on 17.08.2017 and the claim petition was preferred on 23.06.2020 there was apparently delay in preferring the claim petition. This led to the filing of the application for condonation of delay.

5. At the hearing, the learned counsel for the respective parties informs this court that the proposed amendment vide section 53 of the Amendment Act has in fact not yet been enforced. Copies of various notifications bringing in force various provisions of the Amendment Act have been annexed by the appellant in the appeal.

6. The Motor Vehicles Act, 1988 came into force w.e.f. 01.07.1989. Sub-section (3) of section 166 as originally brought into force was omitted by Act 53 of 1994 w.e.f. 14.11.1994. Prior to the omission it read as:-

> ***"(3)*** *No application for such compensation shall be entertained unless it is made within six months of the occurrence of the accident:*
>
> *Provided that the Claims Tribunal may entertain the application after the expiry of the said period of six months but not later than twelve months, if it is satisfied that the applicant was prevented by sufficient cause from making the application in time.***"**

7. After the omission of sub-section (3) as it existed, section 166 reads as under:-

> ***"166****. Application for compensation.—(1) An application for compensation arising out of an*

accident of the nature specified in sub-section (1) of Section 165 may be made—

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application:

Provided further that where a person accepts compensation under Section 164 in accordance with the procedure provided under Section 149, his claims petition before the Claims Tribunal shall lapse."

8. It would be noticed that after the omission of sub-section (3) as it existed, there is no provision prescribing a period of limitation in section 166 of the Motor Vehicles Act, 1988.

9. The Amendment Act notified vide notification dated 09.08.2019 was published in the Gazette of India on 09.08.2019 itself. It inserted sub-section (3) to section 166 of the Motor Vehicles Act, 1988 once again providing a period of limitation for preferring a claim petition.

10. Section 1 (2) of the Amendment Act however, provided that:

> ***"(2)*** *It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.***"**

11. Thus it is clear that although the Amendment Act was notified on 09.08.2019 the provisions thereof would come into force on such dates as notified by the Central Government.

12. The Ministry of Road Transport and Highways has issued various notifications in exercise of the powers conferred by sub-section (2) of section 1 of the Amendment Act notifying the coming into force of the various provisions of the Amendment Act on different dates.

13. Notification dated 28.08.2019 published in the Gazette of India on the same date notified 01.09.2019 as the date on which sections 2, 3, clauses (i) to (iv) of section 4 (both inclusive), clause (i) to (iii) of section 5 (both inclusive), section 6, clause (i) of section 7, sections 9 and 10, section 14, section 16, clause (ii) of section 17, section 20, clause (ii) of section 21, section 22, section 24, section 27, clause (i) of section 28, section 29 to 35 (both inclusive), section 37 and 38, section 41 and 42, section 43, section 46, section 48 and 49, section 58 to 73 (both inclusive), section 75, sub-clause (i) of clause (B) of section 77, section 78 to 87 (both inclusive), section 89, sub-clause (a) of clause (i) and clause (ii) of section 91 and section 92 shall come into force.

14. Notification dated 30.08.2019 published in the Gazette of India on the same date notified that the provision of section 1 shall come into force on 01.09.2019.

15. Notification dated 25.09.2020 published in the Gazette of India on the same date notified sections 45, 74, 88, 90 and sub-clause (b) of clause (i) of section 91 shall come into force on 01.10.2020.

16. Notification dated 26.11.2020 published in the Gazette of India on the same date notified 27.11.2020 as the date on which section 36 of the Amendment Act shall come into force.

17. The Allahabad High Court in ***Shailendra Tripathi and Another vs. Dharmendra Yadav and Others***[1] rendered on 20.11.2020 has held that sections 50 to 57 of the Amendment Act are yet to be notified. Similarly, the Chattisgarh High Court in ***Mukesh Patle vs. Shailendra Verma***[2] rendered on 20.01.2021 has held that although the legislature had proposed the amendment, section 53, amongst others, is yet to be enforced.

18. The accident is said to have occurred on 17.08.2017. As such the proposed amendment to section 166 of the Motor Vehicles Act, 1988 which is yet to be enforced would have no effect. It is quite evident that the application for condonation of delay filed by the appellant and the impugned order dated 11.11.2020 were made and passed on a misconception of facts and law. Both the appellant as well as the Claims Tribunal seemed to have incorrectly believed that sub-section (3) of section 166 as brought in by the Amendment Act was enforced and therefore, applicable. In the circumstances, the impugned order dated 11.11.2020 passed by the Claims Tribunal in MACT Case No. 04 of 2020 is set aside and the claim petition preferred by the appellant is restored back to its files.

19. Copy of this order shall be sent to the Claims Tribunal for information and compliance.

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[1] 2020 SCC OnLine All 1360
[2] 2021 SCC OnLine Chh 466

SLR (2021) SIKKIM 325
(Before Hon'ble the Chief Justice)

WP (C) No. 2 of 2019

Mr. Tara Prasad Sharma ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

Petitioner in person.

For Respondent 1 and 2: Dr. Doma T. Bhutia, Addl. Advocate General and Mr. S.K. Chettri, Government Advocate.

For Respondent No. 3: Mr. A. Moulik, Sr. Advocate assisted by Mr. Ranjit Prasad, Advocate.

For Respondent No. 4: Mr. A.K. Upadhyaya, Sr. Advocate assisted by Mr. Thupden Bhutia and Mr. Sonam R. Lepcha, Advocates.

Date of decision: 10th May 2021

A. Constitution of India – Article 226 – The issue regarding *"honourable acquittal", "acquitted of blame"* and *"fully acquitted"* are unknown to the Code of Criminal Procedure or the Indian Penal Code. It has been developed by judicial pronouncements. It is difficult to define what is meant by the expression *"honourably acquitted"* – When all the material evidence has been considered and charge, as alleged against the accused could not be proved, it is honorable acquittal – Otherwise, on account of technical flaw or due to non-production of important witnesses or the witnesses turning hostile, or due to settlement between the parties or otherwise, prosecution has failed to prove the charge beyond reasonable doubt, may not come within the purview of *"honourably acquitted"* – Such acquittal is otherwise than *"honourable"* to which the proceedings

may be followed. The discretion of such proceedings would lie on the appointing authority to take a decision looking into the nature of job and suitability of propriety and probity of the candidate – Acquittal of the writ petitioner in G.R Case No. 644 of 2013 was not honourable but by giving him a benefit of doubt – As the acquittal of the writ petitioner was other than honourable, the proceedings of the Department may follow to judge his suitability looking into the credibility of the post – The writ petitioner would not *ipso facto* be entitled to continue to hold the post of Civil Judge-cum-Judicial Magistrate merely because he was acquitted.

(Paras 9, 13, 14 and 15)

B. Constitution of India – Article 226 – The Full Court examined all the materials and was of the view that the conduct of the writ petitioner was not free from an element of doubt, therefore, he was not given the assignment relating to administration of justice. Thus, it was resolved to withdraw the recommendation made earlier in his favour on 05.07.2017 for his appointment as Civil Judge-cum-Judicial Magistrate. It was further resolved that the next candidate in the merit list (Respondent No. 4) be recommended for appointment on the said post – It is clear that withdrawal of the previous recommendation was because the writ petitioner's acquittal was other than honourable and his conduct was found under a cloud to be assigned the work of judicial administration or as a Judge – Held: The High Court of Sikkim is competent to make recommendation for appointment to the post of Civil Judge – Employer has right to consider all relevant facts available and as to his antecedents, and may take appropriate decision as to continuation of the employee in the employment looking to the standard of propriety and probity. The employer cannot be compelled to appoint a candidate for holding civil post, if not acquitted clearly – The scope of interference is limited to the extent of *mala fide* or suffers from bias or arbitrariness, or if it is established that the decision taken by the appointing authority is based on perversity or irrationality.

(Paras 17, 25 and 26)

Petition dismissed.

Chronology of cases cited:

1. Joginder Singh v. Union Territory of Chandigarh and Others, (2015) 2 SCC 377.

2. Avtar Singh v. Union of India and Others, (2016) 8 SCC 471.

3. Mohammed Imran v. State of Maharashtra and Others, (2019) 17 SCC 696.

4. State of M.P and Others v. Nandlal Jaiswal and Others, (1986) 4 SCC 566.

5. C. Ravichandran Iyer v. Justice A.M. Bhattacharjee and Others, (1995) 5 SCC 457.

6. Syed T.A. Naqshbandi and Others v. State of Jammu & Kashmir and Others, (2003) 9 SCC 592.

7. Rajendra Singh Verma (Dead) Through LRs and Others v. Lieutenant Governor (NCT of Delhi) and Others, (2011) 10 SCC 1.

8. R.C. Chandel v. High Court of Madhya Pradesh and Another, (2012) 8 SCC 58.

9. Deputy Inspector General of Police and Another v. S. Samuthiram, (2013) 1 SCC 598.

10. Commissioner of Police, New Delhi and Another v. Mehar Singh, (2013) 7 SCC 685.

11. Union Territory, Chandigarh Administration and Others v. Pradeep Kumar and Another, (2018) 1 SCC 797.

12. Ram Murti Yadev v. State of Uttar Pradesh and Another, (2020) 1 SCC 801.

13. P.S. Sadasivaswamy v. State of Tamil Nadu, (1975) 1 SCC 152.

14. Ramana Dayaram Shetty v. International Airport Authority of India and Others, (1979) 3 SCC 489.

15. Ashok Kumar Mishra and Others v. Collector, Raipur and Others, (1980) 1 SCC 180.

16. Smt. Sudama Devi v. Commissioner and Others, (1983) 2 SCC 1.

17. R & M Trust v. Koramangala Residents Vigilance Group and Others, (2005) 3 SCC 91.

18. Shankara Cooperative Housing Society Ltd. v. M. Prabhakar and Others, (2011) 5 SCC 607.

19. Vijay Kumar Kaul and Others v. Union of India and Others, (2012) 7 SCC 610.

20. State of Madhya Pradesh and Others v. Parvez Khan, (2015) 2 SCC 591.

21. State of Madhya Pradesh and Others v. Abhijit Singh Pawar, (2018) 18 SCC 733.

22. State of Assam v. Raghava Rajgoplalachari, MANU/SC/0460/1967.

23. Robert Stuart Wauchope v. Emperor, (1934) 61 ILR Cal. 168.

24. R.P. Kapur v. Union of India, AIR 1964 SC 787.

25. Ashutosh Pawar v. High Court of Madhya Pradesh and Another, 2018 (2) MPLJ 419 (2018 SCC Online MP 72).

26. Anil Bhardwaj v. High Court of Madhya Pradesh and Others, 2020 SCC Online SC 832.

27. State of Odisha and Others v. Gobinda Behera, 2020 SCC Online SC 199.

28. State of Rajasthan and Others v. Love Kush Meena, 2021 SCC Online SC 252.

JUDGMENT

Jitendra Kumar Maheshwari, CJ

Invoking the jurisdiction under Article 226 of the Constitution of India, challenging the resolution dated 11.08.2017 of Full Court of the High Court of Sikkim recommending to withdraw the appointment of the petitioner made by previous resolution of the Full Court dated 05.07.2017 on the post of Civil Judge-cum-Judicial Magistrate, and to challenge the appointment of respondent no.4 made in place of the petitioner based on the same resolution and vide Office Order dated 08.02.2018 on the same post, this petition has been filed.

2. The facts unfolded of the case are that an advertisement was issued by the High Court of Sikkim on 24.02.2017 inviting applications from the eligible and interested candidates to fill up three vacant posts of Civil Judge-cum-Judicial Magistrate (First Class) in the Cadre of Sikkim Judicial

Service, as per Annexure P-9. The petitioner submitted his application form and appeared in the written test. He found place in the list of successful candidates as per notification dated 14.06.2017 and called for the interview. The petitioner appeared in the Viva Voce Test and found place in the Merit List at Sl.No.2 of the selected candidates published on 05.07.2017. As per the resolution dated 05.07.2017 of Full Court of the High Court of Sikkim, the name of the petitioner and others were recommended for appointment to the State Government for the post of Civil Judge-cum-Judicial Magistrate. After appointment, the Joint Secretary, Department of Personnel, Administrative Reforms, Training, Public Grievances (DoPART), Government of Sikkim, vide letter dated 10.08.2017 informed to the Registrar General, High Court of Sikkim that one of the selected candidates, Shri Tara Prasad Sharma (petitioner) was found involved in Police Case No. 24/2012 registered by P.S. Sadar on 28.02.2012 under Section 420/468/471 of IPC, though acquitted by the Court of Judicial Magistrate, East Gangtok, vide judgment dated 30.04.2016. The letter of DoPART was placed before the Full Court. The Full Court in its Meeting held on 11.08.2017, after examining all materials, unanimously resolved that the conduct of the petitioner is not free from the element of doubt, thus, he may not be given the assignment of administration of justice and recommended to withdraw the previous resolution dated 05.07.2017 with respect to appointment of the petitioner to the post of Civil Judge-cum-Judicial Magistrate. In furtherance thereto his services has been dispensed with and vide Office Order dated 08.02.2018 the respondent no.4 was directed to be appointed on the said post.

3. The petitioner present in-person contended that he was acquitted from the charge levelled against him under Section 468 of the IPC vide judgment dated 30.04.2016. On receiving the offer of appointment vide Memorandum dated 03.08.2017 he submitted his attestation form on 04.08.2017 specifying the details of the criminal case and its result. He has urged, it is not a case of concealment of material facts, as he has disclosed the details of criminal case and its result acquitting him in the attestation form. Being candidate of merit as per the resolution of the Full Court dated 05.07.2017 he had rightly been appointed by the State Government. Merely registering a criminal case in which he was acquitted by the Court, may not debar him from the appointment as Civil Judge. The referred resolution dated 11.08.2017 recommending to withdraw his appointment is unjust, arbitrary that too without affording due opportunity of hearing and also

contrary to the law laid down by the Hon ble Apex Court. Reliance has been placed by him on the judgments of ***Joginder Singh vs. Union Territory of Chandigarh and Others*** reported in ***(2015) 2 SCC 377***, ***Avtar Singh vs. Union of India and Others*** reported in ***(2016) 8 SCC 471***, ***Mohammed Imran vs. State of Maharashtra and Others*** reported in ***(2019) 17 SCC 696*** to substantiate the contentions.

4. On the other hand, respondent no.3 has filed the counter-affidavit inter alia stating that in furtherance to the notice inviting application to fill up the post of Civil Judge-cum-Judicial Magistrate, First Class in the Cadre of Sikkim Judicial Service, the petitioner submitted his application. In the Column 11 of the application form, other relevant information which applicant deems fit were required to be furnished. In the said column, petitioner has not furnished the information regarding registration of the criminal case and his acquittal. In absence of the said information at the time of scrutiny the Registry permitted the petitioner to appear in the written examination and called for Viva Voce Test on qualifying written test. It is said even before the Selection Committee information regarding criminal case has not been furnished by the petitioner. In case, the said information would have made available, the application form itself might be rejected *in limine* at the time of scrutiny by the High Court. In absence of having the material information by the previous resolution of the Full Court dated 05.07.2017, the name of petitioner with others was recommended for appointment. In furtherance to the said resolution, vide Office Memorandum dated 03.08.2017 he was appointed subject to the Police Verification and suitability on the post of Civil Judge. As the petitioner divulged the fact of registration of FIR and acquittal which came to the knowledge by the letter of DoPART dated 10.08.2017, however, the Full Court vide resolution dated 11.08.2017 withdrawn the previous recommendation dated 05.07.2017 because the conduct of the petitioner was not found free from element of doubt. It is opined by the Full Court that such a person may not be assigned the work of administration of justice. On submitting the representation by the petitioner, it was rejected by the Full Court on 20.02.2018. In the above mentioned fact, all the adverse allegations made in the writ petition are denied for all practical purposes and submitted no relief as prayed can be granted. Learned Sr. Counsel placed reliance on the judgments of ***State of M.P. and Others vs. Nandlal Jaiswal and Others*** reported in ***(1986) 4 SCC 566***, ***C. Ravichandran Iyer vs. Justice A.M. Bhattacharjee and Others*** reported in ***(1995) 5 SCC 457***, ***Syed T.A.***

Naqshbandi and Others vs. State of Jammu & Kashmir and Others reported in ***(2003) 9 SCC 592***, ***Rajendra Singh Verma(Dead) Through Lrs. and Others vs. Lieutenant Governor (NCT of Delhi) and Others*** reported in ***(2011) 10 SCC 1***, ***R.C. Chandel vs. High Court of Madhya Pradesh and Another*** reported in ***(2012) 8 SCC 58***, ***Deputy Inspector General of Police and Another vs. S. Samuthiram*** reported in ***(2013) 1 SCC 598***, ***Commissioner of Police, New Delhi and Another vs. Mehar Singh*** reported in ***(2013) 7 SCC 685***, ***Union Territory, Chandigarh Administration and Others vs. Pradeep Kumar and Another*** reported in ***(2018) 1 SCC 797*** and ***Ram Murti Yadev vs. State of Uttar Pradesh and Another*** reported in ***(2020) 1 SCC 801***.

5. Learned Senior Counsel appearing on behalf of respondent no.4 has *inter alia* contended that it is a case in which petitioner was not acquitted honourably but acquitted giving benefit of doubt. After taking note of the same, the appointing authority has rightly exercised its discretion to discontinue the petitioner and to appoint Respondent No.4 on the said vacant post. If the High Court has applied its mind on the materials placed and opined that the conduct of the petitioner is not free from doubt and resolved to discontinue the petitioner from the work of administration of justice. Such discretion is not assailable until questioned on the ground of mala-fide, ther.efore, interference in exercise of power under Article 226 of the Constitution of India is not warranted. In reply, respondent no.4 has made similar contentions as raised by respondent no.3 in addition that he was already appointed in State Judicial Services, West Bengal. But due to his appointment, he joined his duties in the State of Sikkim leaving his job in the State of West Bengal. Thus, in alternative, looking to the hardship, prayer is made that if the petitioner succeeded and allowed to continue; one post may be created or may be accommodated against the existing vacant posts. Learned Sr. Counsel placed reliance on the judgments of ***P.S. Sadasivaswamy vs. State of Tamil Nadu*** reported in ***(1975) 1 SCC 152***, ***Ramana Dayaram Shetty vs. International Airport Authority of India and Others*** reported in ***(1979) 3 SCC 489***, ***Ashok Kumar Mishra and Others vs. Collector, Raipur and Others*** reported in ***(1980) 1 SCC 180***, ***Smt. Sudama Devi vs. Commissioner and Others*** reported in ***(1983) 2 SCC 1***, ***R & M Trust vs. Koramangala Residents Vigilance Group and Others*** reported in ***(2005) 3 SCC 91***, ***Shankara Cooperative Housing Society Ltd. vs. M. Prabhakar and Others*** reported in ***(2011) 5 SCC 607***, ***Vijay Kumar Kaul and Others vs.***

Union of India and Others reported in ***(2012) 7 SCC 610***, ***Commissioner of Police vs. Mehar Singh*** (supra), ***State of Madhya Pradesh and Others vs. Parvez Khan*** reported in ***(2015) 2 SCC 591***, ***Avtar Singh*** (supra), ***Union Territory, Chandigarh Administration and others vs. Pradeep Kumar and Another*** (supra) and **State of Madhya Pradesh and Others vs. Abhijit Singh Pawar** reported in **(2018) 18 SCC 733**.

6. Learned Additional Advocate General appearing on behalf of respondents no. 1 and 2 contended that the petitioner has been acquitted from the charge, however, at this stage it is the discretion of the recommending authority to appoint him on the post of Civil Judge-cum-Judicial Magistrate or not. The State Government has only acted upon the recommendation of the High Court, therefore, they have not much to say in the present case except awaiting the verdict of the Court for compliance.

7. Upon hearing, the petitioner and learned counsels representing the parties on the basis of the submissions made, in the opinion of this court, following questions arises for consideration in the present case.

(i) Whether acquittal vide judgment dated 30.04.2016 in a criminal case bearing G.R. Case No. 644/2013 may lead to the conclusion that petitioner is entitled to continue on the post of Civil Judge-cum-Judicial Magistrate?

(ii) Whether in the facts and circumstances of the case, the Full Court resolution of the High Court of Sikkim dated 11.08.2017 withdrawing the previous recommendations of appointment of the petitioner from the post of Civil Judge-cum-Judicial Magistrate is justified or can it be interfered with in the facts of the case in exercise of power under Article 226 of the Constitution of India?

Reference Question No. (i):

8. In reference to question no.1, the issue regarding acquittal of petitioner in criminal case may have bearing to appoint the petitioner on the post of Civil Judge-cum-Judicial Magistrate. In this respect, in the context of settled legal position, it is required to be seen what is the effect of “honourably acquitted” or “acquitted giving benefit of doubt” by the Court.

The elucidation of the aforesaid issue may have material bearing to reference Q. No.1 which can be understand by various precedents of Honble the Apex Court and High Courts.

9. The issue regarding „honourable acquittal, acquitted of blame and 'fully acquitted' are unknown to the Code of Criminal Procedure or the Indian Penal Code. It has been developed by judicial pronouncements. It is difficult to define what is mean by the expression 'honourably acquitted'. The guidance may be taken from the case of ***State of Assam vs. Raghava Rajgoplalachari***, reported in MANU/SC/0460/1967. In the said case, the employee was dismissed on account of his conviction under Sections 161/ 467/120B of IPC and under Rule 81(4) read with Rule 121 of the Defence of India Rules. The issue regarding his continuation in service and payment of subsistence allowance during the period of suspension brought under consideration in the context of Assam Fundament Rules (FR) 54. As per FR 54(a), if the employee is honourably acquitted he would be entitled to full pay and allowances in case he had not been dismissed, removed or otherwise it may be payable in such proportion as revising and appellate authority may prescribe. In the said case Honble the Apex Court has referred the judgment of ***Robert Stuart Wauchope vs. Emperor*** reported in ***(1934) 61 ILR Cal. 168***, in the context of expression 'honourably acquitted', Lord Williams, J. observed as thus:

> *"The expression "honourably acquitted" is one which is unknown to courts of justice. Apparently it is a form of order used in courts martial and other extra judicial tribunals. We said in our judgment that we accepted the explanation given by the Appellant believed it to be true and considered that it ought to have been accepted by the Government authorities and by the magistrate., Further we decided that the Appellant had not misappropriated the monies referred to in the charge. It is thus clear that the effect of our judgment was that the Appellant was acquitted as fully and completely as it was possible for him to be acquitted. Presumably, this is equivalent to what Government authorities term "honourably acquitted."*

The reference to the case of ***R.P. Kapur vs. Union of India*** reported in ***AIR 1964 SC 787*** has also made, referring the observations of Honble Wanchoo, J. as he then was reproduced, as thus:

> "*Even in case of acquittal, proceedings may follow where the acquittal is other than honourable.*"

Therefore, in conclusions, where the acquittal is not "honourably" ordered by the Court, such acquittal is other than "honourable", and may follow the proceedings.

10. In the case of ***S. Samuthiram*** (supra), the Honble Apex Court has considered the judgment of ***Reserve Bank of India vs. Bhopal Singh Panchal*** (supra) and also the judgment of ***R.P. Kapur*** (supra), ***Raghava Rajagopalachari*** (supra) and referred the expression "honourably acquitted" as used in the case of ***Robert Stuart Wanchope*** (supra); it is observed that the standard of proof required for holding a person guilty by a criminal court and enquiry conducted by way of disciplinary proceeding is entirely different. In a criminal case, the onus of establishing guilt to the accused is on the prosecution, until proved beyond reasonable doubt. The Court observed that the prosecution did not take steps to examine many of the crucial witnesses on the ground that the complainant and his wife turned hostile, thus acquittal of the accused is by giving benefit of doubt. In that situation, the respondent was not honourably acquitted by the criminal court. While in a case of departmental proceedings, the guilt may be proved on the basis of preponderance and probabilities. It is observed that there may be cases where the service rules provide that in spite of domestic enquiry, if criminal court acquits an employee honourably, he could be reinstated. It is said that an employee has to be reinstated in service or not depends upon the question whether the service rules contain any such provision for reinstatement as a matter of right otherwise on acquittal giving benefit of doubt would not automatically lead to a conclusion for the reinstatement of the candidate.

11. Recently, the Apex Court in the case of ***Union Territory, Chandigarh Administration and others vs. Pradeep Kumar and Another*** relying upon the judgment of ***S. Samuthiram*** (supra) held that acquittal in a criminal case is not conclusive of the suitability of the

candidates on the post concerned, the acquittal or discharge of a person cannot always be inferred that he was falsely involved or he had no criminal antecedent. The issue of honourable acquittal was further considered by the Apex Court in the case of ***Mehar Singh*** (supra), relying upon the judgment of **S. Samuthiram** (supra), ***Bhopal Singh Panchal*** (supra) observed that the acquittal because of non-examination of key witnesses is not honourable, in fact, it is by giving benefit of doubt.

12. Honble the Apex Court in the case of ***Parvez Khan*** (supra) has observed that on the ground of criminal antecedents of candidate who was acquitted for want of evidence or was discharged, shall not be allowed to presume that he was completely exonerated. In the case of ***Mehar Singh*** (supra), the Court observed that the nature of acquittal is necessary for core consideration, whether acquittal is on technical ground or honourable. It is held that the candidates whose acquittal is not honourable are not suitable for Government service and are to be avoided. The relevant factors and the nature of offence, the extent of his involvement, whether acquittal was a clean acquittal or acquittal by giving benefit of doubt, propensity of such person to indulge in similar activities in future, are the aspects relevant to consider by the Screening Committee who is competent to decide all these issues.

13. In view of the forgoing legal position, the expression „honourably acquitted may lead to the conclusion when all the material evidence has been duly considered, even charge as alleged against the accused could not prove holding him guilty. Otherwise on account of technical flow or due to non production of important witnesses or the witnesses turned hostile or due to settlement between the parties or otherwise prosecution has failed to prove the charge beyond reasonable doubt may not come within the purview of „honourably acquitted and such acquittal is otherwise than "honourable" to which the proceedings may be followed. The discretion of such proceedings would lay on the appointing authority to take decision looking to the nature of job and suitability of propriety and probity of the candidate.

14. In the context of the above legal position, if we see the judgment of acquittal passed by the Judicial Magistrate, East Sikkim, Gangtok in G.R. Case No. 644 of 2013 decided on 30.04.2016 then it reveal that petitioner approached to the office of the Directorate of Fisheries to check the file

pertaining to appointment of the Fisheries Block Officers. As alleged, with criminal intent to tamper the marks awarded to his sister, Narmada Sharma, who was one of the participants for the post of Fisheries Block Officer, he had fraudulently tampered with the public document converting numerical 1 into numerical 9 by adding an oval part in the original mark. The sister of the accused demanded document in RTI, however, on coming to know the fact, the notice was send to the petitioner and the report of forensic experts were called. The offence was registered against him under Section 420/468/471/34 of the IPC and filed the Challan. The trial court had framed the charge only under Section 468 of the IPC but not of other offences. After trial, the court acquitted the accused because the plausible explanation of belated FIR is not brought on record. It is not explained why the document Exhibit-A 19 (Document 'Y') was alleged to have been made on 27.01.2011 and signed by PW-3, though he was promoted on the said post on 11.03.2011. Why the specimen of the handwritings or signature of the accused was not taken by the I.O. for examination though it is required to deal with the accused for the purpose of cheating. As per the report of CFSL, Kolkata, it is found prove that interpolation in the marks awarded by PW-3 is there but it is not sufficient to convict the accused, looking to the above lacunas of the prosecution. Therefore, said prosecution has failed to prove the case against accused beyond reasonable doubt however, acquitted the petitioner. Thus, looking to the reasoning of the trial court, it is clear, the acquittal of accused (petitioner) is not honourable but giving him benefit of doubt.

15. On analyzing the case of prosecution and the reason of acquittal as recorded vide judgment dated 30.04.2016, it is luculent like a day light that petitioner has not been honourably acquitted but his acquittal is giving benefit of doubt. In the light of the legal and factual position as discussed hereinabove, as the acquittal of petitioner is other than honourable, the proceedings of the Department may follow to judge his suitability looking to the credibility of the post meaning thereby the petitioner would not ipso facto entitled to continue to hold the post of Civil Judge-cum-Judicial Magistrate merely because he was acquitted. The question no.1 is answered accordingly. R

eference Question No. (ii)

16. In the present case, the applications were invited to fill up the post of Civil Judge-cum-Judicial Magistrate (First Class) in the cadre of Sikkim

Judicial Service vide Employment Notice dated 24.02.2017. The petitioner applied for the post and appeared in the written examination. On declaring him successful, he was called for the oral interview. The Final Merit List was prepared and placed before the Full Court on 05.07.2017. The Full Court on the same date passed a resolution making recommendation for appointment, in absence of the details of the criminal case of the petitioner. The offer for appointment was issued vide Memorandum dated 03/08/2017, subject to Police Verification with regard to suitability, asking Attestation Form in duplicate. In the said Attestation Form in Column No.12, the details of criminal case and the date of acquittal was mentioned by the petitioner. On Police Verification vide letter Ref. No.14900/G/DOP dated 10.08.2017 addressed to the Registrar General, it was reported that the Sadar Police registered a case against petitioner at Crime No.24/2012 dated 28.02.2012 U/s 420/468/471/34 of the IPC and tried for the charge U/s 468 of the IPC, in which he has been acquitted on 30.04.2016 by the Judicial Magistrate, East, Gangtok. On receiving the said information, the matter was placed before the Full Court alongwith relevant material. The Full Court on consideration passed the resolution dated 11.08.2017 and decided to withdraw the previous resolution dated 05.07.2017. The decision of the Full Court is relevant however, reproduced as thus:

> *"1. To further consider the letter bearing No.14900/G/DOP dated 10.08.2017 received from the Department of Personnel (DOPART), Government of Sikkim, in regard to the matter of appointment of Mr. Tara Prasad Sharma, in the post of Civil Judge-cum-Judicial Magistrate in response to this Registry letter No. V(13)Confdl/3467 dated 05.07.2017.*
>
> *1. On verification it was found that Mr. Tara Prasad Sharma was charge-sheeted for interpolation with official records. However, he was acquitted on the ground that the prosecution has failed to prove the case beyond reasonable doubt.*
>
> *We have examined all the materials and are of the considered view that as the conduct of the candidate is not free from an element of*

doubt, he may not be given the assignment of administration of justice. Thus, it is unanimously resolved to withdraw the recommendation made in favour of the above candidate on 05th July 2017 to the State Government for appointment in the post of Civil Judge-cum-Judicial Magistrate.

Further, the fourth candidate, namely, Mr. Jabyang Dorjee Sherpa in the merit list be recommended for appointment on the post of Civil Judge-cum-Judicial Magistrate."

17. In view of the aforesaid, it is clear that the Full Court unanimously was of the opinion that the acquittal of the petitioner was giving him benefit of doubt as the prosecution has failed to prove the case beyond reasonable doubt. The Full Court has examined all the material and of the view that the conduct of the petitioner is not free from an element of doubt, therefore, he may not be given the assignment relating to administration of justice. Thus, resolved to withdraw the recommendation made earlier in favour of the petitioner on 05.07.2017 for his appointment as Civil Judge-cum-Judicial Magistrate. It was further resolved that the next candidate in the Merit List, Mr. Jabyang Dorjee Sherpa (Respondent No.4) be recommended for appointment on the said post. Thus, it is clear that withdrawal of the previous recommendation is because his acquittal other than honourable, and his conduct was found under cloud to assign the work of judicial administration, or as a Judge. From the above and in conspectus of undisputed fact that High Court of Sikkim is the only competent to make the recommendation for appointment to the post of Civil Judge, but the discretion has not exercised in favour of petitioner looking to the conduct and probity of petitioner for holding the post of Judicial Officer.

18. In the said sequel of facts, the arguments advanced by the petitioner-in-person and the counsel for the respondents are required to be adverted to. The petitioner has placed reliance on the judgments of ***Joginder Singh*** (supra), ***Avtar Singh*** (supra) and ***Mohammed Imran*** (supra) while the counsel for the respondent no.3 has relied upon the judgments of ***Nandlal Jaiswal*** (supra), ***C. Ravichandra Iyer*** (supra), ***Syed T.A. Naqshbandi*** (supra), ***Rajendra Singh Verma(Dead) Through Lrs.*** (supra), ***R.C. Chandel*** (supra), ***S. Samuthiram*** (supra), ***Mehar***

Singh (supra), ***Pradeep Kumar*** (supra) and ***Ram Murti Yadev*** (supra) and the counsel for respondent no.4 has relied upon the judgments of ***P.S. Sadasivaswamy*** (supra), ***Ramana Dayaram Shetty*** (supra), ***Ashok Kumar Mishra*** (supra), ***Smt. Sudama Devi*** (supra), ***R & M Trust*** (supra), ***Shankara Co-op. Housing Society Ltd.*** (supra), ***Vijay Kumar Kaul*** (supra), ***Mehar Singh*** (supra), ***Parvez Khan*** (supra), ***Avtar Singh*** (supra), ***Pradeep Kumar*** (supra) and **Abhijit Singh Pawar** (supra).

19. The legal position in the matter of appointment of a Judicial Officer on acquittal from a criminal case may be considered in the said facts and the law laid down by Honble the Apex Court. The two-Judge Bench of Honble the Apex Court in the case of ***Joginder Singh*** (supra), as relied by the petitioner has considered the issue in the context of the post of a Constable in the Police Department. In the said case, a criminal case was registered against the Constable under Sections 148/149/323/325/307 of the IPC; in which he was honourably acquitted because the prosecution had miserably failed to prove the charges leveled against the complainant as the injured eyewitness had failed to identify the assailants. Therefore, Honble the Apex Court has upheld the judgment of the Central Administrative Tribunal, setting aside the order of the High Court directing to issue the order of appointment. In the facts of the present case, the judgment of ***Joginder Singh*** (supra) having no application because the petitioner was not honourably acquitted, in fact, he was acquitted giving benefit of doubt, therefore, the said judgment is of no avail to him.

20. The petitioner and respondent, both have relied upon the judgment of ***Avtar Singh*** (supra). The three-Judge Bench of Honble the Supreme Court has an occasion to crystallize the law with respect to concealment of material facts in the Attestation Form as well having criminal antecedents, conviction or acquittal of the selected candidate in the context whether they are entitled for appointment. The conclusion drawn in this regard is in paragraph 38 of the judgment; the relevant conclusion applicable to the facts of the present case is in sub paragraphs 38.4.3 and 38.5, for ready reference, it is reproduced as under:

> "38.4.3. If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of

> reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.
>
> 38.5 In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate."

From the above, it is clear that on recording acquittal in a case involving moral turpitude on technical ground in absence of clean acquittal, the employer may consider all relevant facts as to antecedents and may take appropriate decision as to continuance of the employee. It is further clear that even on giving truthful declaration by the employee regarding a concluded criminal case, the employer still has the right to consider the antecedents and cannot be compelled to appoint the candidate.

21. The petitioner has placed heavy reliance on the judgment of ***Mohammed Imran*** (supra). In the said case, Honble the Apex Court in paragraph 8 has taken the plea of discrimination because one person acquitted has been appointed following the same process of examination while the petitioner in that case was discriminated in the matter of appointment and also observed that mechanical or rhetorical incantation of moral turpitude may not be applied to deny appointment in judicial service, however, the court directed for appointment of the petitioner in that case.

22. It is not out of place to mention here that the judgment of ***Avtar Singh*** (supra) is the law on the subject and holds the field. The said judgment has been considered by the Full Bench of the Madhya Pradesh High Court in the case of ***Ashutosh Pawar vs. High Court of Madhya Pradesh and Another*** reported in ***2018 (2) MPLJ 419 (2018 SCC Online MP 72)***. The Full Bench observed that the expectations from a Judicial Officer are of much higher standard. There cannot be any compromise in respect of rectitude, honesty and integrity of a candidate who seeks appointment as Civil Judge. The personal conduct of a candidate who may be appointed as Judicial Officer has to be free from any taint. The same must be in tune with highest standard of propriety and probity. The standard of conduct is higher than that expected of an ordinary citizen and

also higher than that expected of a professional in law as well. It is stated that mere acquittal in a criminal case would not be sufficient to infer that candidate possess a good character. The Competent Authority has to take a decision in respect of the suitability of candidate to discharge the function to a civil post.

23. Honble the Apex Court in the case of ***Anil Bhardwaj vs. High Court of Madhya Pradesh and Others*** reported in ***2020 SCC Online SC 832*** decided on 13.10.2020, observed that a candidate wishing to join the police force must be a person having impeccable character and integrity. The said principle applies with greater force to the judicial service. Even in case of acquittal, it ought to be examined as to whether the person was completely exonerated in the case. The acquittal in criminal case did not furnish sufficient ground to the appellant for appointment. Honble the Apex Court in the case of ***State of Odisha and Others vs. Gobinda Behera*** reported in ***2020 SCC Online SC 199*** also rely upon the judgment of ***Avtar Singh*** (supra), and in paragraph 7 observed that the employer can legitimately conclude that a person who has suppressed material facts does not deserve to be in its employment.

24. Recently, Honble the Supreme Court in the case of ***State of Rajasthan and Others vs. Love Kush Meena*** reported in ***2021 SCC Online SC 252*** has considered all the aforementioned judgments including the judgment of ***Mohammed Imran*** (supra) relied by the petitioner, and in paragraph 23, the court observed as thus:

> "23. Examining the controversy in the present case in the conspectus of the aforesaid legal position, what is important to note is the fact that the view of this Court has depended on the nature of offence charged and the result of the same. The mere fact of an acquittal would not suffice but rather it would depend on whether it is a clean acquittal based on total absence of evidence or in the criminal jurisprudence requiring the case to be proved beyond reasonable doubt, that parameter having not been met, benefit of doubt has been granted to the accused. No doubt, in that facts of the present case, the person who ran the tractor over the deceased

> lady was one of the other co-accused but the role assigned to the others including the respondent herein was not of a mere bystander or being present at site. The attack with knives was alleged against all the other co-accused including the respondent."

In view of the above concepteurs, it is important to note that the view of the Court may be depend on the nature of offence charged and its result. Mere acquittal would not sufficient but rather it would depend on whether it is a clean acquittal based on total absence of evidence or in the criminal jurisprudence requiring the case to be proved beyond reasonable doubt, that parameter having not been met, and the accused granted benefit of doubt but the role assigned to the accused may be relevant to consider. The Apex Court in reference to the relevant parameters extracted in the judgment of **Avtar Singh** (supra) observed where in respect of a heinous or serious nature of crime the acquittal is based on a benefit of doubt cannot make the candidate eligible for appointment. While dealing the case of police personnel, it is held that even circular issued by the Department contrary to the ratio of **Avtar Singh** (supra) cannot give any benefit to the respondent and accordingly the judgment of the High Court directing to appoint the respondent was set aside.

25. In view of the forgoing discussions it is clear that even acquittal of the petitioner giving benefit of doubt, in a case involving moral turpitude, is not sufficient to grant employment until he is acquitted clearly. The employer is having right to consider all relevant facts available and as to antecedents and may take appropriate decision as to continuation of the employee in the employment looking to the standard of propriety and probity. The employer cannot be compelled to appoint the candidate for holding the civil post, if not acquitted clearly.

26. In the present case as noted above and on reading the resolution of the Full Court it is crystal clear that the Full Court has considered the interpolation of marks pertaining to appointment of the Fisheries Block Officer in the official record. As per judgment, petitioner was acquitted giving benefit of doubt because the prosecution has failed to prove the case beyond reasonable doubt. On examination of the material, the Full Court was unanimously of the view that the conduct of the petitioner is not free

from an element of doubt, therefore, he may not be given the assignment of administration of justice to continue on the post of Judicial Officer. The said decision was on due considerations of the material placed with a view that petitioner is not suitable for the post of Civil Judge-cum-Judicial Magistrate. The conduct of the petitioner was not found of impeccable character, looking to the standard of the propriety and probity for the post. In such a decision the scope of interference is limited to the extent if it is aspired by mala fide, or suffer from bias of arbitrariness, or established that the decision taken by the appointing authority is based on perversity or irrationality. It is not a case of the petitioner that the decision taken by the Full Court is mala fide or on any extraneous consideration or on irrationality. In absence of the above said grounds, the scope of interference by the High Court is very limited to which the guidance may be taken from various pronouncements of Hon ble the Supreme Court, i.e. **Raghava Rajgoplalachari** (supra), **Robert Stuart Wauchope**(supra), **R.P. Kapur** (supra), **Bhopal Singh Panchal** (supra), **Joginder Singh** (supra), **Avtar Singh** (supra), **Mohammed Imran** (supra), **S. Samuthiram** (supra), **Mehar Singh** (supra), **Pradeep Kumar** (supra), **Parvez Khan** (supra), **Ashutosh Pawar** (supra), **Anil Bhardwaj** (supra), **Govind Behra** (supra) and **Love Kush Meena** (supra). As the petitioner has failed to make out a case within the parameters set out in the above cases, therefore, interference to the decision of the Full Court of Sikkim dated 11.08.2017 is not warranted.

27. In view of the forgoing discussions, it is abundantly clear that against the petitioner an offence was registered in Sadar Police Case No. 24/2012 dated 28.02.2012 for an offence under Sections 420/468/471/ 34 of the IPC and the Challan was filed. He was tried for the charge under Section 468 of the IPC by the Court of Judicial Magistrate, East Sikkim, Gangtok and vide judgment dated 30.04.2016 acquitted giving him benefit of doubt. His acquittal was not honorable but other than honourable. It cannot be doubted that the charged offence involve moral turpitude. The Full Court while recommending to withdraw the appointment of the petitioner has considered the conduct which is not free from an element of doubt, however, decided that he may not be given the assignment of administration of justice and accordingly, passed the resolution. The said resolution has not been challenged either on the basis of mala fide or on extraneous considerations or irrationality of the findings. In absence thereto, in the

opinion of this court, interference to the resolution of the Full Court dated 11.08.2017 is not warranted. It is to be noted that upon receiving the representation of the petitioner dated 29.12.2017, it was considered by the Full Court again on 20.02.2018 and rejected the same. Thus, resolution passed by the Full Court is on consideration of the character of the petitioner which was not found impeccable and suited to the post of Civil Judge-cum-Judicial Magistrate. In such a case, High Court cannnot be compelled to issue the writ in the nature of mandamus and to grant the relief as prayed by petitioner. The Question no. (ii) is answered, accordingly.

28. It is to observe that this petition is bereft of any merit, therefore, alternative argument advanced by the respondent no.4 is not required to be dealt with in detail. Similarly, the judgments, cited by learned counsel for the parties dealing the issue of compulsory retirement is also not being referred to burden the judgment as not having much relevance to the issue discussed hereinabove. Therefore, other judgments cited by the respondents have not been discussed in detail.

29. In view of the discussions made hereinabove, the inescapable conclusion is that the petition filed by the petitioner is meritless and not entitled to the relief as prayed. Accordingly, the Writ Petition is dismissed. In the facts of the case, parties to bear their own costs.

SLR (2021) SIKKIM 345

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

M.A.C Appeal No. 1 of 2020

Suja Khilingay ….. APPELLANT

Versus

Archana Chettri and Others ….. RESPONDENTS

For the Appellant: Mr. Thupden G. Bhutia, Advocate.

For Respondents 1&3: Ms. Zola Megi, Advocate.

For Respondent No.2: Mr. Sudesh Joshi, Advocate.

Date of decision: 10th May 2021

A. Motor Vehicles Act, 1988– S. 166 – The provisions of the Motor Vehicles Act, 1998 makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The Court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable – A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned (In *re.Raj Kumar* discussed).

(Para 15)

B. Motor Vehicles Act, 1988 – S. 166 – Appellant aggrieved by the fact that although the Claims Tribunal had come to a finding that the injuries

sustained by her due to the accident were *"serious/grievous"* in nature, it went on to hold that it was a case of *"routine personal injury"* and by holding so failed to award compensation under the other heads as per paragraph 6 of the judgment of the Supreme Court in the case of *Raj Kumar* – Held: Partial disablement is temporary but reduces the earning capacity of the person in the employment he was engaged at the time of the accident. The evidence on record suggests that the appellant was temporarily and partially disabled. It was for this reason that the Claims Tribunal awarded compensation of ₹ 1,62,000/-as loss of earning during the period of treatment. The oral evidence of the appellant corroborated by the medical evidence and medical reports leads to the inevitable conclusion that she had suffered grievous injury which cannot be, under any circumstance, termed as *"routine personal injury"* – The injuries so sustained by the appellant would amount to partial disability as defined under S. 2(g) of the Employees Compensation Act, 1923 – In cases involving partial disablement, the term *"compensation"* used in S. 166 of the Motor Vehicles Act, 1988 would include not only the expenses incurred for immediate treatment, but also amount likely to be incurred for future medical treatment/care necessary for a particular injury or disability caused by an accident. (In *re.Afnees* discussed) – Since there was no permanent disability, the appellant not entitled to compensation under the head *"loss of future earnings on account of permanent disability"* – Court to calculate compensation payable under three heads i.e. *"Future medical expenses"*, *"Loss of amenities (and/or loss of prospects of marriage"* and *"Loss of expectation of life (shortening of normal longevity)"*.

(Paras 13, 24 and 25)

Appeal partly allowed.

Chronology of cases cited:

1. Raj Kumar v. Ajay Kumar, (2011) 1 SCC 343.
2. Govind Yadav v. New India Insurance Co. Ltd., (2011) 10 SCC 683.
3. Afnees v. Oriental Insurance Co. Ltd., (2018) 13 SCC 119.
4. Ramachandrappa v. Manager, Royal Sundaram Alliance Insurance Co. Ltd., (2011) 13 SCC 236.
5. Kajal v. Jagdish Chand, (2020) 4 SCC 413.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The claimant is a private school teacher. She was walking on the side of the road when a vehicle bearing registration no.SK.01 TR 3193 (Mahindra KUV100), driven by the respondent no.3, came in excessive speed and hit the claimant. As a result, the claimant was thrown 70-80 feet from the place of impact and sustained multiple grievous injuries on 11.03.2016. She was 26 years old at the time of the accident. The claimant was earning a total monthly income of Rs.13,500/- (Rs.8000/- as monthly salary plus Rs.5,500/- from private tuition). She filed a claim petition before the Motor Accident Claims Tribunal (Claims Tribunal) seeking compensation of an amount of Rs.24,23,463/- on 06.12.2017 under Section 166 of the Motor Vehicles Act, 1988. Written objections were filed by the respondent nos.1 and 2, the owner and the Insurance Company respectively. The respondent no.3 the driver of the motor vehicle did not file a counter to the claim petition. The claimant examined herself and her sister Ms. Puja Khilingay to prove the accident; the grievous injuries sustained by her; the period she had to undergo hospitalization and treatment as a result of which she could not join duty. The claimant also examined Ms. Anita Singh, Principal of Sernya English Medium School to prove that she was a teacher and earning a salary. She examined Mr. Ram Chettri to prove that she also give private tuitions and earned additional income. Dr. S.K. Dewan, Associate Professor in the Department of Orthopaedics at Central Referral (Manipal) Hospital, Tadong was examined by the claimant to prove the nature of grievous injuries, the duration of hospitalization and her medical consultation with him even after the hospitalization. The respondent no.1 examined herself as the owner of the vehicle. She proved that the vehicle was duly insured with the respondent no.2 and the policy was subsisting at the time of the accident; the vehicle was well maintained and mechanically fit and that the driver had a valid driving license. The respondent no.2 in its written objection took all possible legal objections and contended that there was no nexus between the accident and the cause of death. The respondent no.2 also denied the facts asserted by the claimant in her claim petition and contended that the compensation claimed was excessive. The respondent no.2 did not lead any evidence. The Claims Tribunal vide judgment and award dated 31.10.2019 however, awarded compensation only to the tune of Rs.5,56,060/- along with interest @ 12% per annum from the date of the filing of the claim petition till full and final payment.

2. Heard the learned counsel for the parties.

3. Mr. Thupden G. Bhutia, learned counsel for the claimant submits that the claimant is aggrieved by the quantum of compensation awarded by the Claims Tribunal as it had wrongly held that the accident was a *"routine personal injury"* case and by so doing disentitled the claimant from receiving just compensation under various other heads. Mr. Sudesh Joshi, learned counsel for the respondent no.2 submitted that the Claims Tribunal had been extremely fair and granted compensation wherever entitled to the full extent of claim. Ms. Zola Megi, learned counsel representing the respondent no.1 i.e. the owner of the motor vehicle and respondent no.3 i.e. the driver of the motor vehicle submitted that motor vehicle was roadworthy and duly insured. She further submitted that the respondent no.3 was a good driver having a valid driving license.

4. In the claims petition the claimant had claimed the following amounts:

Amount of Compensation Claimed:	
a. Transportation to hospital:	Rs.1000/-
b. Medical expenditure:	Rs.1,44,463/-
c. Extra nourishment:	Rs.50,000/-
d. Pain and sufferings:	Rs.2,00,000/-
e. Food & Accommodation:	Rs.60,000/-
f. Loss of amenities and loss of expectation of life:	Rs.3,00,000/-
g. Further partial disability (disfigurement of face/legs/teeth and after accident the claimant has suffer loss of vision because of which she has started wearing spectacles after the accident.):	Rs.6,00,000/-
h. Loss of marriage prospectus (sic k. prospects):-	
i. Attendant charge(Rs.5000 x 12)	Rs.2,00,000/-
j. Future medical expenses;	Rs.60,000/-

k.	For general charges:-	Rs.7,00,000/-
l.	Compensation for the loss of earning power (during the period of continuing disability) Rs.13,500 x 12 months: Rs.1,62,000/- -1/31,62,000-54000	Rs.1,08,000/-
	Grand Total:	**Rs.24,23,463/-**

5. The Claims Tribunal concluded that the claimant had sustained serious/grievous injuries due to the accident and that the manner in which the claimant was hit by the motor vehicle would indicate that the accident had occurred due to rough and negligent driving by the respondent no.3 who had failed to be cautious while driving in a public place. The Claims Tribunal further held that the accident had occurred during the subsistence of the insurance policy taken by the respondent no.1 which was a private car package policy covering third parties. The Claims Tribunal held that the respondent no.2 could not avoid its liability to compensate the claimant as it had insured the respondent no.1. However, relying upon the judgment of the Supreme Court in ***Raj Kumar vs. Ajay Kumar***[1] the Claims Tribunal held that this was a case of *"routine personal injury"* and not a serious injury and substantially reduced the compensation amount.

6. In ***Raj Kumar (supra)*** the Supreme Court while once again examining a claim under Section 166 of the Motor Vehicles Act, 1988 for permanent disability held:

> ***"6.*** *The heads under which compensation is awarded in personal injury cases are the following:*
>
> *Pecuniary damages (Special damages)*
>
> *(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.*
>
> *(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:*

[1] (2011) 1 SCC 343

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses. Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

7. *Assessment of pecuniary damages under Item (i) and under Item (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses—Item (iii)—depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages—Items (iv), (v) and (vi)—involves determination of lump sum amounts with*

*reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. Decisions of this Court and the High Courts contain necessary guidelines for award under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability—Item (ii)(a). We are concerned with that assessment in this case.***"**

7. In ***Govind Yadav vs. New India Insurance Company limited***[2] the Supreme Court examined a claim for compensation under Section 166 of the Motor Vehicles Act, 1988 for permanent partial disablement and held:

"11. *The personal sufferings of the survivors and disabled persons are manifold. Sometimes they can be measured in terms of money but most of the times it is not possible to do so. If an individual is permanently disabled in an accident, the cost of his medical treatment and care is likely to be very high. In cases involving total or partial disablement, the term "compensation" used in Section 166 of the Motor Vehicles Act, 1988 (for short "the Act") would include not only the expenses incurred for immediate treatment, but also the amount likely to be incurred for future medical treatment/care necessary for a particular injury or disability caused by an accident.***"**

x x x x x x x

"18. *In our view, the principles laid down in Arvind Kumar Mishra v. New India Assurance Co. Ltd. [(2010)*

10 SCC 254 : (2010) 3 SCC (Cri) 1258 : (2010) 4 SCC (Civ) 153] and Raj Kumar v. Ajay Kumar [(2011) 1 SCC 343 : (2011) 1 SCC (Cri) 1161 :

[2] (2011) 10 SCC 683

*(2011) 1 SCC (Civ) 164] must be followed by all the Tribunals and the High Courts in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily. If the victim of the accident suffers permanent disability, then efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and his inability to lead a normal life and enjoy amenities, which he would have enjoyed but for the disability caused due to the accident.***"**

8. The Claims Tribunal was of the opinion that the present case was a case of *"routine personal injury"* as there had been considerable improvement in the condition of the claimant and therefore only entitled to:-

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food and miscellaneous expenditure.

(ii) (a) loss of earning during the period of treatment.

(iii) Damages for pain, suffering and trauma as a consequence of the injuries.

9. For treatment and medical expenses the Claims Tribunal awarded a total amount of Rs.1,43,059.43 tabulating the entire medical bills and invoices submitted by the claimant for her treatment at the Central Referral Manipal Hospital, including expenditure made for medicines at Jimini Enterprise and Sunshine Dental Care. The claimant has no issue with regard to the quantum of compensation granted for treatment and medical expenses.

10. An amount of Rs.1000/- was awarded towards transportation cost and Rs.50,000/- towards miscellaneous expenses including attendant and extra nourishment charges under the same head. The claimant is not satisfied with the amount of compensation under these subheads.

11. The Claims Tribunal also noted that the claimant has been *"seriously/grievously injured"* and accordingly awarded Rs. 2 lakhs

towards pain, suffering and trauma. This was the full amount of compensation sought by the claimant and therefore, she has no grievance under this head.

12. For the loss of earning during the period of treatment the Claims Tribunal considered that the claimant was a teacher in a private school earning a monthly salary of Rs.4,500/-. To that further amount of Rs.3,500/- per month and Rs.5,500/- per mensem were also considered as her earnings from giving tuitions to students. Therefore, the claimants monthly income was calculated as Rs.13,500/-. The Claims Tribunal came to a finding that due to the serious/grievous injuries sustained by the claimant it was possible that she could not resume work for a period of one year. Accordingly, an amount of Rs.1,62,000/- (Rs.13,500 x 12) was arrived at, as the claimant's loss of earning during period of treatment. The claimant also does not have any grievance on this count. This is because although in the claim petition she had herself deducted 1/3 of the amount and claimed only Rs.1,08,000/- the Claims Tribunal awarded the entire amount.

13. The claimant is aggrieved by the fact that although the Claims Tribunal had come to a finding that the injuries sustained by the claimant due to the accident were *"serious/grievous"* in nature it went on to hold that it was a case of *"routine personal injury"* and by holding so failed to award compensation under the other heads as per paragraph 6 of the judgment of the Supreme Court in ***Raj Kumar (supra)***.

14. Under the head loss of amenities and loss of expectation of life the claimant had claimed an amount of Rs.6 lakhs towards further partial disability (disfigurement of face/legs/teeth and loss of vision because of which the claimant had to wear spectacles after the accident). An amount of Rs.7 lakhs was claimed as future medical expenses. A further amount of Rs.2 lakhs was claimed for loss of prospect of marriage. None of the above claims were granted by the Claims Tribunal as it held that this was a case of *"routine personal injury"*.

15. As held by the Supreme Court in ***Raj Kumar (supra)*** the provisions of the Motor Vehicles Act, 1998 makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss

suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.

16. The claimant in her evidence on affidavit has deposed that she had sustained multiple grievous injuries. According to the claimant she sustained injuries on her face including superficial laceration over left side of forehead, laceration over upper lip and laceration over mucosal lip. She also suffered a broken tooth. The claimant also claimed that she suffered polytrauma, pelvic fracture, bladder injury/rupture, fracture of the inferior and superior pubic rami on left side with inferior displacement of the pubic bone and lacerated kidney. She further claimed that NCCT of the brain revealed she suffered haemorrhage which was managed by a neurosurgery team. During her cross-examination the claimant admitted that she had not filed any disability certificate from the concerned doctor or from the social welfare department to show the percentage of disability on her due to the accident.

17. Dr. S.K. Dewan (C.W.5) deposed that the claimant was admitted in the hospital on 11.3.2016 and discharged on 11.4.2016. According to him the claimant had suffered multiple injuries including fracture of pelvic bone, injury on her urinary bladder, injury and laceration of kidney. She had also suffered some abrasion on her face. Dr. S.K. Dewan opined that the injuries were grievous in nature. He stated that even after her discharge, the claimant regularly visited him for clinical consultation and that she reportedly had some problems squatting, crossing her legs and standing. He stated that the claimant was still under medical review and had made considerable improvement in her movements. In cross-examination he deposed that he had not issued any disability certificate to her. Exhibit-1 is the certificate issued by Dr. S.K. Dewan which certifies that the claimant had admitted to the hospital with RTA and sustained fracture of both superior and inferior rami with extra peritoneal bladder rupture with lacerated kidney. According to the certificate the claimant had recovered but at the time of examination

she had difficulty in standing, squatting and sitting crossed legged which condition was attributable to the fracture.

18. The discharge summary dated 11.04.2016 from the Central Referral Hospital (exhibit-4) corroborates the aforesaid facts.

19. The question which falls for consideration is whether the injuries suffered by the claimant was "*routine personal injury*" or "*serious injury*" entitling the claimant to the full compensation for personal injury as per paragraph 6 of ***Raj Kumar (supra)***.

20. In ***Afnees vs. Oriental Insurance Co. Ltd.,***[3] the Supreme Court held:

> ***"13.*** *The personal sufferings of the survivors and disabled persons are manifold. Sometimes they can be measured in terms of money but most of the times it is not possible to do so. If an individual is permanently disabled in an accident, the cost of his medical treatment and care is likely to be very high. In cases involving total or partial disablement, the term "compensation" used in Section 166 of the Motor Vehicles Act, 1988 (for short "the Act") would include not only the expenses incurred for immediate treatment, but also the amount likely to be incurred for future medical treatment/care necessary for a particular injury or disability caused by an accident.***"**

21. In ***Ramachandrappa vs. Manager, Royal Sundaram Alliance Insurance Co. Ltd.***[4] the Supreme Court held:

> ***"7.*** *The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule.*

[3] (2018) 13 SCC 119
[4] (2011) 13 SCC 236

The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper. ***8.*** *The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case.***"**

22. In ***Raj Kumar (supra)*** the Supreme Court held:

"Assessment of future loss of earnings due to permanent disability

8. *Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation, after achieving the maximum bodily improvement or recovery which is likely to remain for the remainder life of the injured. Temporary disability refers to the incapacity or loss of use of some part of the body*

on account of the injury, which will cease to exist at the end of the period of treatment and recuperation. Permanent disability can be either partial or total. Partial permanent disability refers to a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. Total permanent disability refers to a person's inability to perform any avocation or employment related activities as a result of the accident. The permanent disabilities that may arise from motor accident injuries, are of a much wider range when compared to the physical disabilities which are enumerated in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("the Disabilities Act", for short). But if any of the disabilities enumerated in Section 2(i) of the Disabilities Act are the result of injuries sustained in a motor accident, they can be permanent disabilities for the purpose of claiming compensation.

9. *The percentage of permanent disability is expressed by the doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the*

*extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body cannot obviously exceed 100%.***"**

23. The Employee's Compensation Act, 1923 defines *"partial disablement"* in Section 2(g) which reads:

> **""***partial disablement", means where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a employee in any employment in which he was engaged at the time of the accident resulting in the disablement, and, where the disablement is of a permanent nature, such disablement as reduces is earning capacity in every employment which he was capable for undertaking at that time: provided that every injury specified in Part II of Schedule I shall be deemed to result in permanent partial disablement.***"**

24. Partial disablement is therefore temporary but reduces the earning capacity of the person in the employment he was engaged at the time of the accident. The evidence on record suggests that the claimant was thus temporarily and partially disabled. It was for this reason that the Claims Tribunal awarded compensation of Rs.1,62,000/- as loss of earning during the period of treatment. The oral evidence of the claimant corroborated by the medical evidence of Dr. S.K. Dewan and the medical reports leads to the inevitable conclusion that the claimant had suffered grievous injury which cannot be, under any circumstance, termed as *"routine personal injury"*. This court is of the view that the injuries so sustained by the claimant would amount to partial disability as defined under Section 2(g) of the Employees Compensation Act, 1923. The Supreme Court in ***Afnees (supra)*** has clearly held that in cases involving partial disablement as well the term *"compensation"* used in Section 166 of the Motor Vehicles Act, 1988 would include not only the expenses incurred for immediate treatment, but

also amount likely to be incurred for future medical treatment/care necessary for a particular injury or disability caused by an accident. It is therefore, important to compute the compensation that must be awarded to the claimant under the other heads as per paragraph 6 of the judgment of the Supreme Court in ***Raj Kumar (supra).***

25. Since there was no permanent disability the claimant is not entitled to compensation under the head *"(ii) (b) loss of future earnings on account of permanent disability."* Therefore, this court is required to calculate the compensation, if any, payable under three heads i.e. *"(iii) Future medical expenses"; "(v) Loss of amenities (and/or loss of prospects of marriage and "(vi) Loss of expectation of life (shortening of normal longevity)."* The evidence available under each of these heads shall now be discussed.

(iii) Future medical expenses

26. Except for claiming that she is having difficulty in standing, squatting and sitting crossed leg, the claimant has led no evidence to ascertain the type and quantum of future medical expenses she may incur. The discharge summary (exhibit-4) does not prescribe any extensive medical instructions to the claimant for the future. The claimant has also not filed any disabilities certificate to gather the extent of disability, although it is certain that she was partially disabled. The claimant has not claimed to be permanently disabled. Dr. S.K. Dewan opined that the injuries sustained by the claimant were grievous in nature. Although he acknowledged that the claimant had reported having some problems squatting, crossing her legs and standing he did not give any opinion as to how long she would take to fully recover as he had deposed that *"there has been considerable improvement in her movements."* The Supreme Court in ***Raj Kumar (supra)*** has held that the award under the head, future medical expenses depends upon specific medical evidence regarding need for further treatment and cost thereof. Sketchy as it may be, the evidence does suggest that the claimant may need further medical treatment if she continues to have problem in sitting, standing and squatting. The Claims Tribunal has held that the injury sustained by the claimant was serious and grievous. The claimant had suffered fracture of both superior and inferior rami, extra peritoneal bladder rupture and lacerated kidney.

27. In ***Kajal vs. Jagdish Chand***[5] the Supreme Court examined a claim for compensation for permanent disability. While computing the compensation for future medical treatment the Supreme Court noticed that there was no evidence in this regard but also opined that there can hardly be such evidence. In such circumstances, keeping in mind the nature of injuries and other relevant facts the Supreme Court awarded a lump sum compensation for future medical expenses.

28. In the circumstances, this court is of the opinion that an amount of Rs.25,000/- would be just and reasonable award for future medical expenses of the claimant to cover any incidental medical expenses she may incur to resolve her problem of sitting, standing and squatting.

Loss of marriage prospects.

29. In ***Raj Kumar (supra)*** the Supreme Court held that assessment of non pecuniary damages like loss of amenities (and/or loss of prospects of marriage) involves determination of lump sum amounts with reference to circumstances such as age, nature of injury, deprivation, disability suffered by the claimant and the effect thereof on the future life of the claimant. The claimant was a young 26 years old private school teacher at the time of the accident. She suffered serious and grievous injuries due to the accident for no fault of hers. According to the claimant she has suffered disfigurement of the face due to the accident. The photographs exhibited by her do reflect disfigurement to a certain extent due to the injuries sustained. Besides facial disfigurement, the serious and grievous injury sustained by her including pelvic fracture, bladder rupture, fracture of the inferior and superior pubic rami and displacement of the pubic bone may also contribute to her marriage prospects. The evidence suggests that she still suffers when she sits, stands or squats. This would also be an additional contribution to her diminished marriage prospects. In the circumstances, this court is of the opinion that the claim for loss of marriage prospect is not out of place. An amount of Rs.2,00,000/- as claimed by the claimant is therefore, awarded under this head.

(vi) Loss of expectation of life (shortening of normal longevity).

[5] (2020) 4 SCC 413

30. There is no specific medical evidence that due to the injuries sustained by the claimant there would be loss of expectation of life (shortening of normal longevity) of the claimant although the claimant had been seriously and grievously injured. Dr. S.K. Dewan had certified and deposed that the claimant had recovered. In the circumstances, this court is of the opinion that no amount was required to be granted as compensation under this head.

31. The claimant submits that the award of compensation under the head - expenses relating to transportation, and nourishing food is abysmally low. The Claims Tribunal has awarded an amount of Rs.1000/- towards transportation cost and Rs.50,000/- towards miscellaneous expenses including attendant and extra nourishment charges. The claimant was in hospital from 11.03.2016 till 11.04.2016 grievously injured both internally and externally. The Claims Tribunal has concluded that even after her treatment at the hospital for a month she had to undergo follow ups thereafter. The Claims Tribunal has also held that even the serious nature of injuries sustained by the claimant it is highly possible that she could not have been able to resume work for a period of one year, thus resulting in loss of income. Although the claimant was residing at Tadong Bazaar and she was treated at Central Referral Hospital which is also located at Tadong it is quite obvious that due to the serious nature of injuries sustained by her she would have incurred substantial transportation costs. Though the claimant has not deposed that she had hired a care giver it would not be unreasonable to assume that her family members must have fitted into that role and diverted their time for her care. It is also reasonable to assume that the claimant needed nourishing food during the entire period of treatment and thereafter, to recoup her health. The transportation charges must include the transportation charges incurred by the caregivers as well. Similarly if the caregivers would incur expenses for food during the period of care giving those expenses could be included as miscellaneous expenses. The claimant had sought for Rs.50,000/- for extra nourishment; Rs.1000/- for transportation and Rs.60,000/- for food and accommodation. In the facts and circumstances of the present case, a lump sum amount of Rs.1,00,000/- towards this head would be reasonable.

32. The total compensation thus computed would be:

Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food and miscellaneous expenditure.

towards treatment, hospitalization and medicine	Rs.1,43,059.43/-
towards expenses relating to transportation, nourishing food, expenses for caregivers including their food and other miscellaneous expenses.	Rs.1,00,000/-

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(a)	towards loss of earning during period of treatment.	Rs.1,62,000/-
(b)	Loss of future earnings on account of permanent disability.	Nil

(iii) Future medical expenses.

towards future medical expenses	Rs.25,000/-

Non pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity),

(iv)	towards damages for pain, suffering and trauma as a consequence of the injuries.	Rs.2,00,000/-
(v)	towards loss of prospects of marriage.	Rs.2,00,000/-
(vi)	Loss of expectation of life (shortening of normal longevity),	Nil
	Grand total	**Rs. 8,30,059.43/-**

33. The judgment and award of the Claims Tribunal dated 31.10.2019 are accordingly modified. As against a total compensation of Rs.5,56,060/- computed by the Claims Tribunal an amount of Rs. 8,30,060/- (rounded off) is awarded to the claimant. As directed by the Claims Tribunal the said amount shall carry an interest @ 12% per annum from the date of filing of the claim petition i.e. 06.12.2017 till full and final payment.

34. The appeal is allowed to the above extent.

35. No order as to costs. Copy of this Judgment be sent to the learned Claims Tribunal, East Sikkim for information. Records of the learned Claims Tribunal be remitted forthwith.

SLR (2021) SIKKIM 364

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

Bail Appln. No. 9 of 2021

Bikash Rai *alias* Kalay Bikash ….. PETITIONER

Versus

State of Sikkim ….. RESPONDENT

For the Petitioner: Mr. Tashi Wongdi Bhutia and Mr. Shakil Karki, Advocates.

For the Respondents: Mr. Sudesh Joshi, Public Prosecutor.

Date of decision: 10th May, 2021

A. Sikkim Anti Drugs Act, 2006 – S. 18 – Code of Criminal Procedure, 1973 – S. 439 – Bail –The quantity of controlled substances seized is large and would obviously not be for the personal consumption of the petitioner. The vehicle in which the controlled articles were found, was in the custody of the petitioner – In light of the facts and considering that the sale of controlled substances has proved detrimental to society inasmuch as children as young as eight years old are rampantly misusing such controlled substances due to the unconscionable sale by persons lacking social responsibility, the petition for bail deserves no consideration – That apart, S. 18 of the SADA, 2006 which is in consonance with S. 37 of the NDPS Act, 1985 provides that where the Public Prosecutor opposes the application for bail, the Court is to be satisfied that the petitioner is not guilty of such offence and he is not likely to commit any offence while on bail.

(Para 4)

Application dismissed.

ORDER

Meenakshi Madan Rai, J

1. The Applicant was arrested in connection with Ranipool Police Station Case No.19/2020 dated 30.08.2020 under Sections 7/9/14 of the Sikkim Anti Drugs Act, 2006 ("SADA, 2006") read with Section 9(1)(c) of the Sikkim Anti Drugs Amendment Act, 2017. He was arrested on 03.09.2020 and remanded to Judicial Custody on 09.09.2020. Two Bail Applications filed before the Learned Special Judge, SADA, 2006, East Sikkim at Gangtok, were rejected vide Orders dated 29.09.2020 and 01.03.2021 respectively. The Applicant is thirty-three years old. Learned Counsel for the Applicant submitted that the rejection of his Bail Petitions tantamounts to a pre-trial conviction of the Applicant who, in fact, has not committed any offence and was arrested merely on the basis of a statement made by a co-accused one Anmol Rai, whose name was later clarified to be Anmol Thapa. The controlled substances were seized from a Tata Sumo vehicle which does not belong to the Applicant but belongs to one Kiran Kumar Chettri. The keys of the vehicle were seized from one Gopal Rai *alias* Bablu, hence no evidence whatsoever links the crime to the Applicant, who is a permanent resident of Tambutar, Ranipool, East Sikkim and has a wife and daughter who are presently suffering on account of his incarceration. In the facts and circumstances reflected above, the Applicant deserves to be enlarged on bail. That, he is willing to abide by any terms and conditions imposed by this Court.

2. Repudiating the contentions of Learned Counsel for the Applicant, Learned Public Prosecutor contended that the controlled articles seized by the Police was in a commercial quantity amounting to 258 bottles of Rexdryl Cough Syrup of 100 ml each. The vehicle was in the constructive custody of the Applicant, the keys of the vehicle having been left by Gopal Rai with him. That, he frequently deals in the sale of controlled substances including Cough Syrup and should he be enlarged on bail, in all likelihood he will tamper with evidence and threaten the witness Anmol Thapa thereby causing prejudice to the Prosecution case. The Petitioner had, in fact, absconded after the First Information Report ("FIR") was lodged and could be arrested only on 03.09.2020. That, the RFSL Report has been filed before the Learned Trial Court and trial has commenced in the matter, hence the Petition for bail be rejected in view of the provisions of Section 18 of the SADA, 2006.

3. I have heard the rival contentions of Learned Counsel for the parties. I have also perused the records placed before me.

4. As submitted by the Learned Public Prosecutor, the quantity of controlled substances seized is indeed large and would obviously not be for the personal consumption of the Applicant. The vehicle in which the controlled articles were found, was in the custody of the Applicant as revealed by the records before this Court today. In light of the facts placed before me and considering that the sale of the controlled substances has proved detrimental to society inasmuch as children as young as eight years old are rampantly misusing such controlled substances due to the unconscionable sale by persons lacking social responsibility, in my considered opinion the petition for bail deserves no consideration. That apart, Section 18 of the SADA, 2006 which is in consonance with Section 37 of the NDPS Act, 1985 provides that where the Public Prosecutor opposes the application for bail, the Court is to be satisfied that the Petitioner is not guilty of such offence and he is not likely to commit any offence while on bail. In view of the provision of law and considering the facts and circumstances, the petition stands rejected.

5. I hasten to add that the observations made hereinabove will have no consequences on the merits of the matter which shall be considered at the time of trial. The Learned Trial Court obviously shall consider the evidence placed by the Prosecution at the time of trial and reach an independent finding unhindered by the observations made by this Court in this Order.

6. The Learned Trial Court shall complete the trial within six months from today.

7. Copy of this Order be forwarded to the Learned Trial Court, for information and compliance.

SLR (2021) SIKKIM 367

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

Bail Appln. No. 7 of 2021

Sagar Pradhan ….. **PETITIONER**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. Mr. D. P. Luitel, Advocate.

For the Respondent: Mr. Hissey Gyaltsen, Assistant Public Prosecutor.

Date of decision: 15th May 2021

A. Sikkim Anti Drugs Act, 2006 – S. 18 – Bail –S. 18 of SADA, 2006, *inter alia*, provides that no person accused of an offence punishable under the Act shall be released on bail or on his own bond unless the Court is satisfied that there are reasonable grounds of believing that the applicant is not guilty of such offence and that he is not likely to commit any offence while on bail – The words *"reasonable grounds"* in S. 18 of SADA, 2006 would have the same meaning as has been explained by the Supreme Court while interpreting S. 37 of the NDPS Act, 1985 – It would connote substantial probable cause for believing that the accused is not guilty of the offences charged and that this reasonable belief contemplated in turn would point to the existence of such facts and circumstances as are sufficient to justify recording of satisfaction that the accused is not guilty of the offences charged – From a perusal of the probable evidence filed along with the charge-sheet, at this juncture, it cannot be said with certainty whether it was the appellant who had run away when Krishna Gopal Chettri was apprehended. There is no substantial material to connect the appellant to the alleged crime – There is reasonable ground for believing, at this stage, that the applicant is not guilty of the alleged offences.

(Paras 16 and 17)

Application allowed.

Chronology of cases cited:

1. State of M.P. v. Kajad, (2001) 7 SCC 673.
2. Union of India v. Shiv Shanker Kesari, 2(2007) 7 SCC 798.
3. Union of India and Another v. Sanjeev V. Deshpande, (2014) 13 SCC 1.
4. Ganesh Sharma @ Gelal v. State of Sikkim, Bail Appln. No. 12 of 2020.
5. Narcotics Control Bureau v. Kishan Lal & Others, (1991) 1 SCC 705.
6. Intelligence Officer, Narcotics C. Bureau v. Sambhu Sonkar and Another, (2001) 2 SCC 562.
7. Narcotics Control Bureau v. Dilip Pralhad Namade, (2004) 3 SCC 619.
8. Collector of Customs, New Delhi v. Ahmadalieva Nodira, (2004) SCC (Cri.) 834.

ORDER

Bhaskar Raj Pradhan, J

1. This bail application has been filed by the applicant, one of the three co-accused persons facing trial under the Sikkim Anti Drugs Act, 2006 (SADA, 2006). The facts necessary for the decision of this application is being narrated.

2. On 15.05.2020, an FIR was lodged before the Sadar Police Station, Gangtok, stating that on 15.05.2020, at around 1720 hours, beat 25 informed over WT set that one unknown person along with a bedding case was detained by some locals near Tadong Senior Secondary School and reported that he was suspected to be carrying contraband substances in it. The informant, as per the direction of the Station House Officer (SHO), visited the locality and conducted inquiry. Krishan Gopal Chettri along with the bedding case, was found to be guarded by beat police and the locals, who reported that they had seen two persons carrying a bedding case in a suspicious manner. When they inquired from them, one of the person ran away. They managed to detain Krishna Gopal Chettri and informed the beat personnel, who conducted the search and seizure. The following items were seized from inside the bedding case carried by Krishna Gopal Chettri:-

"*1. 85 bottles of Relax cof T cough syrup bearing batch no.07108-SD2, mfg. Oct.2018, Exp: Sept, 2020 marked as exhibit A. Out of 85 bottles one bottle was taken out packed & sealed separately and marked as exhibit S1.*

2. 68 phials of blue colored WINSPASMO capsules bearing batch no. WBS19012, Mfg. Aug. 2019, Exp. July 2021, each phial containing 08 capsules, totaling 544 capsules marked as exhibit B. Out of 68 phials one phial was taken out packed & sealed separately and marked as exhibit S2.

3. 08 phials of Nitrosun 10 tablets bearing batch no. AB04703, Mfg. 12/2019, Exp.11/2022, each phial containing 10 tablets totaling 80 tablets. Out of 8 phials one phial was taken out packed & sealed separately and marked as exhibit S3."

3. On completion of the investigation, charge-sheet was filed on 19.07.2020 on finding *prima facie* case under Section 7 (a)(b)/9/14 of the Sikkim Anti Drugs Act, 2006 read with Section 9(1)(b) of the Sikkim Anti Drugs (Amendment) Act, 2017 and Section 34 of the Indian Penal Code, 1860 (IPC) against the accused Krishna Gopal Chettri, Dipen Chettri and the applicant for intra-state illicit trafficking of contraband substances without any valid medical prescription issued by a registered medical practitioner.

4. On 24.12.2020, the learned Special Judge, (SADA, 2006), East Sikkim at Gangtok, framed four charges against the applicant under Section 9(1)(c) of the SADA, 2006 read with Section 34 IPC; Section 9(1)(a) of the SADA, 2006 read with Section 34 IPC; Section 9(1)(b) of the SADA, 2006 read with Section 34 IPC and Section 9(4) of the SADA, 2006 read with Section 34 IPC.

5. On the same date, the learned Special Judge directed the examination of the prosecution witnesses from 07.06.2021 till 17.06.2021. Therefore, the prosecution witnesses are yet to be examined.

6. The applicant has made two futile attempts for securing his bail from the learned Special Judge. On 02.02.2021, the second bail application was rejected on the grounds that his involvement in the case could not be ruled out and that charges, after having found *prima facie* case, had been framed.

7. It transpires that on the failure of the prosecution to file the charge-sheet within the stipulated time, Krishna Gopal Chettri was granted default bail under Section 167(2) of the Cr.P.C. on 14.08.2020. Deepen Chettri, the other co-accused, was granted regular bail by this Court on 19.01.2021.

8. The learned counsel for the applicant submits that the applicant has been languishing in the State Jail from 13.11.2020, i.e., the date he was arrested, till now on mere suspicion. The charge-sheet having been filed, the only material pressed against him is the statement of the co-accused Krishna Gopal Chettri recorded under Section 161 of the Cr.P.C., which is a weak piece of evidence. It is submitted that in the present case both the co-accused are on bail and on the grounds of parity itself, the applicant is also entitled to bail.

9. *Per contra*, Mr. Hissey Gyaltsen, learned Assistant Public Prosecutor (APP), submits that the statement of the co-accused Krishna Gopal Chettri clearly implicates the applicant. Besides the statement of the co-accused, attention was also drawn to the statement of one Abhijit Tamang recorded under Section 161 Cr.P.C., which according to the learned APP also implicates the applicant. The learned APP also drew the attention of this Court to Section 18 of the SADA, 2006 and submitted that the applicant had failed to satisfy this Court 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. He referred to ***State of M.P. vs. Kajad***[1]***; Union of India vs. Shiv Shanker Kesari***[2] and ***Union of India and Anr. vs. Sanjeev V. Deshpande***[3]**,** in which the Supreme Court considered Section 37 of the NDPS Act, which is in *pari- materia* to Section 18 of the SADA, 2006. He also referred to the judgment of this Court in ***Ganesh Sharma @ Gelal v. State of Sikkim***[4], in which Section 18 of SADA, 2006 was considered.

10. Mr. Luitel submitted that the facts in the present case are completely different to the case referred to by the learned APP.

11. In ***Kajad*** (supra), the Supreme Court while examining Section 37 of the NDPS Act, held:

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[1] (2001) 7 SCC 673
[2] (2007) 7 SCC 798
[3] (2014) 13 SCC 1
[4] Judgment (oral) dated 25.01.2021 of the High Court of Sikkim in Bail Application No. 12 of 2020

> ***"5.*** *……. The purpose for which the Act was enacted and the menace of drug trafficking which it intends to curtail is evident from its scheme. A perusal of Section 37 of the Act leaves no doubt in the mind of the court that a person accused of an offence, punishable for a term of imprisonment of five years or more, shall generally be not released on bail. Negation of bail is the rule and its grant an exception under sub-clause (ii) of clause (b) of Section 37(1). For granting the bail the court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (1) of Section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for.****"***

12. In ***Shiv Shanker Kesari*** (supra), the Supreme Court held:

> ***"6.*** *As the provision itself provides that no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the court that there are reasonable grounds for believing that the accused in not guilty and that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.****"***
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> *x x x x x x x x*
>
> ***"11.*** *The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of*

*not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records it satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.***"**

13. In ***Sanjeev vs. Deshpande*** (supra), the Supreme Court held:

> ***"5.*** *Section 37 of the Act stipulates that all the offences punishable under the Act shall be cognizable. It further stipulates that: (1) persons accused of an offence under Sections 19, 24, 27-A or persons accused of offences involved in "commercial quantity" shall not be released on bail, unless the Public Prosecutor is given an opportunity to oppose the application for bail; and (2) more importantly that unless "the Court is satisfied that there are reasonable grounds for believing" that the accused is not guilty of such an offence. Further, the Court is also required to be satisfied that such a person is not likely to commit any offence while on bail. In other words, Section 37 departs from the long established principle of presumption of innocence in favour of an accused person until proved otherwise.***"**

14. The prosecution case seems to be that after the three accused persons named in the charge-sheet had collected the contraband substances, Krishna Gopal Chettri and the applicant were intercepted by the locals - Bir Bahadur Tamang and Karma Pintso Bhutia, on suspicion that they were carrying a bedding case. It is their case that when they made inquiries, the applicant fled but Krishna Gopal Chettri was apprehended. It is further alleged that when search was conducted, contraband substances were recovered from the bedding case in the possession of Krishna Gopal Chettri.

15. This Court has gone through the statement of Krishna Gopal Chettri, the co-accused, recorded under section 161 Cr.P.C. The statements

recorded under Section 161 Cr.P.C. of Bir Bahadur Tamang and Karma Pintso Bhutia, are also on record. The statements of Abhijit Tamang has also been perused. These statements on their own do no connect the present applicant to the seizure. There is no identification of the applicant by any of the witnesses, as the person who had fled away when Krishna Gopal Chettri was apprehended. Krishna Gopal Chettri, being a co-accused, his statement can be used only to lend assurance to other evidence against the applicant. However, such material seems lacking. While Krishna Gopal Chettri is on a default bail, the other co-accused - Deepen Chettri, who was similarly placed, has been granted bail by this Court under Section 439 of the Cr.P.C. on 19.01.2021.

16. At this juncture, it would be relevant to note that Section 18 of SADA, 2006, *inter alia*, provides that no person accused of an offence punishable under the Act shall be released on bail or on his own bond unless the court is satisfied that there are reasonable grounds of believing that the applicant is not guilty of such offence and that he is not likely to commit any offence while on bail. In ***Ganesh*** (supra), this Court had examined the provision of Section 18 of SADA 2006 and found it to be in *pari materia* to Section 37 of the NDPS Act, 1985. This Court, following the judgments of the Supreme Court in ***Narcotics Control Bureau vs. Kishan Lal & Ors.[5]; Intelligence Officer, Narcotics C. Bureau vs. Sambhu Sonkar & Anr.[6]; Narcotics Control Bureau vs. Dilip Pralhad Namade[7] and Collector of Customs, New Delhi vs. Ahmadalieva Nodira[8]***, held that the words *"reasonable grounds"* in Section 18 of SADA 2006 would have the same meaning as has been explained by the Supreme Court while interpreting Section 37 of the NDPS Act, 1985. This Court held that it would connote substantial probable cause for believing that the accused is not guilty of the offences charged and that this reasonable belief contemplated in turn would point to the existence of such facts and circumstances as are sufficient to justify recording of satisfaction that the accused is not guilty of the offences charged. The judgment of the Supreme Court relied upon by the learned APP also holds that for granting bail, the court must, on the basis of the records produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail.

[5] (1991) 1 SCC 705
[6] (2001) 2 SCC 562
[7] (2004) 3 SCC 619
[8] (2004) SCC (Cri.) 834

17. The evidence is yet to be led by the prosecution. From a perusal of the probable evidence filed along with the charge-sheet, at this juncture, it cannot be said with certainty whether it was the appellant who had run away when Krishna Gopal Chettri was apprehended. There is no substantial material to connect the appellant to the alleged crime. There is therefore, reasonable ground for believing, at this stage, that the applicant is not guilty of the alleged offences. The charge-sheet does not indicate the applicant's involvement in any previous criminal case. The learned APP has also not pointed out any circumstance from the records of the case that he is likely to commit any offence while on bail. The records reveal that the applicant is only 24 years old and has been incarcerated for more than five months. This Court is, thus, of the considered view that the applicant is entitled to bail.

18. Accordingly, the applicant is granted bail on his furnishing security to the satisfaction of the learned Special Judge, SADA, 2006, East Sikkim, on the following conditions:-

(i) The applicant shall not leave the jurisdiction of the Sadar Police Station, Gangtok, without the written permission of the Investigating Officer.

(ii) He shall report to the Station House Officer (SHO) of the Sadar Police Station, Gangtok, every Monday at 10.30 a.m. If the date fixed by the learned Special Judge for the trial of the case falls on a Monday, he shall report on the next working day, at the same time, on which day he is not required for the trial.

(iii) He shall stay away from the prosecution witnesses during the period of trial and not attempt to influence them or even contact them, directly or indirectly.

(iv) He shall appear before the learned Special Judge, on every date fixed for trial.

(v) He shall give his cell phone number to the Investigating Officer and shall not change it without the permission of the learned Special Judge.

(vi) Once the trial begins, he shall not in any manner delay the trial.

(vii) If he violates any of the terms, the Investigating Officer shall be entitled to apply to the Special Judge for cancellation of the bail.

19. The application for bail is allowed and accordingly disposed of.