

**THE HIGH COURT OF SIKKIM : GANGTOK**  
(Criminal appeal Jurisdiction)

DIVISION BENCH: THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE  
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

**Crl. Appeal No.29 of 2024**

Yeshey Lepcha,  
S/o Late Topgay Lepcha,  
Resident of Shipgyer,  
Mangan District, North Sikkim.  
***Presently at: Rongyek Jail***

..... Appellant

**Versus**

State of Sikkim

.....Respondent

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

**Appearance:**

Mr. Sudesh Joshi, Advocate with Mr. Saurav Singh  
and Mr. Adarsh Gurung, Advocates for the Appellant.

Mr. Thinlay Dorjee Bhutia, Public Prosecutor.

Date of Hearing : 21.05.2025 & 26.05.2025  
Date of Judgment : 19.06.2025

**J U D G M E N T**

**Bhaskar Raj Pradhan, J.**

1. The appellant has suffered a conviction for repeatedly committing sexual assault on the victim under section 9(l) and for committing sexual assault being her guardian under section 9(n) of the Protection of Children

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from Sexual Offences Act, 2012 (the POCSO Act). He has also been convicted for committing rape repeatedly on the victim under section 376 (2) (n) of the Indian Penal Code, 1860 (IPC). He was sentenced to imprisonment for six years and fine of Rs.20,000/- under section 9(l) as well as under 9(n) of the POCSO Act. In default of payment of fine for the sentences the appellant was required to further undergo simple imprisonment for one year. The appellant was also sentenced to fifteen years of rigorous imprisonment and a fine of Rs.25,000/- for commission of offence under section 376 (2) (n) IPC. In default he was to undergo simple imprisonment for one year. The learned Special Judge also recommended a payment of Rs.7 lakhs as compensation to the survivor under the Sikkim Compensation to Victims (or their Dependents) Scheme, 2021. The appellant has preferred this appeal challenging the conviction and sentences.

**2.** The introduction to the POCSO Act states that sexual offences against children are not adequately addressed by the existing laws. A large number of such offences are neither specifically provided for nor are they adequately penalised. Such offences against children need to be defined explicitly and countered through adequate

penalties as an effective deterrence. The POCSO Act provides for protection of children for offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of children.

**3.** Sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.

**Genesis of the prosecution**

**4.** On 03.10.2023 the victim's friend (P.W.9) informed the teacher (P.W.1) about the disclosure made by the victim (P.W.7) to her. The teacher (P.W.1) informed the victim's class teacher (P.W.17) that the victim's friend (P.W.9) had reported about the victim being harassed by the appellant. This matter was then reported to the Principal's office. On the Principal's advice the teacher (P.W.1) and the class teacher (P.W.17) took the victim to the police station. The victim was unable to open up at the police station. The police therefore, advised them to take the victim to the one stop centre. At the one stop centre the victim revealed to the case worker (P.W.8) that she was being sexually assaulted by her paternal uncle and there was also history of forceful sexual penetration on her and further that the

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last incident of sexual assault took place on 29.09.2023. As the police were all engaged that day, the case worker (P.W.8) went to the police station and lodged the First Information Report (FIR) (exhibit P-10) on the next day i.e. 04.10.2023 against the appellant. On the same day the victim was examined by the Medical Officer (P.W.16). The victim discloses to her that she used to stay with the appellant and his children at Sxxxx (name redacted) since childhood. During her childhood the appellant used to touch her over her private parts, but since last two months he advised her to stay in a separate room which previously counted as sitting room/guest room and after this incident when she shifted he usually came to her room and touched her private part and even had sexual intercourse with her several times. The last sexual intercourse took place on 29.09.2023. The victim also informed her that there was penetration of the penis into the vagina. The victim gave positive report for masturbation of the appellant by the victim/forced manipulation of genitals of appellant by the victim. She disclosed that ejaculation occurred outside body orifice-vaginal area. She also complained about touching and fondling of breast and vagina. These facts were recorded by the Medical Officer (P.W.16) in her

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medical report (exhibit P-23) dated 04.10.2023. On examination of the victim the Medical officer recorded that her labia majora was enlarged, in labia minora there was erythema of skin with ulcerative type vision on the inner mucosa of perineal region and had creamy coloured vaginal discharge. There was tear at the hymen perineum at 6 O' clock position. The Medical Officer (P.W.16) was of the opinion that expert opinion/OBG consultation was required. Thereafter, on 09.10.2023 the victim was examined by the Consultant (P.W.15) Department of OBG. The victim informed the Consultant (P.W.15) that she had been molested by the appellant since childhood. He used to touch her body parts. They used to stay together. She was sexually assaulted multiple times by the appellant. She did not mention for how many years. The last incident of sexual abuse was on 29.09.2023 when he had come to her house at around 2300 hours to 0000 hours on the following day and forced her to sexual intercourse. The victim also informed the Consultant (P.W.15) that the appellant used to lure her with money. She usually would be sleeping at the time of the incident. The penetration was in her genitalia. She also gives positive report for masturbation of the appellant by the victim/forced

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manipulation of genitals of the appellant by the victim and the ejaculation used to occur outside the body orifice. There was touching and fondling of breast and vagina involved. There was history of vaginal discharge since the incident of sexual violence. She recorded this history as informed by the victim in her medico legal examination report (exhibit 21) proved by her. The Consultant (P.W.15) noted that the hymen perineum was found absent i.e. the hymen was not intact. Since the victim complained of itching and discharge in the par vagina, she prescribed sexually transmitted prevention treatment. According to the Consultant (P.W.15) once a person is exposed to recurrent sexual activity, there are complaints of itching and unusual discharge from the vagina and it is important for the person to get treatment. The Consultant's (P.W.15) final opinion was that recent or past act of sexual intercourse could not be ruled out.

**5.** The process of criminal investigation against the appellant started when the victim, now twenty years old, shared her ordeal with her friend (P.W.9). The delay in reporting the crime and the truth and veracity of the deposition of the victim is questioned by the appellant.

### **The Final Report and the indictment**

6. The investigation led to the filing of the charge sheet against the appellant who was found to have *prima facie* committed the offences under section 376 IPC read with section 5(l), (n), (p)/section 6 of the POCSO Act on the victim more than once from her childhood despite being a relative through blood.

### **The Charges**

7. Seven charges were framed by the learned Special Judge on 09.02.2024 under section 9(l), 9(m) and 9(n) of the POCSO Act for commission of offence from the year 2010 onwards. The appellant was also charged for commission of aggravated penetrative sexual assault under section 5(l) and 5(n) of the POCSO Act and section 376(2)(f) and 376(2)(n) of the IPC from the year 2010 till 29.09.2023. The appellant pleaded not guilty and claimed trial.

### **The Trial**

8. During the trial nineteen prosecution witnesses were examined. The examination of the appellant under section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.) was conducted on 12.07.2024. In his defence the appellant

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stated that he was a man who has achieved a lot of things in life, given shelter to the victim as she was in a sad state after her mother passed away. He had given good education and was strict with her so that she would do well in life. However, she did not like him being strict and lodged the false complaint against him. He claimed innocence and stated that he had defence witnesses to examine. The appellant examined seven defence witnesses including himself. To a specific question in section 313 Cr.P.C. examinations on the incident of 29.09.2023 the appellant stated that he was at Sxxxx (name redacted) on the relevant date.

### **SUBMISSIONS**

**9.** Mr. Sudesh Joshi, learned counsel appearing for the appellant submitted that the deposition of the victim is not of sterling quality. It suffers from several fatal discrepancies. The victim had complained about the alleged sexual assaults when she was twenty years old and an adult. The complaint was about sexual assault before she was in the 5<sup>th</sup> or 6<sup>th</sup> standard in a general nature except the allegation of rape by the appellant on 29.09.2023 which she did not depose about in her deposition in court



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although she had specifically talked about it in her statement recorded under section 164 Cr.P.C.. Although the victim had reported about the alleged incident of rape on her on 29.09.2023 even to the Medical Officer (P.W.16) who examined her on 04.10.2023 and the Consultant (P.W.15) their opinions were not conclusive of rape or sexual assault. Further, even the opinion of the Consultant (P.W.15) who examined her on 09.10.2023 was only that recent or past act of sexual intercourse could not be ruled out. Relying upon the depositions of seven defence witnesses it is submitted that the defence had been able to establish his *alibi* that on 29.09.2023 the appellant was not at Mxxxx (name redacted) the alleged place of occurrence but at Sxxxx (name redacted). The deposition of the younger brother (D.W.6) of the victim confirmed that in fact on 29.09.2023 the appellant was not in the house. It was submitted that the evidence of defence witnesses was not given equal weightage by the learned Special Judge and their evidence incorrectly examined.

**10.** The learned Public Prosecutor while submitting that the conviction of the appellant under the POCSO Act may not be interfered with fairly conceded that the victim had not specifically mentioned the date of the last incident i.e.

29.09.2023. It was submitted that the evidence of the victim could not be demolished during cross examination. The victim's testimony finds corroboration in the deposition of the victim's friend (P.W.9), the teacher (P.W.1) the class teacher (P.W.17), the case worker (P.W.8), the Medical officer (P.W.16) and the Consultant (P.W.15). It is submitted that the defence witnesses have been found to be unreliable by the learned Special Judge.

### **The Consideration**

**11.** For the purpose of establishing the age of the victim the prosecution examined the father of the victim (P.W.6) who had obtained her birth certificate (exhibit P-7); the victim who confirmed her date of birth as 20.01.2003 and identified her birth certificate (exhibit-P-7); the Medical Officer as well as Registrar, Birth and Deaths, Cxxxxx (name redacted) Primary Health Centre Mxxxxx (name redacted) (P.W.2) who had furnished the details of the victim's birth as found in the Live Birth register; the Medical Officer and in charge Registrar Births and Deaths (P.W.4) who issued the birth certificate (exhibit-P-7) of the victim; the appellant's wife (P.W.11) from whose possession birth certificate (exhibit-P-7) was seized vide seizure memo

(exhibit P-16) and who identified the birth certificate of the victim and her signature at the back of the birth certificate (exhibit P-7); P.W.13 and P.W.14 who were the witnesses to the seizure of the birth certificate (exhibit P-7) vide seizure memo (exhibit P-16); Head Mistress (P.W.3) of the Primary School attended by the victim, who furnished the information about the age of the victim as found in the school admission register (exhibit P-6); the Head Master of Government Primary School (P.W.5) who had filed the school admission register (exhibit P-6) and identified his signature thereon; the Principal (P.W.10) of the School where the victim had studied who provided information about the date of birth of the victim i.e. 20.01.2003 as per the School records.

**12.** The original birth certificate (exhibit P-7) of the victim which is a public document was produced by the prosecution. The victim's father (P.W.6) identified it as the one obtained by him from the Primary Health Centre. Although, during cross-examination the victim's father (P.W.6) deposed that he did not know the victim's age he clarified stating that the date of birth of the victim was mentioned in the birth certificate (exhibit P-7). The birth certificate (exhibit P-7) records the victim's date of birth as

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20.01.2003. The appellant's wife (P.W.11) confirmed that the birth certificate (exhibit P-7) was seized from her possession and it bore her signature at the back. The Investigating Officer (P.W.19), P.W.13 and P.W.14 the two seizure witnesses confirmed the seizure. The victim admittedly was staying with the appellant and his wife (P.W.11). The Medical Officer, in charge Registrar, Births and Deaths (P.W.4) confirmed that he had issued the birth certificate (exhibit P-7) of the victim. The Medical Officer, as well as Registrar, Births and Deaths (P.W.2) provided the details of the victims as recorded in the Live Birth register produced in the original and certified extract (exhibit P-3) proved in court. According to the Live Birth register her date of birth was also 20.01.2003. The Head Mistress of the Government Primary School (P.W.3) which the victim attended also recorded her date of birth as 20.01.2003 in the admission register maintained by the school. The Head Mistress (P.W.3) produced the original admission register for the inspection of the Court and exhibited the extract thereof (exhibit P-6). The Head Master of the Government Primary School (P.W.5) who made the entry in the school admission register confirmed the same. The Principal of the Senior Secondary School (P.W.10) also deposed that as per

his school record of the victim the date of birth recorded was 20.01.2003. The investigating officer (P.W.19) confirmed the seizure of all these exhibits relating to the birth of the victim by him. The date of birth of the victim has been sufficiently proved as 20.01.2003. The victim would have therefore attained majority on 20.01.2021. We are not in agreement with the findings of the learned Special Judge that the prosecution has failed to establish the date of birth of the victim.

**13.** The evidence led by the prosecution reflects that the scene of the crime is set in a semi rural area. The appellant was the “Panchayat” of Sxxxx (name redacted). He was a married man with several children. He also had another wife living in Mxxxx (name redacted). The house where the victim was allegedly sexually abused and raped was located in Pxxxx (name redacted). The victim’s father (P.W.6) was a government employee as per his deposition and unemployed as per the deposition of the appellant’s wife (P.W.11). The victim’s mother had passed away when she was in the 2<sup>nd</sup> grade of Sxxxx (name redacted) Primary School. The appellant had in the year 2010 taken the victim to Mxxxx (name redacted) for her further studies when she was 5 to 6 years of age.

**14.** The FIR (exhibit P-10) was lodged on 04.10.2023 by the case worker (P.W.8) of the one stop centre on the version of the victim. The FIR (exhibit P-10) complains about sexual offences against the victim for the past many years as well as the recent incident of sexual intercourse without consent on 29.09.2023. The FIR (exhibit P-10) was lodged within four days of the alleged incident of 29.09.2023. The victim was an adult when she decided to speak about the alleged sexual abuse committed on her by the appellant over a long period of time even prior to when she was in the 5<sup>th</sup> or 6<sup>th</sup> standard. According to the victim's friend (P.W.9) during August 2023 while walking to school the victim disclosed to her about the appellant inappropriately touching her and sexually abusing her.

**15.** On 03.10.2023 the victim's friend (P.W.9) reported to the teacher that the victim was being harassed by the appellant. The victim did not attend the school that day. The victim's friend (P.W.9) immediately shared the information with the teacher (P.W.1). The teacher (P.W.1) informed the class teacher (P.W.17) about it the same day. The teacher (P.W.1) and the class teacher (P.W.17) took the victim to the police station where the victim became nervous and therefore, they were advised to take the victim

to the one stop centre. The victim disclosed to the case worker (P.W.8) that she was being sexually assaulted by the appellant since long time and there was history of forceful sexual penetration on her. The last incident of sexual assault took place on 29.09.2023. The FIR (exhibit P-10) also reported the commission of sexual offence for past many years without the victim's consent. The FIR (exhibit P-10) also specifically mentioned that the last incident of sexual abuse was on 29.09.2023.

**16.** Considering the fact that the prosecution has not been able to produce direct evidence in support of the victim's deposition regarding the past incidents of sexual abuse which allegedly started when she was a child it would be vital to examine if the allegation of sexual abuse made by the victim was true. The victim has stated about it in specific detail in her statement recorded under section 164 of the Cr.P.C.. However, we find that the victim has not mentioned the date i.e. 29.09.2023 in her deposition in court.

**17.** The victim's statement recorded under section 164 Cr.P.C. (exhibit P-9) states about the appellant caressing her breast and private part by inserting his hand

underneath the clothes when she was studying in Mxxxxx (name redacted) Senior Secondary School. It also states that she had told the appellant's wife (P.W.11) and her sister about it who changed her room to the sitting room. She stated that whenever the appellant used to come to the house he would come to the sitting room area and caress her breast and private part. She stated about sexual molestation by the appellant and rape. She vividly described the incident of 29.09.2023 in detail mentioning that it happened in the sitting room of the house. During her deposition in court, the victim identified her 164 statement (exhibit P-9) as the one recorded in court.

**18.** During the trial the victim deposed about the commission of sexual abuse being committed in three broad periods.

**19.** First was the period prior to the victim being in the 5<sup>th</sup> or 6<sup>th</sup> standard. Considering the fact that the victim was twenty one years and had appeared in the 12<sup>th</sup> standard board examination when she deposed about it the incident relating to this period would be at least several years prior.



**20.** The second period relates to the time when the appellant and his wife were staying in Dxxxx (name of the place redacted) and the victim and the three sons of the appellant were staying at Pxxxx (name of the place redacted). The victim alleged that when the appellant visited them at Pxxxx (name of the place redacted) he would ask her to come to his room and although she would sleep with his sons the appellant would come to her bed and force himself on her and she would be raped by him many times. The victim did not provide any details with regard to the timeline when these incidents transpired.

**21.** The third period relates to a period when the victim started sleeping in the sitting room. The victim did not give any reference to a timeline about this period as well although she deposed that the appellant used to come to the sitting room and rape her. According to the victim after this she told her two friends about it who reported it to their teacher and thereafter the matter was reported to the police.

**22.** Although the victim did not specifically mention the date of the last incident i.e. 29.09.2023 a holistic reading of her deposition does indicate that in fact she was talking

about the sexual crime committed recently. The prosecution had the victim examined on 04.10.2023 by the Medical Officer (P.W.16) on the same date when the FIR (exhibit P10) was lodged against the appellant.

**23.** In matters of sexual crime the court is always faced with the dichotomy of whether to believe the victim as rarely would one find such crimes committed in the presence of others. It becomes even more trying for the court when one has to rule on the truthfulness of the victim's statement when she deposes about sexual assaults several years before the complaint. The Supreme Court however, has laid down the fundamental rule of a "sterling witness". If this rule of a sterling witness is followed and the victim's testimony tested, it would be easier for the court to administer criminal justice to victims of sexual crimes. If the victim's testimony qualifies as that of sterling witness it would be prudent to convict the appellant on her sole testimony. After examining the judgment of the Supreme Court in **Rai Sandeep** vs. **State (NCT of Delhi)**<sup>1</sup> and **Krishna Kumar Malik** vs. **State of Haryana**<sup>2</sup> in the words of

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<sup>1</sup> (2012) 8 SCC 21

<sup>2</sup> (2011) 7 SCC 130

the Supreme Court in ***Nirmal Prem Kumar & Anr. vs. State represented by Inspector of Police***<sup>3</sup>:-

*“15. What flows from the aforesaid decisions is that in cases where witnesses are neither wholly reliable nor wholly unreliable, the Court should strive to find out the true genesis of the incident. The Court can rely on the victim as a “sterling witness” without further corroboration, but the quality and credibility must be exceptionally high. The statement of the prosecutrix ought to be consistent from the beginning to the end (minor inconsistencies excepted), from the initial statement to the oral testimony, without creating any doubt qua the prosecution's case. While a victim's testimony is usually enough for sexual offence cases, an unreliable or insufficient account from the prosecutrix, marked by identified flaws and gaps, could make it difficult for a conviction to be recorded.”*

**24.** The victim was subjected to extensive cross examination by the defence. Nothing substantial to demolish the victim's testimony could be extracted from her. The victim truthfully answered that it was true that the appellant had given her a mobile phone and that prior to 2023 she never reported the matter to anyone. She also admitted that she was aware that there are other POCSO victims in the same school where she was studying and that there are complaints that students do not obey their teachers. When confronted with her section 164 Cr.P.C. statement the victim denied that on 29.09.2023 the appellant was not at Mxxxxx (name redacted).

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<sup>3</sup> 2024 SCC OnLine SC 260

**25.** The deposition of the victim is corroborated by the victim's friend (P.W.9) to whom the victim had first disclosed about the sexual abuse; the teacher (P.W.1), the class teacher (P.W.17) who on learning about the sexual abuse encouraged the victim to report the matter; and the case worker (P.W.8) who lodged the FIR (exhibit P-10) after the victim disclosed the factum of the sexual abuse and rape upon her by the appellant. The FIR has been proved by the case worker (P.W.8). The cross examination of these prosecution witnesses does not disclose that the victim lied to them about the sexual abuse by the appellant. From the deposition of investigating officer (P.W.19) it is clear that the victim had narrated the same story to the police under section 161 Cr.P.C., to the learned Judicial Magistrate under section 164 Cr.P.C. and to the court on 09.04.2024. The failure of the victim to specify the date 29.09.2023 in her deposition would not dislodge the prosecution case as it is only a minor discrepancy which can almost certainly be attributed to nervousness and being overawed by the court atmosphere and alien surrounding.

**26.** In the Indian context even if major portion of the evidence is found to be deficient, in case the residue is

sufficient to prove the guilt of an accused, his conviction can be maintained. It is quite common to come across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration and embellishment. (see **Gangadhar Behera vs. State of Orissa**<sup>4</sup>). It is the imperative duty of the court to separate the grain from the chaff, separate the truth from falsehood. As the present case is dependent on appreciation of the oral evidence the approach of the court must be whether the evidence of the witness read as a whole appears to have a ring of truth. After that impression is formed it is necessary to scrutinize the evidence in terms of its deficiencies, drawback and infirmities. Thereafter the evidence must be evaluated. If in spite of the deficiencies, drawbacks and infirmities the evidence of the witness still sounds truthful they can be regarded as minor and trivial and not touching the core of the case. Discrepancies due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition, shock and horror at the time of occurrence if given undue weightage may lead to an erroneous appreciation. (see **State of Uttar Pradesh vs.**

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<sup>4</sup> (2002) 8 SCC 381

**Krishna Master & Ors.**<sup>5</sup>). Hypertechnical approach of examining evidence, attaching importance to technical errors would be erroneous if it does not go to the root of the matter. If the court before whom the witness gives evidence has come to a sound conclusion on the truthfulness of the testimony of the witness, the Appellate Court which does not have the same benefit should be cautious in setting aside that opinion (see **Leela Ram vs. State of Haryana**<sup>6</sup>).

**27.** It is important to keep in mind the setting of the crime as well. The Court must be conscious of the behavioural patterns and perceptive habits. Sophisticated approach based on unreal assumptions about human conduct should not be applied to those given to a different way of life in rural or semi rural settings (see **Shivaji Sahabrao Bobade vs. State of Maharashtra**<sup>7</sup>). Ultimately the court tasked with rendering justice must seek the truth from the facts as brought out in the evidence. Truth alone would serve justice.

**28.** It is impossible in any criminal trial to prove all the elements with scientific precision. It is well settled that “to prove beyond reasonable doubt” would mean the conviction

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<sup>5</sup> (2010) 12 SCC 324

<sup>6</sup> (1999) 9 SCC 525

<sup>7</sup> (1973) 2 SCC 793

of the criminal court of the “*guilt beyond the range of reasonable doubt*”. It should afford “*moral certainty*” to the court. Proof beyond reasonable doubt should not be stretched to engulf every degree of doubt. The court should appreciate the evidence of a witness with the approach as to whether the evidence read as a whole “*appears to have a ring of truth*” (see ***State of Haryana vs. Bhagirath***<sup>8</sup>).

**29.** The sagacity, tenacity and the alertness of the trial judge would be instrumental in passing a sound judgement keeping the balance between the protection of victims of sexual crimes and the liberty of the accused.

**30.** Although the Medical Officer (P.W.16) could not give a final opinion and sought for expert opinion, the Consultant (P.W.15) opined that recent or past act of sexual intercourse could not be ruled out. Both the Medical Officer (P.W.16) and the Consultant (P.W.15) noted that the hymen perineum was not intact. The Medical Officer (P.W.16) who examined her on 04.10.2023 recorded that her labia majora was enlarged and there was tear at the hymen perineum at a 6 O’ clock position. The Consultant (P.W.15) also deposed that the victim was prescribed sexually

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<sup>8</sup> (1999) 5 SCC 96

transmitted infection prevention treatment. The Consultant (P.W.15) opined that once a person is exposed to recurrent sexual activity, there are complaints of itching and unusual discharge from the vagina. The deposition of the Medical Officer (P.W.16) and the Consultant (P.W.15) lends credence to the prosecution story that the victim was subjected to rape on multiple occasions.

**31.** During the cross examination of the victim the defence suggested that the appellant was not at Mxxxx (name redacted). She denied the suggestion. The appellant's wife (P.W.11) who was examined as a prosecution witness deposed that as per her knowledge, on 29.09.2023 she and her husband were at Txxxx (name redacted) and he did not visit Mxxxx (name redacted). This was on the suggestion of the defence during her cross examination. Quite clearly the defence had laid the foundation of an *alibi* through the cross examination of the victim and thereafter, of the appellant's wife (P.W.11). However, to a specific question regarding the incident of 29.09.2023 the appellant took the plea that he was in another place i.e. at Sxxxx (name redacted) on that date. It was not the same place i.e. Txxxx (name redacted) as deposed by the appellant's wife (P.W.11) during her cross



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examination. The appellant led seven defence witnesses out of which the appellant (D.W.1), D.W.2, D.W.3, D.W.4 (all known to the appellant) and the appellant's daughter (D.W.5) specifically deposed that the appellant was at Sxxxx (name redacted). The victim's brother (D.W.6) deposed that the appellant was not in the house but away that relevant night. The victim's brother (D.W.6) also supported the appellants alibi to that extent by stating so. To an important question by the learned Special Judge the victim's brother (D.W.6) admitted that his expenses were being borne by the appellant. The appellant's minor son (D.W.7) deposed that on 29.09.2023 he along with the victim and another were at home and the appellant was not at home. During cross examination he volunteered to state that the appellant was at Txxxx (name redacted). The defence of the appellant is inconsistent as to where he was located on 29.09.2023. If the plea taken in the cross examination of the appellant's wife (P.W.11) that he was with her at Txxxx (name redacted) then the deposition of the appellant (D.W.1) and his five defence witnesses that he was at Sxxxx (name redacted) would be false. The appellant's wife (P.W.11) during her cross examination stated that she was with the appellant and two other

persons Pxxxx Bxxxx (name redacted) and Cxxxx Lxxxx (name redacted). The said two persons were examined as (D.W.2) and (D.W.3) by the defence. D.W.3 deposed that the appellant was with him at Sxxxx (name redacted). This would imply that none of them were speaking the truth.

**32.** The appellant introduced another allegation against the victim through his own deposition as a defence witness and the deposition of the victim's brother (D.W.6). The appellant (D.W.1) deposed that he had learnt that the victim was having affair with married man of the locality and she used to bring boys into his house and his daughter had to chase them away because of which he had to become strict as he feared that she would become pregnant. The victim's brother (D.W.6) stated that he had learnt that the victim was having an affair with a person named Cxxxx Pxxxx (name redacted) who was already married and they were exchanging text messages. It was also alleged that this person's wife had learnt about it and during that time the victim disclosed that she had slept with one Nxxxx (name redacted). We find that this is an attempt to discredit the victim and shame her through hearsay evidence without the victim being confronted about the allegation during her cross examination in court. This

was also not the stand of the appellant during his examination under section 313 Cr.P.C.

**33.** The learned Special Judge on the analysis of the evidence led by the prosecution held that the prosecution has been able to prove the case beyond reasonable doubt. The learned Special judge has also opined that due to lack of absolute proof that the victim was a minor at the time when the penetrative sexual offence was committed the charge under section 5(l) and 5(n) of the POCSO Act do not sustain but the charge under section 9(l) and 9(n) of the POCSO Act and Section 376(2)(n) IPC stands proved. The Learned Special Judge has also concluded that the evidence of the victim is unimpeachable.

**34.** In *State of U.P. vs. Babu Ram*<sup>9</sup> the Supreme Court held that deposition of witnesses, whether they are examined on the prosecution side or defence side or as court witnesses, are oral evidence in the case and hence the scrutiny thereof shall be without any predilection or bias. No witness is entitled to get better treatment merely because he was examined as a prosecution witness or even as a court

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<sup>9</sup> (2000) 4 SCC 515

witness. It is judicial scrutiny which is warranted in respect of the depositions of all witnesses for which different yardstick cannot be prescribed as for those different categories of witnesses.

**35.** A false alibi by itself may not be sufficient to arrive at a verdict of guilt but it would be a relevant circumstance to consider on the overall perspective of the case. When the testimony of the injured victim has survived the piercing cross examination of the defence and is also sufficiently corroborated by other prosecution witnesses the false alibi of the appellant gives an additional assurance that his conviction was correct. There was no reason for the appellant to set up a false alibi if he was innocent.

**36.** It is also equally well settled that in cases involving sexual molestation, supposed consideration which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the victim should not, unless the discrepancies are such which are fatal in nature, be allowed to throw out and otherwise reliable prosecution case. The inherent bashfulness of a women and her tendency to conceal outrage of sexual aggression should not be ignored. The testimony of the victim in such

case is vital and unless there are compelling reasons which necessitate corroboration the court should find no difficulty to act on the victim's testimony alone to convict the accused. The Indian Evidence Act, 1872 does not mandate that the victim's evidence cannot be accepted without corroboration. It is crucial to remember that a victim of sexual assault is not an accomplice to the crime but a victim of another person's lust. The victim stands at a higher pedestal than even an injured witness as she suffers from emotional injury. In case of injured witnesses there is injury on the physical form, while in the case of an injured victim the injury is physical, psychological and emotional. In such cases the advisability of corroboration should always be in the mind of court as a matter of prudence but it is not a rule of practice that in every case there must be corroboration before a conviction. Corroboration does not necessarily mean independent confirmation of every material circumstance and some additional evidence rendering it probable would satisfy the corroboration.

**37.** The appellant was taking care of the victim and her brother after they started living with him ever since their mother died when she was barely three or four years of age. The appellant was therefore in a dominant position. The

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failure of the victim to report about her sexual abuse which according to her started even prior to her being in the 5<sup>th</sup> and 6<sup>th</sup> standard considering the setting of the crime and the surrounding circumstances is understandable. Quite understandably it was only when the victim turned twenty, understood the implication of the sexual abuse in its gravity that she decided to share her inner most feelings with her friend (P.W.9). The story as narrated by the victim is believable and has a ring of truth in spite of minor discrepancies. Therefore, there is no reason not to believe her deposition regarding her sexual abuse by the appellant when she was a child. The prosecution has been able to establish the dominant position of the appellant vis-a-vis the victim throughout the period. The fact that the appellant has managed to convince the victim's brother (D.W.6) to depose against her and help him with a false alibi reassures this position. The victim's deposition has withstood the unfortunate attempt of the appellant to question her character to protect his interest. Merely because the victim sought to open up about the sexual abuse committed by the appellant on her for a long period of time after the last incident we cannot disbelieve her. The

testimony of the victim clearly qualifies as that of a sterling witness.

**38.** The learned Special Judge has acquitted the appellant for offences under section 5(l), 5(n) and 9(m) of the POCSO Act i.e. the fourth charge, the fifth charge and the second charge respectively. The appellant has also been acquitted under section 376 (2) (f) of the IPC i.e. the sixth charge. As the State has not preferred any appeal against the acquittal we uphold the acquittal.

**39.** According to the victim the appellant admitted her to a school where studied UKG and class I. The victim was twenty one years of age when she deposed before the court on 09.04.2024. As such the victim would be a child as defined under section 2 (d) of the POCSO Act when the appellant used to fondle her breast as deposed by her. The learned Special Judge has convicted the appellant under section 9(l) punishable under section 10 of the POCSO Act for having committed the offence of aggravated sexual assault upon the victim after 2010. The evidence of the victim reflects that she was repeatedly committed sexual assault by the appellant more than once. Section 9(l) describes this assault as aggravated sexual assault. Section

10 prescribes a punishment of imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine. The learned Special Judge has sentenced the appellant to a term of six years imprisonment and a fine of Rs.20,000/-. It was also directed in default of payment of fine the appellant would undergo simple imprisonment for a period of one year. We uphold the conviction under section 9(l) and the punishment under section 10 of the POCSO Act.

**40.** Section 9(n) of the POCSO Act relates to aggravated sexual assault committed on a child by a person being a relative through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with the parent of the child, or who is living in the same or shared household with the child. The evidence led by the prosecution convincingly establishes that the victim, if not relative of the appellant through blood was under his guardianship and was living in the same household with the appellant when he committed aggravated sexual assault upon the victim. As such the appellant is liable to be convicted under section 9(n) and punished under section 10 of the POCSO Act. The



appellant has been convicted under 9(n) and punished with imprisonment for a term of six years under section 10 of the POCSO Act. We uphold the conviction and sentence.

**41.** Section 376(2) (n) of the IPC relates to the offence of rape committed repeatedly on the same woman. Since the prosecution has not been able to provide any evidence as to the period the offence of rape multiple times was committed upon the victim there would be no evidence to show whether the rape was committed on the victim when she was a child or an adult. However, there is no uncertainty that when the appellant raped her multiple times she was a woman as defined in section 10 of the IPC which provides that the word 'woman' denotes a female human being of any age. The deposition of the victim convinces us that she was repeatedly raped by the appellant. The punishment prescribed is rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine. The learned special judge has convicted the appellant under section 376(2)(n) and punished him with rigorous imprisonment for a term of fifteen years and a fine of Rs.25000/-. In default of payment of fine the

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learned Special Judge has directed that the appellant shall undergo further simple imprisonment for a period of one year. Considering the gravity of the offence and the circumstances under which it was committed upon the victim we uphold the conviction and sentence as well. The recommendation of the learned Special Judge for payment of Rs.7 lakhs compensation to the victim is also upheld.

**42.** The appeal is therefore, rejected. A copy of this judgment shall be provided free of cost to the appellant forthwith and also forwarded to the court of the learned Special Judge.

**43.** As the appellant is lodged in Rongyek Jail, Gangtok, a copy of the judgement shall also be forwarded to him through email to the jailer, Rongyek Jail, Gangtok specifying that he may if he desires file appeal before the Supreme Court through the Supreme Court Legal Services Committee.

**( Bhaskar Raj Pradhan )**  
**Judge**

**( Meenakshi Madan Rai )**  
**Judge**

Approved for reporting : **Yes**

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