# THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 8th July, 2024

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

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Crl.A. No.32 of 2023

**Appellant** : State of Sikkim

***versus***

**Respondent** : Suresh Pradhan

Appeal under Section 378(1)(b) of
the Code of Criminal Procedure, 1973

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**Appearance**

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

Mr. Umesh Ranpal, Advocate (Legal Aid Counsel) for the Respondent.

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# JUDGMENT

Meenakshi Madan Rai, J.

***1.*** The minor victims, PW-1 aged about 16 years and PW-2 aged about 14 years, are said to have been the victims of sexual assault perpetrated on them by their biological father, aged about 44 years. The last incident having occurred on 25-08-2020. This allegation came to light on the lodging of the FIR, Exhibit 3, by PW-3 and PW-7, Team Members of the Childline Sub-Centre of the concerned area, on 26-08-2020. It was informed therein that the two minor girls were rescued by the relevant Childline Sub-Centre on information received at the Childline Helpline No.1098 at 11 a.m. the same day. Pursuant thereto, the matter came to be registered at the concerned Police Station under Section 376 of the Indian Penal Code, 1860 (hereinafter, "IPC"), read with Sections 4/6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act") against the Respondent.

***2.*** The matter was investigated into by PW-14 the IO of the case, who submitted Charge-Sheet against the Respondent under the afore-mentioned legal provisions. Charge was framed by the Learned Trial Court against the Respondent under Sections 5(n)/6, 9(n)/10, 9(l)/10 of the POCSO Act, Sections 376(2)(f), 376(3), 354 and 506 of the IPC. The trial commenced as the Respondent pleaded "not guilty" to any of the charges. The Prosecution examined fourteen witnesses to prove its case. Thereafter, the Respondent was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C."), where he claimed innocence and stated that he had not committed the alleged offences against his minor daughters. That, as he was a strict father, they had falsely implicated him. The Learned Trial Court on marshalling the entire evidence on record concluded that the evidence of the Prosecution witnesses did not support the Prosecution case and the Respondent was entitled to the benefit of doubt, consequently, he was acquitted of all the offences charged with.

***3.*** Learned Additional Public Prosecutor, assailing the Judgment of acquittal in Sessions Trial (POCSO) Case No.26 of 2020, dated 16-11-2022, of the Court of the Special Judge, Protection of Children from Sexual Offences (POCSO) at Namchi, urged that in fact the Prosecution had established that the offence on the minor victims were perpetrated since the year 2011. That, the acts of sexual assault continued against both the victims till 2018/2019 and both victims had complained before PW-8 their school Principal and PW-9 their school teacher, both the authorities failed to take steps in the matter. Consequently, having summoned

up adequate courage they called the Childline Helpline number and reported the matter. That, the evidence of both the victims are consistent with regard to the sexual assault perpetrated on them by their father and hence, the Judgment of the Learned Trial Court be set aside and the Respondent be convicted for the offences charged with and sentenced as per law.

***4.*** *Per contra*, Learned Counsel for the Respondent submitted that the Prosecution failed to establish its case beyond reasonable doubt and merely because it is a case under the POCSO Act, the Respondent cannot be submitted to the rigors of incarceration, sans proof of commission of offence. Hence, no interference is essential in the impugned Judgment.

***5.*** We have heard Learned Counsel for the parties *in extenso* and carefully examined all evidence on record.

***6.*** On the anvil of the submissions put forth, we are to consider whether the Learned Trial Court failed to appreciate the evidence of the victims in its correct perspective, which thereby led to the acquittal of the Respondent.

***7.*** The Learned Trial Court formulated *inter alia* the following points for determination;

*a. that the accused, being the father of the victims, committed penetrative sexual assault upon the victims.*

*b. that the accused, being the father of the victims, sharing the same household, committed sexual assault upon the victims.*

*c. that the accused committed sexual assault upon the victims, repeatedly.*

*d. that the accused, being the father of the victims, committed rape upon the victims.*

*e. that the accused committed rape upon the victims who were under 16 years of age.*

*f. that the accused assaulted and used criminal force against the victims in order to outrage their modesty.*

*g. that the accused intimidated the victims, criminally.*

***8.*** The Learned Trial Court then proceeded to address the issue regarding the age of the victims and in Paragraphs 23, 24 and 25 of the impugned Judgment discussed Exhibits 25 and 26 the Birth Certificates of the victims. It was *inter alia* noted that to prove the contents thereof, the Prosecution examined PW-4 Izak Rai and IO of the case PW-14. The Learned Trial Court observed *inter alia* as follows:

> **"**23. …….. In order to prove the seizure of Exhibit 25 and Exhibit 26, and also to prove the contents thereof, the prosecution examined PW 4 (*Ijek Rai*) and IO of the case (*PW 14*). …… in view of the evidence of PW 4, it is difficult to belief (sic) that the original Birth Certificate was seized by the IO in the presence of PW 4 and Baldev Chettri, who as argued by Ld Defence Counsel was not arrayed as a witness. Further, PW 4 has not stated anything in his evidence about the IO seizing the Birth Certificate of the victims, Baldev Chettri and PW 4 standing as witness, during his examination before the Court. ……..**"**

***(i)*** In this context, on meticulously examining the evidence of PW-4, it is seen that he is a Childline Member and had received the call from a staff of a Childline Centre of another area, who informed him that, a minor child had complained about sexual abuse by her father. The witness mentioned that counselling was extended to both children after they were rescued by PW-4. He makes no mention whatsoever of the seizure of Exhibits 25 and 26 in his presence or knowledge of its contents.

***(ii)*** It is therefore unfathomable as to how the Learned Trial Court arrived at the finding that the Prosecution had furnished PW-4 to prove the contents of Exhibits 25 and 26 as neither his deposition reveals such facts nor was he listed as the witness who was to prove the said documents. The Charge-Sheet in the records of the case, reads as **"***FINAL FORM/REPORT — Section 173 Cr.P.C. — PART III***"** wherein at Sl. No.5, the name of PW-4 appears as "Izak

Rai" and in Column No.7 under the heading **"**Type of evidence to be tendered**"** it is recorded as; **"***FIR & statement 161 Cr.P.C & 164 Cr.P.C (victim)***"**. Therefore flagging the above two points, the observation of the Learned Trial Court that PW-4 was to prove Exhibits 25 and 26 is clearly an erroneous observation.

***(iii)*** That having been said, while continuing the discussion pertaining to the victims' age, the Learned Trial Court was of the view that the wife of the Respondent, who is the mother of the victims was tendered by the Prosecution, without so much as enquiring of her of the date of birth of the victims, neither was such enquiry made from PW-5, the victims' brother. The evidence of PW-8 the school Principal, who identified Exhibit 5, photocopy of details entered in the school admission records of the victims was disregarded by the Court, for the reason that, the original Register was not furnished before the Court. The Learned Trial Court was also unimpressed with the evidence of PW-10, the Registrar, Births & Deaths of the concerned PHC, who identified Exhibits 8 and 9 as the relevant page of the Birth Register, pertaining to the victims, as the witness was unaware of the basis of the entries therein. The Learned Trial Court disregarded the evidence of PW-11 as she had only received the requisition, Exhibit 10 from the IO, requesting for the photocopy of the Admission Register along with date of birth recorded in the Register, but such documents evidently were not furnished before the Court. After discussing the evidence of the witnesses *supra*, the Court concluded that in light of the evidence furnished it was difficult to conclude that PW-1 and PW-2 were 'children' as defined under the POCSO Act.

***(iv)*** Apart from the error with regard to PW-4 discussed (*supra*), we are of the considered opinion that no error arises on the reasoning and finding of the Learned Trial Court with regard to the age of the victims as discussed *supra*.

***9.*** While disbelieving the victims on the aspect of sexual assault, the Learned Trial Court in the following Paragraphs of the impugned Judgment observed as extracted hereunder;

> **"**26. Having dealt with the age of the victims, now this court has to consider whether the sexual assault against the victims by the accused has been proved by the prosecution. The most important witnesses produced by the prosecution in order to establish the sexual assault against the accused were PW 1 and PW 2, respectively. The evidence of PW 1 and PW 2, including their statements under Section 164 CrPC has been considered by this court carefully. The 164 CrPC statements of the victims do not corroborate to their depositions before the court. The statements of PW 1 and PW 2 corroborates to the extend (sic) that both of them have stated: *It is true that before lodging the FIR my father (accused) had warned me if I failed in my academic curriculum he would buy me a cow and that I would have to look after it and take it for grazing...* (emphasis supplied). It this court considers the evidence of PW 1 and PW 2, respectively, this court is inclined to except (sic) the argument of Ld Defence Counsel that the accused was a strict father and that he may have been punishing the victims, if they do not complete the chores assigned by him. This court also cannot overlook the evidence of PW 1 and PW 2, respectively, which corroborates to the extend (sic) that the accused deposited a sum of Rs 2,000/- (*Rupees Two Thousand*) Only in the bank accounts of the victims. The other point which remains unanswered is why did PW 1 as well as PW 2 did not reveal about the incident, to their mother (*PW 6*) and their brother (*PW 5*). The exact PO, number of incident(s) of assault, the whereabout of the mother, during the time of the alleged assault upon the victims, also remained unanswered before this court.
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> 27. The evidence of PW 5 (*brother of the victims*) and PW 6 (*mother of the victims*) belies the case of the prosecution, so does the evidence of PW 12 (*the doctor who examined the victims*). The only evidence which was placed before this court with regard to sexual assault was of PW 9 (*teacher of PW 1*). PW 9 has stated, during the year 2018-2019, PW 9 came to know from PW 1 that PW 1 was subjected to bad touch by the accused who was her father. As per PW 9, on hearing this PW 9 informed the principal who later called PW 1's mother (*PW 6*) and confronted her however, PW 6 denied the said allegation, and instead defended the accused. Thus,

> in view of the contradictory evidence of PW 9 and PW 6 this court cannot consider their evidence(s) to be vital evidence to establish the charge of sexual assault.
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> 28. …… Further the evidence of PW 14 (*IO of the case*) also does not lend credence to the case of the prosecution, as the IO has specifically stated he did not array Baldev Chettri as a witness in this case. Further, PW 14 has also stated that he did not array the paternal uncle of the victims, as a witness in the present case. The evidence brought before this court by the defence is that the accused was a strict father however, the IO has failed to investigate the present case on that aspect, thus, has left this court with unanswered questions.
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> ……
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> 30. The case of the prosecution is that the victims were sexually assaulted by the accused, continuously for many years *ie* when PW 1 was in Class-II, and PW 2 was in Class-VII, respectively. It is relevant to note the FIR came to be lodged only on 26.08.2020, *ie* years after the continuous sexual abuse of the accused upon the victims. It is difficult thus, to believe that neither the mother, nor the brother(s) of the victims were unaware of the incident, living under the same roof. Further, the prosecution, as discussed above, did not examine the mother and the brother on that aspect, nor did the prosecution inquire the age of the victims, from the mother and the brother(s).**"**

Having thus meticulously perused the observations, the reasoning and the conclusion of the Learned Trial Court on the question of sexual assault, we are inclined to disagree with the findings of the Learned Trial Court.

***10.*** Indeed, before delving into further discussions on the afore-mentioned point, it is relevant to record here that we are aware of the position of law regarding the scope of intervention in a case of acquittal in criminal appeals. Section 386 Cr.P.C. clearly lays down that in an appeal from an order of acquittal, the Appellate Court may reverse such order and direct that further enquiry be made or that the accused be re-tried or committed for trial as the case may be, or find him guilty and pass sentence on him according to law. We cannot loose sight of the provisions of Section 386(e) of the Cr.P.C. which reads as follows;

> **"386. Powers of the Appellate Court**.—After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—
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> ……
>
> (e) make any amendment or any consequential or incidental order that may be just or proper;
>
> ……**"**

The provision thus urges the Appellate Court to ensure that evenhanded justice is meted out to the parties concerned.

***(i)*** It goes without saying that the presumption commences with the innocence of the accused, unless, the Prosecution is able to establish its case, by proving the guilt of the accused beyond all reasonable doubt. While considering an Appeal against acquittal the Supreme Court in ***Jagan M. Seshadri*** vs. ***State of T.N.***[1] has held as follows;

> **"9.** …….. We are constrained to observe that the High Court was dealing with an appeal against acquittal. It was required to deal with various grounds on which acquittal had been based and to dispel those grounds. It has not done so. Salutary principles while dealing with appeal against acquittal have been overlooked by the High Court. If the appreciation of evidence by the trial court did not suffer from any flaw, as indeed none has been pointed out in the impugned judgment, the order of acquittal could not have been set aside. The view taken by the learned trial court was a reasonable view and even if by any stretch of imagination, it could be said that another view was possible, that was not a ground sound enough to set aside an order of acquittal.**"**

***(ii)*** In ***Sanjeev and Another*** vs. ***State of Himachal Pradesh***[2] it was observed by the Supreme Court is as follows;

> **"7.** It is well settled that:
>
> **7.1.** While dealing with an appeal against acquittal, the reasons which had weighed with the trial court in acquitting the accused must be dealt with, in case the appellate court is of the view that

[1] (2002) 9 SCC 639
[2] (2022) 6 SCC 294

> the acquittal rendered by the trial court deserves to be upturned ……
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> **7.2.** With an order of acquittal by the trial court, the normal presumption of innocence in a criminal matter gets reinforced ……
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> **7.3.** If two views are possible from the evidence on record, the appellate court must be extremely slow in interfering with the appeal against acquittal ……**"**

***(iii)*** More recently, in ***Mallappa and Others*** vs. ***State of Karnataka***[3] the Supreme Court held that:

> **"26.** No doubt, an order of acquittal is open to appeal and there is no quarrel about that. It is also beyond doubt that in the exercise of appellate powers, there is no inhibition on the High Court to reappreciate or re-visit the evidence on record. However, the power of the High Court to reappreciate the evidence is a qualified power, especially when the order under challenge is of acquittal. **The first and foremost question to be asked is whether the trial court thoroughly appreciated the evidence on record and gave due consideration to all material pieces of evidence. The second point for consideration is whether the finding of the trial court is illegal or affected by an error of law or fact. If not, the third consideration is whether the view taken by the trial court is a fairly possible view. A decision of acquittal is not meant to be reversed on a mere difference of opinion. What is required is an illegality or perversity.**
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> **27.** It may be noted that the possibility of two views in a criminal case is not an extraordinary phenomenon. **The "*two-views theory*" has been judicially recognised by the courts and it comes into play when the appreciation of evidence results into two equally plausible views. However, the controversy is to be resolved in favour of the accused. For, the very existence of an equally plausible view in favour of innocence of the accused is in itself a reasonable doubt in the case of the prosecution. Moreover, it reinforces the presumption of innocence. And therefore, when two views are possible, following the one in favour of innocence of the accused is the safest course of action. Furthermore, it is also settled that if the view of the trial court, in a case of acquittal, is a plausible view, it is not open for the High Court to convict the accused by reappreciating the evidence. If such a course is permissible, it would make it practically impossible to settle the rights and liabilities in the eye of the law."** [emphasis supplied]

***(iv)*** In ***Sadhu Saran Singh*** vs. ***State of Uttar Pradesh and Others***[4] the Supreme Court observed as follows;

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[3] (2024) 3 SCC 544

[4] (2016) 4 SCC 357

> **"20.** ……. In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate court would interfere with the order of acquittal only when there is perversity of fact and law. However, **we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can arise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent.** …….
>
> **21. This Court, in several cases, has taken the consistent view that the appellate court, while dealing with an appeal against acquittal, has no absolute restriction in law to review and relook the entire evidence on which the order of acquittal is founded.** If the appellate court, on scrutiny, finds that the decision of the court below is based on erroneous views and against settled position of law, then the interference of the appellate court with such an order is imperative.**"** **[emphasis supplied]**

***(v)*** In ***Harijan Bhala Teja*** vs. ***State of Gujarat***[5] the Supreme Court held as follows;

> **"12.** No doubt, where, on appreciation of evidence on record, two views are possible, and the trial court has taken a view of acquittal, the appellate court should not interfere with the same. However, this does not mean that in all the cases where the trial court has recorded acquittal, the same should not be interfered with, even if the view is perverse. Where the view taken by the trial court is against the weight of evidence on record, or perverse, it is always open for the appellate court to express the right conclusion after reappreciating the evidence if the charge is proved beyond reasonable doubt on record, and convict the accused. ……**"**

***11.*** The above Judgments therefore clearly lay down the parameters which the High Court is to be alive to when considering an appeal against acquittal and the scope for intervention thereof. While bearing in mind the above enunciated principles it is worth noticing that the introduction to the POCSO Act provides *inter alia* that, sexual offences against children are not adequately addressed by the existing laws. That, a number of such offences are neither specifically provided for nor are they adequately penalized. Such offences against children need to be defined explicitly and

[5] (2016) 12 SCC 665

countered through adequate penalties as an effective deterrence. The Statement of Objects and Reasons *inter alia* provides that the data collected by the National Crime Records Bureau shows that there has been an increase in cases of sexual offences against children. Therefore, it was proposed to enact a self-contained comprehensive legislation to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard to safeguarding the interest and well being of the child at every stage of the judicial process. The introduction to the Act itself states that sexual exploitation and sexual abuse of children are heinous crime and need to be effectively addressed. The intent and purport of the POCSO Act have been thus delineated succinctly.

***12.*** While concluding that the Prosecution failed to prove its case of sexual assault on the minor by the Respondent, the Learned Trial Court was of the view that the Section 164 Cr.P.C. statement of the victims do not corroborate their depositions before the Court. Having walked through the statement of the depositions referred to above, we are of the considered view that the crux of the case has been mentioned unequivocally, sans exacerbation and embellishments by both the victims in their Section 164 Cr.P.C. statements and depositions before the Court.

***(i)*** PW-1 categorically stated in her Section 164 Cr.P.C. statement that, since she was in Class II the Respondent used to fondle her breasts, touch her vagina and sometimes place his genital on the side of her vaginal opening. Before the Learned Trial Court she has, in her deposition in consonance with her Section 164 Cr.P.C. statement, stated that **"***Since I was in Class-II, my*

*father (accused) used to touch and squeeze my breasts and also used to touch my vagina with his hands and penis. These acts continued till the year 2020 when I was studying in Class-XI.***"** Despite a prolix cross-examination, the statements made by her were not decimated.

***(ii)*** PW-2 in her Section 164 Cr.P.C. statement has stated that when she reached Class VII her father started touching her body. He used to squeeze her breasts by putting his hands underneath her clothes, remove her t-shirt look at her breasts and would ask her as to who else was touching her breasts. He also inserted his finger inside her vagina. In her evidence before the Court, she has with consistency reiterated that when she was in Class VII her father touched her breasts, by putting his hand underneath her clothes. Her father used to ask her who was touching her breasts and making it grow. The cross-examination did not decimate her evidence and has extracted the fact that the Respondent used to beat her, her mother and elder sister whenever he was drunk.

***(iii)*** Thus, in view of the persistence in the evidence of PW-1 and PW-2 in their Section 164 Cr.P.C. statements and depositions before the Court which are cogent, articulate and stated with clarity, there is absolutely no reason to conclude that their evidence was concocted or unbelievable. The provision of Section 29 of the POCSO Act is also to be borne in mind at this juncture while considering the evidence of the minor victims. For easy reference the provision is extracted below;

> **"29. Presumption as to certain offences.**— Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed

> or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.**"**

***(iv)*** The Learned Trial Court was of the view that the father was strict and hence the allegations against him, besides, he also deposited money in the account of the victims. Merely depositing money in the account of the victims would not absolve or render the Respondent not guilty of the repulsive and reprehensible acts perpetrated by him not only one daughter but both daughters begotten by him. It would be profitable to peruse the pronouncement of the Supreme Court on the aspect of character of an individual as laid down in ***Harvinder Singh alias Bachhu*** vs. ***State of Himachal Pradesh***[6] at Paragraphs 17 and 18 as follows;

> **"17.** A court of law cannot declare the reputation of a person based upon its own opinion merely because a person is educated and said to be God-fearing, that by itself will not create a positive reputation.
>
> **18.** Character and reputation do have an element of interconnectivity. Reputation is predicated on the general traits of character. In other words, character may be subsumed into reputation. Courts are not expected to get carried away by the mere background of a person especially while acting as an appellate forum, when his conduct, being a relevant fact, creates serious doubt. In other words, the conduct of a witness under Section 8 of the Evidence Act, is a relevant fact to decide, determine and prove the reputation of a witness. When the conduct indicates that it is unnatural from the perspective of normal human behaviour, the so-called reputation takes a back seat.
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> ……**"**

***13.*** The Learned Trial Court was swayed by the fact that the victims did not disclose the incident to their mother PW-6 and brother PW-5 and that it was difficult to believe that neither the brother nor the mother were aware of the incidents when they were living under the same roof. The Learned Trial Court was of the view that the non-reporting of the incidents by PW-1 and PW-2

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[6] 2023 SCC OnLine SC 1347

to their mother PW-6 and their brother PW-5 also raised suspicions about the incidents. Although it is true that the Prosecution has tendered PW-6 being the mother of the victim, the evidence of PW-2 reveals that both PW-6 and herself used to be assaulted by the Respondent when he was inebriated and we can only assume at this stage that PW-6 had opted for silence as she could have been dependant in various ways on the Respondent. Be that as it may, we are not making any observation on this point. The Learned Trial Court was also impressed with the denial by PW-6 to PW-9 about the occurrence of any such incident and chose to rely on such denial, observing that the evidence of PW-9 and PW-6 were contradictory. The non-arraignment of the paternal uncle of the victims also weighed with the Learned Trial Court in disbelieving the victims, although no reasons for such conclusion have been disclosed in the impugned Judgment.

***(i)*** The evidence of PW-9, the school teacher indicates that one of the friends of PW-1 came to her and told her that PW-1 had told her that her father had subjected her to "bad touch". She called PW-1 and spoke to her privately and enquired whether she had told her friend about the "bad touch" perpetrated on her by her father. The victim PW-1 confirmed it as true. When PW-9 enquired as to how severe it was, she told her that her father just subjected her to "bad touch". PW-9 then informed PW-8 the school Principal, who directed her to call PW-6 her mother. PW-6 however denied such incidents. It is relevant to remark that PW-6 made no effort to even question her daughter PW-1 about her allegations but straightway denied that such incidents were occurring in their house which, in our considered opinion, reveals that the mother

was aware of it and as a knee jerk reaction instantly denied it. PW-8 corroborated the evidence of PW-9.

***(ii)*** In ***Vadivelu Thevar and Another*** vs. ***State of Madras***[7] the Supreme Court held as follows;

> **"**[12] ……. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable evidence in support of the prosecution.**"**

***14.*** It was further opined by the Learned Trial Court that the case of the Prosecution is that the victims were sexually assaulted by the accused continuously for many years, i.e., when PW-1 was in Class II and PW-2 was in Class VII. That, it was relevant to note that the FIR came to be lodged only on 26-08-2020, i.e., years after the continuous sexual abuse of the accused upon the victims. Besides, the mother and brother were not examined on this aspect by the Prosecution. The Learned Trial Court also observed that the Respondent during his examination under Section 313 Cr.P.C. pleaded false implication. Hence, in such circumstances, it would be a travesty of justice to shift the

[7] AIR 1957 SC 614

presumption of culpable mental state as defined under Section 29 of the POCSO Act upon the Respondent.

***15.*** It may be pertinently noted here that every person has a different reaction to the circumstances that they are faced with. One person may act impulsively, at the spur of the moment while another may mull over the circumstance and take steps belatedly. In ***Lahu Kamlakar Patil and Another*** vs. ***State of Maharashtra***[8] the Supreme Court observed that :

> **"26.** From the aforesaid pronouncements, it is vivid that witnesses to certain crimes may run away from the scene and may also leave the place due to fear and if there is any delay in their examination, the testimony should not be discarded. **That apart, a court has to keep in mind that different witnesses react differently under different situations. Some witnesses get a shock, some become perplexed, some start wailing and some run away from the scene and yet some who have the courage and conviction come forward either to lodge an FIR or get themselves examined immediately. Thus, it differs from individuals to individuals. There cannot be uniformity in human reaction. While the said principle has to be kept in mind, it is also to be borne in mind that if the conduct of the witness is so unnatural and is not in accord with acceptable human behaviour allowing variations, then his testimony becomes questionable and is likely to be discarded."** [emphasis supplied]

***(i)*** These observations can also be employed for the purposes of considering the position and circumstances of the victims in the instant case. It is their father who committed the offence which could have made them reticent about complaining to their mother. PW-1 based on her evidence could have been around 12 years when the offence was first perpetrated on her. The POCSO Act was enforced only in the year 2012. Awareness of the Act came to be generated 4/5 years thereafter. The victims were children and not living in an urban area. They belong to a remote rural area. These circumstances coupled with other unknown

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[8] (2013) 6 SCC 417

circumstances could have caused the delay in reporting the incident. The circumstances of the case are therefore material to the delay that occurred. The consistent evidence of PW-1 and PW-2 is that they did run from pillar to post in their quest for reliefs and justice, till finally being aware of the Childline Helpline No.1098 which they called.

***(ii)*** In the context of delay in lodging the FIR, in ***Ravinder Kumar and Another*** vs. ***State of Punjab***[9] the Supreme Court observed as follows;

> **"13.** ……. It has to be remembered that law has not fixed any time for lodging the FIR. Hence a delayed FIR is not illegal. Of course a prompt and immediate lodging of the FIR is the ideal as that would give the prosecution a twin advantage. First is that it affords commencement of the investigation without any time lapse. Second is that it expels the opportunity for any possible concoction of a false version. Barring these two plus points for a promptly lodged FIR the demerits of the delayed FIR cannot operate as fatal to any prosecution case. It cannot be overlooked that even a promptly lodged FIR is not an unreserved guarantee for the genuineness of the version incorporated therein.
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> ……
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> **15.** We are not providing an exhaustive catalogue of instances which could cause delay in lodging the FIR. Our effort is to try to point out that the stale demand made in the criminal courts to treat the FIR vitiated merely on the ground of delay in its lodgment cannot be approved as a legal corollary. In any case, where there is delay in making the FIR the court is to look at the causes for it and if such causes are not attributable to any effort to concoct a version no consequence shall be attached to the mere delay in lodging the FIR. ……..**"**

***(iii)*** The Supreme Court in ***State of Himachal Pradesh*** vs. ***Prem Singh***[10] *inter alia* laid down as follows;

> **"6.** So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition-bound society prevalent in

[9] (2001) 7 SCC 690
[10] (2009) 1 SCC 420

> India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR. ....."

***(iv)*** Further, in the recent pronouncement on the delay of lodging the FIR, the Supreme Court in ***Sekaran*** vs. ***State of Tamil Nadu***[11] held as follows;

> **"14.** We start with the FIR, to which exception has been taken by the appellant urging that there has been no satisfactory explanation for its belated registration. It is trite that merely because there is some delay in lodging an FIR, the same by itself and without anything more ought not to weigh in the mind of the courts in all cases as fatal for the prosecution. A realistic and pragmatic approach has to be adopted, keeping in mind the peculiarities of each particular case, to assess whether the unexplained delay in lodging the FIR is an afterthought to give a coloured version of the incident, which is sufficient to corrode the credibility of the prosecution version.
>
> **15.** In cases where delay occurs, it has to be tested on the anvil of other attending circumstances. If on an overall consideration of all relevant circumstances it appears to the court that the delay in lodging the FIR has been explained, mere delay cannot be sufficient to disbelieve the prosecution case; however, if the delay is not satisfactorily explained and it appears to the court that cause for the delay had been necessitated to frame anyone as an accused, there is no reason as to why the delay should not be considered as fatal forming part of several factors to vitiate the conviction.**"**

***16.*** It was the observation of the Learned Trial Court that apart from the evidence of PW-5 and PW-6 belying the Prosecution case, the evidence of PW-12 the Doctor, who examined the victims, also did not support it. In this context, it is appropriate to notice that when PW-2 was examined by PW-12 the Doctor, it was stated that;

> **"**.....
>
> On the same day, the minor victim was brought to CHC Jorethang at around 8:35 p.m. with alleged history of sexual assault by her biological father since past two years on multiple occasions. She gave a history of her father groping her breasts.

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> She did not give a history of forceful penetrative sexual assault. Last history of sexual assault was two to three days ago.
> ……**"**

While examining PW-1, the Doctor has recorded as follows;

> **"**……..
>
> On the same day, the minor victim was brought to CHC Jorethang at around 7:55 p.m. with alleged history of sexual assault by her biological father since she was studying in Class-II. She did not give a history of forceful penetrative sexual assault. Last history of sexual assault was on 21.08.2020. She also gave a history of her father exposing his genitalia and rubbing it on her private part.
> ……**"**

***(i)*** Thus, both the minor victims had given a history of sexual assault to PW-12, but not of penetrative sexual assault. In this circumstance, it stands to reason that there would be no injuries on their person or genital, on their examination by the Doctor but as clearly stated by the Doctor sexual assault on both the victims could not be ruled out.

***17.*** For the foregoing reasons and the legal provision extracted above, we are inclined to hold that the appreciation of the Prosecution evidence by the Learned Trial Court is flawed and there was perversity in the observation of the Learned Trial Court that the Respondent did not perpetrate the offence against his children, this observation being against the weight of evidence.

***18.*** Besides, keeping in mind the intent and purport of the POCSO Act and the specific mandate of Section 29 of the said Act, in our considered opinion, in the instant case, there is no reason whatsoever to disbelieve the victims who have been the recipients of the depravity of their own father.

***19.*** The impugned Judgment deserves to be and is accordingly set aside.

***20.*** In view of the fact that the Prosecution failed to establish that the victims were minors the Respondent cannot be convicted of the offences under the POCSO Act which he was charged with.

***(i)*** The Respondent was charged with the offences under Sections 376(2)(f) and 376(3) of the IPC. As no offence of rape has been made out, he is convicted of the offence under Section 354A(1)(i) and Section 506 of the IPC.

***(ii)*** However, as no specific charge under Section 354A(1)(i) of the IPC was framed against the Respondent, in the foregoing circumstance, it is apposite to invoke the provisions of Section 222(2) of the Cr.P.C. which reads as follows;

> **"222. When offence proved included in offence charged**.—(1) ……..
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.
>
> (3) ……
>
> (4) ……**"**

***(iii)*** It may be clarified here that the object of a charge is to give the accused notice of the offence and the allegation that he is to meet. If the necessary information is conveyed to him, then no prejudice can be said to have been caused to him merely because of the absence of a specific charge as in the instant case, where he has been convicted under Section 354A(1)(i) of the IPC, sans charge. The Court is not to be restricted by technicalities as its main concern is to assess whether the accused had a fair trial and was aware of the offence that he was being tried for. The offences of rape for which charges were framed against the Respondent

have been reduced to a minor offence in consequence of the evidence on record.

***21.*** The Respondent is acquitted of the following offences;

(a) under Section 5(n) punishable under Section 6 of the POCSO Act;

(b) under Section 9(l) punishable under Section 10 of the POCSO Act;

(c) under Section 9(n) punishable under Section 10 of the POCSO Act;

(d) under Section 354 of the IPC.

(e) under Section 376(2)(f) of the IPC; and

(f) under Section 376(3) of the IPC;

***22.*** Appeal is allowed.

***23.*** The matter be posted for hearing on Sentence.

**( Bhaskar Raj Pradhan )**
**Judge**
08-07-2024

**( Meenakshi Madan Rai )**
**Judge**
08-07-2024

Approved for reporting : **Yes**

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