THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 29th September, 2021

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, ACTING CHIEF JUSTICE

Crl.A. No.03 of 2019

Appellant : Dilip Goel

versus

Respondent : State of Sikkim

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

Appearance

Mr. N. Rai, Senior Advocate for the Appellant.

Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, ACJ

1. The minor victim allegedly aged about 15 years was said to have been sexually assaulted by the Appellant aged about 44 years, in a room of a Lodge, which led to the instant case. The Learned Trial Court convicted the Appellant of the offence under Section 3(b) of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012) and under Sections 342/376(2)(i) of the Indian Penal Code, 1860 (for short, "IPC"), vide the impugned Judgment, dated 18-12-2018 in Sessions Trial (POCSO) Case No.25 of 2017. The Order on Sentence dated 19-12-2018 prescribed the following;

(i) imprisonment for a period of 7 years and to pay a fine of Rs.5,000/- (Rupees five thousand) only, under Section 3(b) punishable under Section 4 of the POCSO Act, 2012;

(ii) imprisonment for a term of 1 year and to pay a fine of Rs.2,000/- (Rupees two thousand) only, for the offence under Section 342 of the IPC; and

(iii) rigorous imprisonment for a term of 7 years and to pay a fine of Rs.5,000/- (Rupees five thousand) only, under Section 376(2)(i) of the IPC.

The sentences of imprisonment were ordered to run concurrently and the sentences of fine bore default clauses of imprisonment. Set off was granted in terms of Section 428 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C."). It was further ordered that the fine, if recovered, was to be made over to the victim as compensation. The Appellant was acquitted of the offence under Section 363 of the IPC.

2. The facts of the Prosecution case is that on 22-05-2017, Exhibit 2, an FIR was received from P.W.2, the victim's step-father stating that on 22-08-2017 at around 10.30 hrs. the Appellant, a labour contractor, had lured the victim (P.W.1) to a Lodge and sexually assaulted her. The FIR was accordingly registered on the same day under Section 376 of the IPC read with Section 4 of the POCSO Act, 2012, and investigation endorsed to P.W.20, the Investigating Officer (I.O.). On completion of investigation, Charge-Sheet was submitted against the Appellant under Section 376 of the IPC read with Section 4 of the POCSO Act, 2012. The Learned Trial Court on receipt of the Charge-Sheet framed Charge against the Appellant under Sections 363/342 and 376(1) of the IPC and Sections 3/4 of the POCSO Act, 2012. The Appellant put forth a plea of "not guilty" and the trial commenced with the Prosecution examining 20 (twenty) witnesses in a bid to establish its case, on closure of which, the Appellant was examined under Section 313 of the Cr.P.C. to enable him to explain the incriminating circumstances appearing against him. He claimed not to have been involved in the alleged incident. The final arguments

were heard and the Learned Trial Court after examining the evidence on record convicted the Appellant, as detailed hereinabove.

3. Learned Senior Counsel for the Appellant contended that the Section 164 Cr.P.C. statement of the victim, P.W.1, before the Learned Trial Court indicates that there was no penetrative sexual assault. As per P.W.1, the Appellant had taken her to a Lodge and then fondled her body parts, no allegation of penetrative sexual assault was put forth by her. P.W.13 the owner of the Lodge where the alleged incident had occurred had seen the victim on the road outside the Lodge's gate and not inside the room or in the inside premise of the Lodge, raising doubts about the Prosecution case and the veracity of the Appellant's allegation. That, she complained to P.W.13 that the Appellant had verbally abused her, but made no allegation of sexual assault. P.W.16 the Doctor who examined the victim on the same day, found no signs of use of force or injuries on the person of the victim to reveal sexual assault. The blood group of the Appellant, as per P.W.17, the RFSL Expert, is 'O', but the blood group found on the underwear of the victim was of the blood group 'A'. That, in fact, the victim was a married woman as emanates from the deposition of P.W.2 and P.W.15. Her date of birth was not proved by the said two witnesses although they are her family and no birth certificate was furnished to prove her minority. Relying on the decision of this Court in ***Mangala Mishra @ Dawa Tamang @ Jack*** vs. ***State of Sikkim***[1] it was contended that a photocopy, Exhibit 15, of the entry made in the school admission Register was furnished, but the entry

[1] Crl.A. No.36 of 2017 decided on 13-10-2018 : SLR (2018) SIKKIM 1373

went unproved. As per P.W.8, the Birth Certificate of the victim girl was not found in the school records and he had therefore furnished a photocopy of the relevant page of the school admission Register pertaining to the year 2007 to prove that the victim was born on 20-04-2002, viz., Exhibit 15. His evidence lacked personal knowledge of the entry. P.W.2 also shed no light regarding the entry in Exhibit 15 nor was he aware of the contents of Exhibit 2 which was scribed by P.W.3 on the dictation of the victim's mother. That, P.W.3 lent no credence to the Prosecution case as no evidence emerged in regard to the contents of Exhibit 2. The Prosecution failed to produce and examine the victim's mother in this context. The Seizure Memo, Exhibit 3, reveals that a total of Rs.400/- in denominations of one hundred was seized by the Police and the I.O. had remarked that the money was given to the victim by the Appellant, but no investigation to unearth the reason for the money having been handed over to P.W.1 was undertaken. The evidence of the victim is untrustworthy and has failed to pass the test of a sterling witness. Strength was drawn on this count from the ratio of ***Krishan Kumar Malik*** vs. ***State of Haryana***[2]. Hence, in view of the facts and circumstances enumerated, the impugned Judgment of the Learned Trial Court deserves to be set aside and the Appellant acquitted all the offences charged with.

4. *Per contra*, Learned Additional Public Prosecutor urged that penetrative sexual assault has been proved by the evidence of the Prosecutrix beyond a reasonable doubt as she had unequivocally stated that the Appellant inserted his finger into her private part. That, she was unable to escape from the room as the

[2] (2011) 7 SCC 130.

door was bolted from inside. Her evidence with regard to the Appellant having touched her private part was consistent and the finger nail injury on the face of the Appellant reveals that she had fought off the Appellant when the incident was committed. Accordingly, the impugned Judgment of the Learned Trial Court requires no interference.

5. In the light of the arguments advanced above which have been carefully considered and after examining all the evidence and documents on record, the question that falls for determination by this Court is –

(i) Whether the Prosecution was able to prove that the victim was a minor on the date of the alleged offence?

(ii) Whether the Appellant had committed the offences charged with?

6.(i) While addressing the first question *supra*, for determination, P.W.1 the victim claimed to be 15 years old on the date of her evidence before the Court, on 12-10-2017. The alleged incident had occurred on 22-05-2017. P.W.2 the victim's step father claimed that the victim was 16 years old but admitted that she was a married woman. P.W.15 buttressed the evidence of P.W.2 with regard to the marital status of the victim. P.W.2 claimed to have been married to the victim's mother for the past 15 years, if this evidence is believed to be true then it would lead to the preposterous circumstance of the victim having been admitted to school when she was one year old as Exhibit 15 the certified true copy of the relevant page of the school admission Register, furnished by P.W.8 the School Headmaster records the date of birth of the victim as 20-04-2002. Although a column for signature of father or guardian in Exhibit 15 reflects a name similar

to that of P.W.2, however, in his evidence before the Court P.W.2 has affixed his thumb impression. Consequently, the identity of the person who furnished the date of birth and signed on Exhibit 15 was not established by the Prosecution. The evidence of the I.O. fails to assist the Court in this direction. No effort was made to show Exhibit 15 to P.W.2 to verify the facts reflected therein. P.W.2 not having been shown the document could not verify its contents. The mother of the victim was examined under Section 161 Cr.P.C. during investigation, but not before the Learned Trial Court. Records before this Court reveal that her evidence was slated for 13-11-2017 and the matter disposed of on 18-12-2018 only, in the interim no efforts were made to procure her presence although she was said to left her husband and gone to Nepal. The fact of her leaving for Nepal was not substantiated by any records furnished either from the Panchyat or any other local governing authority. P.W.8 failed to support the Prosecution case being ignorant of the details of the entry at Exhibit 15 or at whose behest the date of birth of the victim had been recorded as 20-04-2002.

(ii) Section 65 of the Indian evidence Act, 1872, provides for cases in which secondary evidence relating to document may be given. Exhibit 15 may have been relied on by the Prosecution in terms of this provision, however it would do well to notice that the provision does not do away the necessity of proof of such documents. In ***Madan Mohan Singh and Others*** vs. ***Rajni Kant and Another***[3] the Hon'ble Supreme Court while differentiating between admissibility of a document and its probative value opined that a document may be admissible but as to whether the entries

[3] (2010) 9 SCC 209

contained therein had probative value could be examined in the facts and circumstances of a case. The relevant portion of the ratio is extracted below for easy reference;

> **"18.** Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in *Ram Prasad Sharma* v. *State of Bihar* [(1969) 2 SCC 359 : AIR 1970 SC 326], *Ram Murti* v. *State of Haryana* [(1970) 3 SCC 21 : 1970 SCC (Cri) 371 : AIR 1970 SC 1029], *Dayaram* v. *Dawalatshah* [(1971) 1 SCC 358 : AIR 1971 SC 681], *Harpal Singh* v. *State of H.P.* [(1981) 1 SCC 560 : 1981 SCC (Cri) 208 : AIR 1981 SC 361], *Ravinder Singh Gorkhi* v. *State of U.P.* [(2006) 5 SCC 584 : (2006) 2 SCC (Cri) 632], *Babloo Pasi* v. *State of Jharkhand* [(2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266], *Desh Raj* v. *Bodh Raj* [(2008) 2 SCC 186 : AIR 2008 SC 632] and *Ram Suresh Singh* v. *Prabhat* Singh [(2009) 6 SCC 681 : (2010) 2 SCC (Cri) 1194]. In these cases, it has been held that even if the entry was made in an official record by the official concerned in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.
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> **19.** Such entries may be in any public document i.e. school register, voters' list or family register prepared under the Rules and Regulations, etc. in force, and may be admissible under Section 35 of the Evidence Act as held in *Mohd. Ikram Hussain* v. *State of U.P.* [AIR 1964 SC 1625 : (1964) 2 Cri LJ 590] and *Santenu Mitra* v. *State of W.B.* [(1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587].
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> **20.** So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, **they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value.** The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in school register/school leaving certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.
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> **21.** For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, government hospital/nursing home, etc., the entry in

> the school register is to be discarded. (Vide *Brij Mohan Singh* v. *Priya Brat Narain Sinha* [AIR 1965 SC 282], *Birad Mal Singhvi* v. *Anand Purohit* [1988 Supp SCC 604 : AIR 1988 SC 1796], *Vishnu* v. *State of Maharashtra* [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217] and *Satpal Singh* v. *State of Haryana* [(2010) 8 SCC 714 : JT (2010) 7 SC 500] .)
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> **22.** If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60 and 61, etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time, etc. mentioned therein. (Vide *Updesh Kumar* v. *Prithvi Singh* [(2001) 2 SCC 524 : 2001 SCC (Cri) 1300 : 2001 SCC (L&S) 1063] and *State of Punjab* v. *Mohinder Singh* [(2005) 3 SCC 702 : AIR 2005 SC 1868].)" **[emphasis supplied]**

(iii) In ***Mangala Mishra*** (*supra*) relied on by the Appellant's Counsel Exhibit 7 the birth certificate of the victim was furnished, however, the seizure of the document was suspect, the signatories to the seizure memo were not produced as witnesses and the origin of the document remained an enigma as no witness was examined with regard to entries in any Register or Exhibit 7. This Court observed that merely because Exhibit 7 was a document furnished by the Prosecution it cannot be accepted as gospel truth without fortification by way of supporting evidence sans examination of its probative value.

(iv) In ***Birad Mal Singhvi*** vs. ***Anand Purohit***[4] the Supreme Court was examining entries in the scholar's register, counterfoil of Secondary Education Certificate of one Hukmi Chand Bhandari, copy of tabulation record of the Secondary School Examination 1974 and copy of tabulation of record of the Secondary School Examination of 1977 marked respectively as Exhibits 8, 9, 10 and 11. The Supreme Court observed *inter alia* that although Exhibits 8, 9, 10, 11 and 12 were relevant and admissible but the documents had no evidentiary value for purpose of proof of date of

[4] 1988 (Supp) SCC 604

birth of Hukmi Chand and Suraj Prakash Joshi as the vital piece of evidence is missing, because no evidence was placed before the Court to show on whose information the date of birth of Hukmi Chand and the date of birth of Suraj Prakash Joshi were recorded in the aforesaid documents. It was further observed that neither of the parents of the two candidates nor any person having special knowledge about their date of birth was examined by the Respondent to prove the date of birth as mentioned in the aforesaid documents. That, parents or near relations having special knowledge are the best person to depose about the date of birth of a person. If entry regarding date of birth in the scholar's register is made on the information given by parents or someone having special knowledge of the fact, it would have probative value. That, the date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.

(v) On the touchstone of the enunciations *supra* it becomes apposite to notice that Exhibit 15 is of no value to the Prosecution case. P.W.2 did not give evidence about the victim's date of birth or prove the contents of Exhibit 15 which in fact he was not shown, neither did P.W.15 her maternal aunt and there was no other person to establish her age as being 15 given that the Prosecution did not examine her mother. As held in ***Birad Mal Singhvi*** and ***Madan Mohan Singh*** (*supra*), parents are the best persons to depose about the age of a child, but the entries in Exhibit 15 were not proved by P.W.2 or the victim's mother. P.W.15 being the maternal aunt could well have had personal knowledge of the victim's age, but her evidence is devoid of such

statement. This Court cannot arrive at a finding that the victim was a child in terms of the POCSO Act, 2012, in the absence of any evidence on this count. It may relevantly be mentioned that the Learned Trial Court accepted Exhibit 15 in totality stating that the Appellant did not refute or controvert the materials on record. However, the evidence of P.W.8, the only person who identified the document being the Headmaster of the School concerned stated that he did not know on what basis the date of birth of the victim was recorded. In the face of such evidence, it goes without saying that the Prosecution has failed to discharge the obligation cast on it to prove its case beyond reasonable doubt. The first question therefore has to be answered in the negative.

7(i). Traversing now to the second question formulated *supra* it is relevant to notice that none of the Prosecution witnesses are ocular, save for P.W.13 who I hasten to clarify did not witness the incident but had seen the victim outside the gate of the Lodge that he owns, the same Lodge where the Appellant had checked in on 17-05-2017 as supported by Exhibit 5, the Register of the guests of the Lodge and where the offence was allegedly committed, as per P.W.1. All that the Court can rely on is the statement of the victim and therefore it is essential to assess whether her evidence would pass the muster of a sterling witness. The victim narrated that the incident pertained to the month of June, 2017, when she was residing with her parents. Contrarily, P.W.2 stated that during the relevant time she was living with her maternal grandmother. Concededly, on the evening prior to the incident, she received a call from an unknown number on her grandmother’s mobile number which she was using and she talked

to the caller who seemed to know her. Later, she received few more calls from the same number, but she did not answer it. The following morning when she was going to her paternal uncle's place she stopped at a place where there was a Peepal tree where the Appellant approached her and struck a conversation with her. Thereafter, he asked her to accompany him to the market and took her to a Lodge there. He dragged her to his room through a narrow passage in the Lodge. After reaching the room, the Appellant bolted the door from inside, touched and fondled her breasts and though she protested he continued his sexual assault on her. He removed her trousers and manipulated her private part and also inserted his finger into her private part. As she was alone in the room she was nervous, but at that moment the Appellant got a call on his mobile phone. When he went to attend to the call she took the opportunity to call her aunt and informed her about the situation, who in turn advised her to approach the Police regarding the matter. She then started ringing the Police emergency number, but the Appellant entered the room and asked her not to inform the Police and gave her Rs.400/- Indian currency notes in the denomination of Rs.100/-. Thereafter, she left the room and straightaway went to the Police Station and informed the Police about the incident. They asked her to accompany them to the Lodge in search of the Appellant, where on reaching they found that the Appellant was about to leave, however the Police apprehended him. The victim was then forwarded to the District Hospital for medical examination. She identified Exhibit 1 shown to her in three pages as the statement made by her before a Magistrate and recorded by the Magistrate and she had also signed

on the document. That, later she was taken to the State Jail at Rongyek for identification of the Appellant during which time she identified him on all three occasions. She identified M.O.II as the track pant and M.O.III as the underwear worn by her at the relevant time. Under cross-examination, she failed to identify M.O.I (collectively) as the same Rs.100/- denomination Indian currency notes which were handed over by her to the Police, during the relevant time. Admittedly, she did not make any hue and cry when the Appellant was dragging her to his room. She also admitted that when the Appellant went to attend to his mobile phone, the Lodge in which she was taken was not locked or latched by the Appellant. The Police did not seize the mobile phone which she was carrying on the relevant day. She had also not inform her parents that she was going to her uncle's house on the relevant day neither had she inform the uncle or aunt to whose house she was going on that day. She had left school in November, 2015. That, she had resumed her studies in the Government School after the alleged incident, but presently was not attending school due to ill-health. She further admitted that the Appellant saw her leaving the Lodge.

(ii) P.W.13 the owner of the Lodge was aware that the Appellant had checked in to his lodge at the relevant period, having introduced himself as a Tower Mechanic of Airtel Telecom Services. In the month of May, 2017, which was a Monday, a day on which the shops in the particular market are usually closed, at around 10 to 11 a.m. he saw the Appellant inside the gate of the Lodge and the victim on the road outside the gate. The victim was complaining that the Appellant had verbally abused her and she

asked him where the Police Station was. He accordingly indicated to her the direction of the Police Station. He noticed that the Appellant was preparing to leave the Lodge, but he restrained him as the victim had gone to the Police Station. He enquired from the Appellant as to what the matter was and the Appellant informed him that the victim had come to collect money. He had given her Rs.400/-, with which she was not satisfied. After some time, the Police arrived at his Lodge and took both the Appellant and the victim with them and later seized Exhibit 5. His cross-examination revealed that he did not hear the voice of the Appellant or the victim prior to him having seen the victim on the road outside the gate and he neither saw the victim entering nor leaving the Lodge. According to him, the Appellant was not nervous when he was preparing to leave the Lodge for his work.

(iii) The evidence of P.W.2 was of no assistance to the Prosecution case. He was called to the Police Station by the Police at around 11.30 a.m. when he was at work, informing him that an incident had occurred concerning his daughter. He along with his wife, a worker in a GREF construction site went to the Police Station. He lodged Exhibit 2 before the SHO regarding the incident. The contents were dictated by his wife and scribed by P.W.3, both P.W.2 and P.W.3, however, failed to prove the contents of the FIR. P.W.3 and P.W.4 were witnesses to the seizure of Rs.400/- in the denomination of Rs.100/- each, but the currency notes as per P.W.4 were in the possession of the Police. They were unaware of the incident, hence the Prosecution could draw no succour from their evidence. P.W.11 a neighbour of P.W.13 was witness to the seizure of the Guest Entry Register

Exhibit 5 from P.W.13, but he stated nothing pertaining to the incident.

(iv) The wearing apparels of the victim M.O.II and III were seized in the presence of P.W.12 and P.W.14, but they were unaware of the ownership of the articles of clothing. P.W.15 the aunt of the victim did not know about the incident save to the effect that some time in the year 2017 she received a phone call from the victim informing her that one man was chasing her, she advised her to call the Police emergency number. P.W.15 the aunt of the victim claims to have received a call on her mobile phone from the victim sounding nervous and informing her that a man was chasing her. She advised the victim to call the Police.

(v) P.W.16 the Doctor, who examined P.W.1, stated as follows;

> **"**On 22.05.2017, I examined a minor girl aged about 15 years, brought by Constable Sabina Pradhan with an alleged history of sexual assault by an unknown person, around 55 years of age, male who pulled to his room and tried to have sexual intercourse and touched her breasts and put his finger on her private part. On my examination of the said minor girl, I found the following;
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> Her vitals were normal. Bilateral breast - normal. Mons pubis - normal. Labia majora and minor - normal. Hymen-no fresh injuries seen.
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> Sample was not taken since the victim did not give history of sexual intercourse.
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> My final opinion was there were no signs of use of force, lack of genital injuries could be because of use of lubricant, it could also be because there was a fingering with the use of lubricant or overpowered or threatened. Sexual violence cannot be ruled out.**"**

Under cross-examination, he admitted that the victim did not have fresh injuries on the hymen and labia majora and labia minora neither did she have any other injuries on her body. He also admitted that his opinion to the extent that sexual violence

could not be ruled out was based on the history of the case of the victim.

(vi) P.W.17, the Junior Scientific Officer, Biology Division, RFSL examined M.O.II a grey colour track pant of the victim, M.O.III one black underwear of the victim and sample blood of the Appellant M.O.IV. The sample blood M.O.IV of the Appellant, gave a positive test for the blood group 'O' while the blood detected in M.O.II and M.O.III (evidently of the victim) tested positive for the blood group 'A'. The evidence of P.W.17 was brushed off as immaterial for the case by the Learned Trial Court but this conclusion was not buttressed by any reasoning.

(vii) The Doctor who examined the Appellant was P.W.18 who had been brought to him with a history of being involved in the sexual offence. He found no injuries on the body of the Appellant. The Appellant had not consumed alcohol or any other intoxicant at the time of his examination. His evidence thus contradicts the argument of the Learned Additional Public Prosecutor who had stated that a finger nail injury was seen on the Appellant's face.

(viii) P.W.19 the Nodal Officer of Bharti Airtel Ltd. testified that the I.O. of the case had made a requisition seeking certification of the Call Detail Record (CDR) of two mobile numbers which was duly furnished to the I.O. and that there had been incoming and outgoing call between the said mobile numbers. The Prosecution however having failed to exhibit any of the documents obtained from P.W.19, his evidence is thus of no relevance to the case, added to this is the fact that the cell phone of the victim was not seized by the Police to establish who had made the first call or

whether the victim was in possession of a mobile phone. The statement of P.W.1 that she had called the Police emergency number of the Lodge's room also remained unproved as her mobile phone was not seized to verify the truth of her statement.

(ix) The I.O. P.W.20 during his evidence admitted that the Appellant did not try to abscond although there was a time gap of one hour 20 minutes between the registration of the FIR and his arrest.

8. The Learned Trial Court while convicting the Appellant was impressed by the statements of the victim and found her testimony to be cogent, believable and trustworthy, but has failed to detail the reasons for arriving at such a conclusion. At Paragraph 17 of the impugned Judgment, the Learned Trial Court has only extracted the evidence of P.W.1 and concluded that there was no reason to doubt her evidence. Reproducing her evidence verbatim does not suffice to establish a finding of truthfulness or trustworthiness. The Learned Trial Court has also placed reliance on Section 164 Cr.P.C. statement of the victim and concluded that as the minor victim was not confronted with her Section 164 Cr.P.C. statement during cross-examination, her evidence therein remained uncontroverted. On this aspect, it is imperative to point out that the Section 164 Cr.P.C. statement of a victim is not substantial evidence and can only be looked into only for the purpose of corroboration or contradiction. Neither was done. In the first instance all that the victim has done is identify Exhibit 1 as her statement recorded by a Magistrate but the contents have not been proved by her in the Court nor was it read out to her. Her story of Rs.400/- being given to her by the Appellant to prevent

her from reporting the matter to the Police appears to be unbelievable for the reason that she has accepted it and still gone to the Police. The Lodge owner appears to have been present in the premises but he did not notice the victim's entry into or exit from the Lodge raising suspicious of whether she really was forced into the Lodge. She raised no cries for help when the Appellant allegedly dragged her into the Lodge which is indeed an unnatural reaction if one is protesting. It is not her case that her mouth was closed or that her limbs were tied. Above all, it is unfathomable as to why she would mutely go where led by the Appellant as she has stated categorically that, **"***the accused asked me to accompany him to ….. Bazaar and took me to a Hotel* ……..**"** She made no protest to his proposition and reached his Lodge without demur. There appears to be no physical coercion by the Appellant. P.W.13 saw her only outside the gate of the Lodge and at that time all that she told him was that the Appellant had abused her verbally and she was going to report the matter to the Police. No allegation of sexual assault was made by her in the first instance to P.W.13. P.W.13 then restrained the Appellant from leaving the Lodge for his work at which time the Appellant did not appear nervous and he made no effort to abscond which is a mitigating circumstance in his favour as the Police arrived at that spot after about one and the half hours of the Appellant being detained by P.W.13. There is no proof whatsoever of use of force by the Appellant on the victim duly buttressed by the medical examination conducted on her which shows no injuries, not only in her genital but also on her person. Thus, in the light of the evidence of P.W.1 even if it is to be assumed that such an incident took place in the Lodge it was

evidently consensual and the victim being peeved by the Appellant making over only Rs.400/- to her took steps against him. The Learned Trial Court has not discussed how the money came into the hands of the Appellant, but concluded sans grounds that the Appellant was guilty. The Prosecution made no effort to investigate into this aspect and no reasons emanated by investigation as to why the Appellant would have handed over money to her. It also appears that post the lodging of Exhibit 2 she prepared to establish that she was a minor and consequently rejoined school although P.W.2 had deposed that she had already left school in 2015. The victim however volunteered to add that she was not attending school due to ill-health. It is also in the statement of the victim that on the relevant day she was going to her paternal uncle's place, but on the way the Appellant met her after which the alleged incident took place. It may relevantly be mentioned that no investigation ensued with regard to the existence of such paternal uncle to establish the veracity of the victim's statement. The mother of the victim is alleged to have conveniently left Sikkim, but no effort was made by the Prosecution to trace her out and bring her back nor is there any report about the truth of this statement, as already discussed *supra*. The non-seizure of the mobile phone of the victim also lends suspicion to her statement regarding a third person calling her before the day of incident as also her call to P.W.15 made after the incident occurred. While pausing here momentarily it is pertinent to note that P.W.15 the victim's aunt despite stating that the victim sounded nervous made no effort to inform the Police or the parents of the victim regarding the alleged phone call received by her from P.W.1 and surprisingly

failed to extend help to her. Her cell phone was not seized during investigation to test the authenticity of her statement. Her evidence fails to inspire the confidence of this Court.

9. In light of all the evidence that has been discussed hereinabove, I am of the considered opinion that the second question also deserves to be determined in the negative. The Prosecution has failed to establish its case against the Appellant beyond a reasonable doubt and he consequently deserves an acquittal.

10. In the end result, the Appellant is acquitted of the offence under Section 3(b) punishable under Section 4 of the POCSO Act, 2012, Section 342 and Section 376(2)(i) of the IPC.

11. Appeal is allowed.

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

13. The Appellant be set at liberty forthwith if not required to be detained in any other case.

14. Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence, be reimbursed to him.

15. No order as to costs.

16. Copy of this Judgment be forwarded to the Learned Trial Court for information and compliance, along with its records, if any.

(Meenakshi Madan Rai)
Acting Chief Justice
29-09-2021

Approved for reporting : **Yes**

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