THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 24th September, 2021

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

Crl. A. No.04 of 2021

Appellant : Bijay Chettri

versus

Respondent : State of Sikkim

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

Appearance

Mr. Jorgay Namka, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Yadev Sharma, Additional Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, ACJ.

1. The Victim in the instant case was at the time of the alleged offence, seven years old, the Appellant was thirty eight years old. The Appellant is before this Court assailing the Judgment and Order on Sentence of the Learned Special Judge, Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act"), South Sikkim at Namchi, in Sessions Trial (POCSO) Case No.33 of 2018, dated 02.02.2021. He stood convicted under Section 9(m) of the POCSO Act and was sentenced to undergo Simple Imprisonment for a period of five years and to pay a fine of Rs.5,000/- (Rupees five thousand) only, with a default Clause of Imprisonment. Set off was granted in terms of Section 428 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.").

2. The grounds raised herein by the Appellant are that; (i) The Victim did not identify the Appellant in the Courtroom; (ii) The testimony of the Victim was not of sterling quality and the Learned Trial Court placed reliance on the Section 164 Cr.P.C. Statement of the Victim to convict the Appellant, despite the Statement being at variance from her Statement before the Learned Court. Hence, the Appellant deserves an acquittal. In support of his contentions, Learned Counsel placed reliance on the Judgments of this Court in ***Milan Rai vs. State of Sikkim***[1]***, Lall Bahadur Kami and Another vs. State of Sikkim***[2]***, Binod Sanyasi vs. State of Sikkim***[3] and ***State of Sikkim vs. Karna Bahadur Rai***[4]***.*** Reliance was also placed on ***State of U.P. vs. Krishna Gopal and Another***[5]***, Vijayee Singh and Others vs. State of U.P.***[6] and ***Navin Dhaniram Baraiye vs. The State of Maharashtra***[7]***.***

3. While resisting the arguments of Learned Counsel for the Appellant, the Learned Additional Public Prosecutor submitted that as the Appellant was present in the Courtroom, there was no question of him not being recognized or identified by the Victim. That, the Section 164 Cr.P.C. Statement of the Victim clearly establishes the act committed by the Appellant as also her evidence before the Learned Court, therefore there ought to be no leniency shown to the Appellant for his heinous act against the innocent Victim. That, consequently, there is no requirement for interference with the impugned Judgment and Order on Sentence.

4. Having considered the rival submissions of Learned Counsel, examined the evidence and documents on record, as also

---

[1] 2016 CriLJ 4591
[2] 2017 SCC OnLine Sikk 173
[3] 2017 SCC OnLine Sikk 28
[4] 2020 SCC OnLine Sikk 33
[5] (1988) 4 SCC 190
[6] (1990) 3 SCC 190
[7] 2018 CriLJ 3393

the impugned Judgment, the only question that falls for consideration before this Court is whether the Appellant was erroneously convicted by the Learned Trial Court?

5. In this regard, we may first look into the facts of the case. Shorn of details, the Prosecution case is that on 15.08.2018, at 18:30 Hrs, a written First Information Report (for short, "FIR") was received by P.W.11 the Station House Officer, Melli Police Station (for short, "Melli P.S.") from P.W.10 ASI Nimchung Bhutia, stating that while he was on duty at the Melli P.S., two boys came to the Police Station with the Appellant and the minor Victim, reporting that the Appellant had sexually assaulted the Victim behind the Melli Hospital Quarters at around 17:00 Hrs of the same day. The FIR was registered at the Melli P.S. under Section 354 of the Indian Penal Code, 1860 (for short, the "IPC") read with Section 10 of the POCSO Act. On completion of investigation, Charge-Sheet was filed against the Appellant under Sections 363, 341, 376, 323 of the IPC read with Sections 6 and 10 of the POCSO Act.

6. The Learned Trial Court framed Charge against the Appellant under Sections 363, 342, 376(2)(i) of the IPC and Section 6 of the POCSO Act. On the plea of 'not guilty' by the Appellant, trial commenced with the Prosecution examining 14 (fourteen) Witnesses to establish its case. On closure of the Prosecution evidence, the Appellant was afforded an opportunity under Section 313 Cr.P.C. to explain the incriminating evidence against him. He denied any involvement in the offence. Arguments of the parties were finally heard and the Judgment of Conviction was pronounced on 02.02.2021, as also the Order on Sentence.

Vide the impugned Judgment, the Appellant was convicted under Section 9(m) of the POCSO Act and acquitted of the offences under Sections 363, 342, 376(2)(i) of the IPC and Section 6 of the POCSO Act, hence this Appeal.

7.(i) P.W.1 the Victim, was examined before the Learned Trial Court on 24.12.2018, her age was recorded as seven years. Before recording her deposition, she was examined in terms of the provisions of Section 33 of the POCSO Act and Section 118 of the Indian Evidence Act, 1872 upon which she was found competent to testify. According to the Victim, on the relevant day, she had gone to witness a football match at Melli Ground with her cousin. In the midst of the football match, she went to purchase juice and in the meantime, her slippers broke. The Appellant came to her and told her that he would repair her slippers and would also buy her sweets. He took her behind the Hospital, inserted his hand inside her frock, touched her private part, kissed her and touched her chest area. He then grabbed her neck and dashed her head on a nearby stone. In the meantime, two boys arrived at the scene and took them to the Police Station. She identified Exhibit 1, shown to her in the Court, as the Statement recorded by the 'Judge Madam' and Exhibit 2, shown to her in the Court, as another document prepared by the 'Judge Madam.' Her cross-examination did not demolish the statements made by her in her evidence-in-chief. P.W.2 (in whose house the Victim was living) fortified the statement of the Victim to the effect that on the relevant day, he had taken her to watch the football match at the ground, besides which, he knew nothing about the incident except what he learnt of it at the Melli Police Station where he was called by his parents.

(ii) The Doctor who examined the Victim on 15.08.2018 itself, testified as P.W.3. On his examination, he found the following;

> *"……..*
> *On examination, she was conscious, oriented and cooperative. There was no smell of alcohol in her breath. Her pulse rate was 80 per minute. Pupils were bilaterally reacting to light. On local examination, there was tenderness over left side of neck. On systemic examination, there was no abnormality detected. On genitals examination*(sic)*, pubic hair was absent. There was no vaginal discharge. There was no old and fresh injury on vagina, vulva and perineum. There was no seminal stains on her genitals. Hymen could not seen*(sic)*. I advised her for RPR (venereal disease), serum HbsAg (Hepatitis B), HIV 1 and 2, urine for pregnancy test and ultrasonography for pregnancy. I also advised for Obstetric and Gynaecological and Psychiatric consultation.*
> *On Urine Pregnancy Test, it was negative. Following items were handed over to the police by me:-*
>
> 1. *Injury report;*
> 2. *Vaginal swabs (two numbers, one dry and one wet);*
> 3. *Undergarments (it was yellow with grey stripe); and*
> 4. *Blood sample (one ml) in vial.*
>
> *On the basis of local examination, there were no signs suggestive of recent sexual intercourse, however sexual violence cannot*(sic) *not be ruled out. However, final opinion was reserved till the availability of RFSL report.*
>
> *Final opinion:- On receipt of RFSL report, I gave my final opinion that clinical and cytopathological examination was not suggestive of forceful, sexual intercourse."*

Exhibit 5 was identified as the Medico Legal Examination Report prepared by him. He also identified the articles MO I to MO IV shown to him in the Court. In his cross-examination, he could not state the exact cause of tenderness found in the neck of the Victim but volunteered to state that it matched the history given by the Victim. The rest of his examination-in-chief remained undecimated.

(iii) The guardian of the minor Victim P.W.4, while supporting the evidence of the Victim and P.W.2 regarding the Victim's presence at the Melli Ground, deposed that on the relevant day, at around 3 p.m. to 4 p.m. when he was watching the football match at the ground, he was summoned to the Melli Police Station where on reaching, he noticed that the Victim was nervous, her clothes were wet and she had sand stuck on her body. She told him

that she was strangled by the Appellant and her neck was paining. He did not witness the incident. The elder sister of the Victim, was a fifteen year old child who was also found competent to testify by the Learned Trial Court and examined as P.W.5. According to this Witness, when the Victim returned home at around 5 p.m., the Witness was told by her that one uncle had put his hands around her neck. P.W.5 noticed that the Victim's neck was swollen. The evidence of P.W.6 who knew the Appellant since 2008, lends no support to the Prosecution case as he was not privy to the offence.

(iv) P.W.7 Pravez Khan, was a seventeen year old child, also found competent to depose by the Learned Trial Court. According to this Witness, he along with his friend were going to attend nature's call behind Melli PHC, where he saw the Appellant half naked below the waist and the Victim next to him. When the minor Victim saw them, she came crying towards them. Both he and his friend noticed that the Appellant was drunk. They took the Appellant and the Victim to Melli P.S. and handed them over to the Police. Later, he came to the Namchi District Court and identified the Appellant in a Test Identification Parade (for short, "T.I. Parade"). He further deposed that Exhibit 6, shown to him in the Court, was the document prepared by the 'Judge Madam' and he identified his signatures on the document. His evidence-in-chief withstood the test of cross-examination.

(v) P.W.8, the then Judicial Magistrate, South Sikkim at Namchi conducted the T.I. Parade, where the Victim and two Witnesses P.W.7 Pravez Khan and one Ujyol Sarki identified the Appellant. P.W.9, the then Judicial Magistrate, South Sikkim at

Namchi identified Exhibit 12 as the Section 164 Cr.P.C. Statement of the Victim recorded by her.

(vi) The Complainant, ASI Nimchung Bhutia, was examined as P.W.10. His statement was to the effect that on 15.08.2018, he was attending his duty at Melli P.S. from 9 a.m. to 8 p.m. At around 6 p.m., one Pervez Khan (P.W.7) along with one Ujwal Sarki brought the Victim and the Appellant to the Melli P.S. where P.W.7 informed him of the incident. After she was brought to Melli P.S., P.W.10 sought details from the Victim, whereupon she gave her name, her age as being six years and when asked about the incident according to P.W.10, she told him that the Appellant had made her open his pants and touch his penis. He accordingly lodged an FIR against the Appellant at the Melli P.S. He identified Exhibit 17 as the FIR lodged by him. Admittedly, in his cross-examination, he had not mentioned that the Appellant had made the Victim open his pants and touch his private part.

(vii) The I.O. P.W.14, evidently, did not seize the Birth Certificate of the Victim, hence she was forwarded for bone age estimation to the District Hospital, Namchi. The evidence of P.W.12 Dr. Annie Rai, the Radiologist at the Hospital, revealed that the approximate bone age of the Victim was between 7.5 years to 8.6 years. Her Report is as follows;

> "……
>
> On 22.09.2018, the victim was sent for bone age estimation by Dr. Rabin Rai, Medical Officer, District Hospital, Namchi, South Sikkim. The following X-rays were done:-
>
> 1. X-ray right shoulder AP view;
> 2. X-ray right elbow AP view;
> 3. X-ray right wrist AP view;
> 4. X-ray right hip joint AP view; and
> 5. X-ray right knee AP view.

> After seeing the X-rays, I gave my opinion that the approximate bone age of the victim was between 7.5 years to 8.6 years.
>
> Exhibit-19, shown to me in the Court today, is the requisition sent by Dr. Rabin Rai for bone age estimation of the victim. Exhibit-20, shown to me in the Court today, is my report on the reverse side of Exhibit-19 wherein Exhibit-20(a) is my signature. Exhibit-21, shown to me in the Court today, is the X-ray plate of the minor victim.
>
> ……"

"AP" *supra* means "anteroposterior." The **Butterworth's Medical Dictionary, Second Edition, Page 127**, explains "anteroposterior" as "**1.** Extending from the front to the back. **2.** Referring to the front and the back."

(viii) P.W.13 Dr. Meenakshi Dahal, examined the Appellant on the same date of the offence i.e. 15.08.2018. According to her,

> "……
>
> On examination, person was conscious, cooperative and well oriented. Pulse was 86 per minute. Blood Pressure – 130/70 mmhg. Alcohol in breath was present. Pupils – bilaterally dilated and sluggish in reaction. On external genitalia examination, it was fully developed. No external fresh injury and smegma was absent. Penile swab and undergarment collected and handed over to the accompanying police personnel.
>
> ……."

She identified Exhibit 22 as the Medical Report of the Appellant prepared by her.

(ix) The I.O., during the course of investigation, had forwarded the Victim for medical examination to P.W.3 and the Appellant to P.W.13 for medical examination. It emerged during her testimony that the Victim and her elder sister, aged about 14 years were orphans and lived in the house of their uncle P.W.4. The Appellant, a Labourer by profession, from the neighbouring State of West Bengal, was working in different sites in Sikkim. On the relevant day, he found the Victim alone playing by the fountain with her juice packet and her slipper broken, thereafter he committed the offence.

8.(i) In a case pertaining to the POCSO Act, it needs no reiteration that it is imperative to establish the age of the Victim and thereby her minority. Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, (for short, the "JJ Act"), provides for determination of age of the child in conflict with law and child in need of care and protection. Although the Victim is neither, nevertheless the same parameters can be utilized for the purposes of determining her age, this was propounded by the Hon'ble Supreme Court in ***Mahadeo S/O Kerba Maske vs. State of Maharashtra and Another***[8], wherein it was observed *inter alia* as follows;

> "**12**. .....Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rules 12(3)(a)(i) to (iii), the medical option can be sought for. **In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.**"
>
> **(Emphasis supplied)**

(ii) Section 94 of the JJ Act is extracted hereinbelow for easy reference. The Section provides for presumption and determination of age;

> "**94. Presumption and determination of age.–**(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.
>
> (2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining–
>
> (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

[8] (2013) 14 SCC 637

> (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;
>
> (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:
>
> Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.
>
> (3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

This provision lays down the requirement for age assessment and Ossification Test as the last resort for age determination when Birth Certificate from the School of the Victim or the local governing bodies are not available.

(iii) Exhibit 26 is a Communication, dated 16.08.2018, which reveals that the I.O. had given information to the Chairperson, Child Welfare Committee, Namchi, South Sikkim about the registration of the Case. Exhibit 27, another Communication, also dated 16.08.2018, was the intimation given by her to the District Child Protection Officer, District Child Protection Unit, Namchi, South Sikkim. The Victim, however, was not produced before the Juvenile Justice Board or before the Child Welfare Committee and therefore she did not have the benefit of having her age assessed on their orders, nor did the Learned Trial Court have the benefit of the assessment of the Victim's age by ocular evidence of the said Authorities. As per the I.O's evidence, the Victim was a Student in a Government School reading in Upper Kindergarten but she was unable to obtain the Birth Certificate or the first School Admission Register pertaining to the Victim, as she was a resident of West Bengal. The evidence of P.W.4, her guardian does not reveal the Victim's age and P.W.5, the fifteen year old sister of the Victim, gave no inkling on this aspect.

Consequently, although the I.O. could have taken steps to procure the Birth Certificate, in its absence, no error emanates on the step of the I.O. in forwarding the Victim for Ossification Test.

(iv) The accuracy of Ossification Test was discussed by the Hon'ble Supreme Court in ***Jyoti Prakash Rai alias Jyoti Prakash vs. State of Bihar***[9]***,*** wherein it was *inter alia* observed that;

> "**13.** A medical report determining the age of a person has never been considered by the courts of law as also by the medical scientists to be conclusive in nature. After a certain age it is difficult to determine the exact age of the person concerned on the basis of ossification test or other tests. This Court in *Vishnu* v. *State of Maharashtra* [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217] opined : (SCC p. 290, para 20)
>
> > "*20*. It is urged before us by Mr Lalit that the determination of the age of the prosecutrix by conducting ossification test is scientifically proved and, therefore, the opinion of the doctor that the girl was of 18-19 years of age should be accepted. We are unable to accept this contention for the reasons that the expert medical evidence is not binding on the ocular evidence. The opinion of the Medical Officer is to assist the court as he is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character and not binding on the witness of fact."
>
> **In the aforementioned situation, this Court in a number of judgments has held that the age determined by the doctors should be given flexibility of two years on either side**."
>
> **[Emphasis supplied]**

(v) In ***Ram Suresh Singh vs. Prabhat Singh alias Chhotu Singh and Another***[10]***,*** the Hon'ble Supreme Court held *inter alia* as follows;

> "**13.** Even if we had to consider the medical report, it is now well known that an error of two years in determining the age is possible. In *Jaya Mala* v. *Govt. of J&K* [(1982) 2 SCC 538 : 1982 SCC (Cri) 502 : AIR 1982 SC 1297] this Court held: (SCC p. 541, para 9)
>
> > "*9*. … However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."
>
> ……."

(vi) In ***Rajak Mohammad* vs. *State of Himachal Pradesh***[11], the Hon'ble Supreme Court *inter alia* observed thus;

> "**9.** While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be

[9] (2008) 15 SCC 223
[10] (2009) 6 SCC 681
[11] (2018) 9 SCC 248

> allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused."

Hence, it is a well settled proposition of law that other things being equal, the interpretation of any provision sought to be adopted by the Court is one that goes in favour of the accused.

(vii) On the bedrock of the extracts of the ratiocinations *supra* and giving the benefit of the Ossification Test to the accused by adding two years to the Victim's age, which as per the Ossification Test was "8.6 years," her age would be only "10.6 years" thereby still making her below twelve years of age. Hence, it is concluded that the offence having been committed on a child below twelve years, the provisions of Section 9(m) of the POCSO Act would fall into place. The Learned Trial Court therefore was not in error on this count.

9.(i) The next vehement argument of Learned Counsel for the Appellant was that the Learned Trial Court has based its Judgment on the Statement of the Victim made under Section 164 Cr.P.C. and convicted the Appellant. As per the Victim;

> *"…….At the khola the bhaiya removed my underwear and touched my front part with his hand. Further, bhaiya then put his private all over my front part. When the child was asked to explain what she meant by "front part", she pointed at her vagina. When I tried to scream for help, the bhaiya grabbed my neck and it hurt……"*

However, before the Learned Trial Court, her Statement was limited to the extent that,

> "……He took me behind the hospital. **The accused inserted his hand inside my frock and touched my private part**. The accused kissed me and touched my chest area. The accused grabbed my neck and dashed my head on a nearby stone. ….."
>
> **(Emphasis supplied)**

(ii) This Court has in a plethora of Judgments propounded the relevance of Section 164 Cr.P.C. Statement. The Statement of

a Witness recorded under Section 164 of the Cr.P.C. is not substantive evidence and can be utilized only for the purpose of contradiction and corroboration. In ***R. Shaji vs. State of Kerala***[12], the Hon'ble Supreme Court observed *inter alia* as under;

> "**26**. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. ……..
>
> **27**. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted. (Vide Jogendra Nahak v. State of Orissa [(2000) 1 SCC 272 : 2000 SCC (Cri) 210 : AIR 1999 SC 2565] and CCE v. Duncan Agro Industries Ltd. [(2000) 7 SCC 53 : 2000 SCC (Cri) 1275])
>
> **28.** Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence."

It thus falls to reason that the Learned Trial Court could only rely on the evidence given on oath in the Court and not one under Section 164 of the Cr.P.C. which can be relied on only for the purposes of corroboration and contradiction.

(iii) Thus, Section 164 Cr.P.C. Statement of the Victim is to be disregarded for the reason that it is not substantive evidence besides which, it was not read out to the Victim in the Courtroom to refresh her memory or to test the veracity of the Statement. In ***Binod Sanyasi vs. State of Sikkim***[13]***,*** this Court held *inter alia* as follows;

---

[12] (2013) 14 SCC 266
[13] 2020 SCC OnLine Sikk 28

> "**14.** Merely because the victim affixed her signature on Exhibit 3, assumptions cannot be drawn of her knowledge of its contents. The document cannot prove itself, the contents thereof are required to be proved in terms of the provisions of the Indian Evidence Act, 1872 (hereinafter "Evidence Act") *viz.* Section 67 of the Act, unless the contents of the documents are said to be admissible by reasoning of a provision of a Statute, example, Section 90 of the Evidence Act. Identification of her signature on Exhibit 3 is not conclusive of knowledge of the contents, when the contents were not put to her to replenish her memory."

Nevertheless, even without the strength of the Section 164 Cr.P.C. Statement, the evidence of the Victim to the effect that the Appellant had indeed touched her genital with his hand cannot be blind sighted as it has weathered the test of cross-examination and remained undemolished. Her evidence reveals that the offence had been committed by the Appellant. P.W.7 Pravez Khan had seen the Appellant in a state of undress below his waist, this circumstance went unexplained by the Appellant. What would be the reason for a grown man to be half naked in front of a child? The evidence of P.W.7 that the Appellant was in a drunken state is substantiated by the evidence of P.W.13, the Doctor who examined him and found alcohol in his breath as also the reaction of his pupils being sluggish.

10. That having been said, it is relevant to consider what "sexual assault" means. Section 7 of the POCSO Act defines sexual assault as under;

> "7. Sexual Assault.–Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or make 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."

"Aggravated Sexual Assault" finds place in Section 9 of the POCSO Act and Section 9 (m) provides as follows;

> "9. Aggravated Sexual Assault. – …….
>
> …….

> *(m)* whoever commits sexual assault on a child below twelve years; …"

Once the child is below twelve years and sexual assault is committed on her then it comes within the ambit of "aggravated sexual assault." While ignoring the reference to Section 164 Cr.P.C. Statement of the Victim relied on by the Learned Trial Court, the evidence given by the Victim in the Court regarding the offence committed by the Appellant under Section 9(m) of the POCSO Act cannot be obliterated.

11.(i) It was also urged by Learned Counsel for the Appellant that the Victim did not identify the Appellant in the Courtroom. In this context, relevant reference is made to the ratiocination in ***Visveswaran vs. State Rep. by S.D.M.***[14]***,*** wherein the Hon'ble Supreme Court observed *inter alia* that;

> "**11.** ……..The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence. In the present case, there are clinching circumstances unerringly pointing out the accusing finger towards the appellant beyond any reasonable doubt."

(ii) In ***Hemudan Nanbha Gadhvi vs. State of Gujarat***[15] the Hon'ble Supreme Court was considering a matter where the Prosecutrix, aged nine years old, turned hostile and not only denied the sexual assault but also declined dock identification. The Learned Trial Court had consequently acquitted the Appellant. The Hon'ble High Court on Appeal, reversed the acquittal and convicted the Appellant holding that the FIR lodged by P.W.1, the Victim's mother, had been duly proved by P.W.12, the Police Sub Inspector and that the T.I. Parade of the Appellant stood proved by P.W.1. It was also observed that it would be a travesty of justice if the

[14] (2003) 6 SCC 73
[15] (2019) 17 SCC 523

Prosecutrix turned hostile and failed to identify the Appellant in the dock. The Hon'ble Court held *inter alia* as hereinbelow;

> "**7.** The appellant was apprehended on suspicion along with another. The TIP was held without delay on 22-2-2004. Ext. P-38, the TIP report bears the thumb impression of PW 2 who was accompanied by her mother. The TIP report has been duly proved by PW 11. The appellant was identified by PW 2. There appears no substantive challenge to the TIP, identification in the dock, generally speaking, is to be given primacy over identification in TIP, as the latter is considered to be corroborative evidence. But it cannot be generalised as a universal rule, that identification in TIP cannot be looked into, in case of failure in dock identification. Much will depend on the facts of a case. If other corroborative evidence is available, identification in TIP will assume relevance and will have to be considered cumulatively.
>
> **8.** In *Prakash* v. *State of Karnataka* [*Prakash* v. *State of Karnataka*, (2014) 12 SCC 133 : (2014) 6 SCC (Cri) 642], it was observed as follows : (SCC p. 144, para 16)
>
> "*16*. …Even so, the failure of a victim or a witness to identify a suspect is not always fatal to the case of the prosecution. In *Visveswaran* v. *State* [*Visveswaran* v. *State*, (2003) 6 SCC 73 : 2003 SCC (Cri) 1270] it was held : (SCC p. 78, para 11)
>
> '*11*. …The identification of the accused either in a test identification parade or in court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a time, crimes are committed under the cover of darkness when none is able to identify the accused. The commission of a crime can be proved also by circumstantial evidence.'"

In the present case, identification of the Appellant by way of T.I. Parade has not been demolished, apart from which P.W.7 was also present at the T.I. Parade and has identified the Appellant in the dock as the same person that he had identified in the T.I. Parade.

(iii) On examining the evidence of the Victim, it is seen that the cross-examination did not contest the identification of the Appellant in the Courtroom. All that the cross-examination of the Victim could draw out was as follows, *"It is not a fact that I did not identify the accused person in the line of several other persons."* It was not brought forth to the Victim that the Appellant was not in the Courtroom or that she had failed to identify him. The records of the Learned Trial Court reveal that on the date of the Victim's evidence (24.12.2018), the Appellant was produced before the Learned Court from Judicial Custody and thereafter remanded back to the

Judicial Custody, after examination of the Victim in the Courtroom, hence, the presence of the Appellant in the Courtroom has been established. On the touchstone of the ratio in ***Visveswaran vs. State*** and ***Hemudan Nanbha Gadhvi*** *(supra),* the identification of the Appellant by the Victim is not decimated. The evidence of P.W.7 establishes that he had seen the Appellant and the Victim together and P.W.7 had identified the Appellant, both in the T.I. Parade and in the Courtroom. Hence, the question of non-identification of the Appellant by the Victim does not arise.

12. The entire facts and circumstances and the discussions hereinabove lead to the unyielding conclusion that the impugned Judgment and Order on Sentence warrants no interference by this Court, save to the extent pertaining to the Statement of the Victim under Section 164 Cr.P.C., as already detailed *supra*.

13. Appeal fails and is accordingly dismissed.

14. No order as to costs.

15. Copy of this Judgment be sent forthwith to the Learned Trial Court, for information, along with its Records.

(Meenakshi Madan Rai)
Acting Chief Justice
24.09.2021

ml Approved for reporting : **Yes**