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EQUIVALENT CITATION

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SUBJECT INDEX

Evidence – Appreciation of evidence – Need for the Courts to ascertain the truth – The Court has to punish the guilty and protect the innocent. Investigating agency required to be fair and efficient. However, any lapse in investigation cannot *per se* be a ground to discard the prosecution case when overwhelming evidence is available to prove the offence. It is vital to examine evidence keeping in mind the setting of the crime – While appreciating the evidence of a witness, the Court must ascertain whether the evidence read as a whole appears to be truthful. It is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court may discard his evidence.
Damber Singh Chettri* v. *State of Sikkim ***783-B***

Evidence – Appreciation of Evidence of a Child Witness – Law recognises the child as a competent witness – Evidence of a child witness can be considered under S. 118 of the Indian Evidence Act, 1872 provided that such witness is able to understand the questions and able to give rational answers thereof – Incumbent upon the Court to put questions to them to gauge effectively the child's power of comprehension and mental state to speak the truth before the Court – Demeanour of the child witness must also be ascertained and noted. The Court therefore, should always record their opinion regarding the child's ability to understand the duty to speak the truth. A child witness if found competent to depose to the facts and a reliable one, such evidence could be the basis of conviction. Tender age of a child witness makes them susceptible to be swayed by what others tell them and may fall easy prey to tutoring and thus, although not as a general rule to be applied in every case but as a precautionary measure in cases in which there is an element of uncertainty, corroboration may be sought for and the evidence evaluated carefully. This is a rule of prudence and the evidence of child witness cannot be rejected *per se* on the presumption that they are likely to have been tutored. The tender age of a child alone cannot be a ground to discard the evidence of a child.
Damber Singh Chettri* v. *State of Sikkim ***783-E***

Evidence – Appreciation of Evidence of Child Victim – A victim of sexual assault is not an accomplice to the crime but a victim of another person's lust – Stands at a higher pedestal than even an injured witness as she/he suffers from emotional injury. In cases of injured witnesses there is injury on the physical form, while in the cases of an injured victim the injury

is physical, psychological and emotional – Child victim is a competent witness. Court may convict the accused on the sole testimony of a child victim if it has no reason to doubt its truthfulness and veracity. Corroboration is only a matter or prudence and not a rule – Corroboration can be dispensed with if, in the particular circumstances of a case the Court is satisfied that it is safe to rely upon the sole testimony of a child victim – Where the Court deems it proper to seek corroboration it must be kept in mind that it is not necessary that there should be independent confirmation of every material circumstance. Some additional evidence rendering it probable may be required to come to the conclusion that it is reasonably safe to act upon the testimony of the child victim as to the guilt of the accused – Corroboration need not be direct – Circumstantial evidence is sufficient if it connects the accused to the crime. Since the victim is a child and therefore may be susceptible to be swayed by what others tell them the Court must remain conscious and assess whether the statement of a child victim is the voluntary expression of the victim and that she was not under influence of others.
Damber Singh Chettri* v. *State of Sikkim ***783-F***

Evidence – Appreciation of Evidence of Child Victim – Presumption that children are more prone to false memory reports than adults and therefore their testimony less reliable no longer holds good – According to current scientific evidence, such views seems to be quite indefensible – It is now quite convincingly argued that adults are more susceptible to false memories compared to children as children depend more heavily on that part of the mind which records what actually happened while adults depends on another part of the mind which records the meaning of what happened – Presumptive unreliability of a child witness and more so a child victim solely on the basis of their tender age therefore, cannot be a general rule for it is equally true that adults are also susceptible to external influences. Today children are perceived to be generally more honest than adult witnesses – Credibility assessment of honesty, memory, suggestibility and communication ability must be applied to all witnesses regardless of age. The development of children's memory as compared to that of adults may require this assessment to be a little different for a child. This is where the Court must ensure proper evaluation on examination of the proved circumstances.
Damber Singh Chettri* v. *State of Sikkim ***783-H***

Evidence – Beyond a reasonable doubt – Principle Explained – A Court could be convinced of the guilt only beyond the range of a

reasonable doubt. Proof beyond a reasonable doubt is the same as proof which affords moral certainty to the Judge. Doubt to be reasonable must be of an honest, sensible and fair-minded man supported by reason with a desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. While appreciating the evidence of a witness the Court must ascertain whether the evidence read as a whole appears to be truthful. It is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court may discard his evidence.
Damber Singh Chettri **v.** ***State of Sikkim*** ***783-C***

Evidence – How should the Court deal with cases which violate human dignity in sexual crimes? – 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 prosecutrix should not, unless the discrepancies are such which are fatal in nature, be allowed to throw out an otherwise reliable prosecution case – Inherent bashfulness of a woman and her tendency to conceal outrage of sexual aggression should not be ignored. The testimony of a victim in such cases 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 a victim's evidence cannot accepted without corroboration.
Damber Singh Chettri **v.** ***State of Sikkim*** ***783-D***

Evidence – Minor discrepancies brought out by clever cross-examination in the present case cannot be equated to substantial infirmities in the evidence of the victim – When there is a variance between direct evidence of the victim tested by cross-examination and the evidence of a witness who heard the victim it is the direct evidence which must be given due weightage.
Damber Singh Chettri **v.** ***State of Sikkim*** ***783-I***

Indian Evidence Act, 1872 – Child Witness – Appreciation of Evidence – The law recognises the child as a competent witness. The evidence of a child witness can be considered under S. 118 of the Indian Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof – Child witness if found competent to depose to the facts and is a reliable one, his evidence could form the basis of conviction – Tender age of a child witness may make them susceptible to be swayed by what others tell them and may fall easy prey to

tutoring and thus, although not as a general rule to be applied in every case but as a precautionary measure, in cases in which there is an element of uncertainty, corroboration may be sought for and the evidence evaluated carefully. This is a rule of prudence – Evidence of child witness cannot be rejected *per se* on the presumption that they are likely to have been tutored.
Md. Ibraj Alam* v. *State of Sikkim ***910-D***

Indian Evidence Act, 1872 – Evidence – The victim stands at a higher pedestal than even an injured witness as he suffers from emotional injury. In cases of injured witnesses there is injury on the physical form, while in the cases of an injured victim the injury is physical, psychological and emotional – Court may convict the accused on the sole testimony of a child victim if it has no reason to doubt its truthfulness and veracity. Corroboration is only a matter or prudence and not a rule – In a case relating to a child victim corroboration can be dispensed with if, in the particular circumstances of a case the Court is satisfied that it is safe to rely upon the sole testimony of a child victim – Where the Court deems it proper to seek corroboration, it must be kept in mind that it is not necessary that there should be independent confirmation of every material circumstance – Corroboration need not be direct and circumstantial evidence is sufficient if it connects the accused to the crime.
Md. Ibraj Alam* v. *State of Sikkim ***910-E***

Evidence – Minor contradictions which do not go to the root of the evidence and make it doubtful should not deter the Court from accepting evidence which is otherwise reliable, cogent and truthful.
Md. Ibraj Alam* v. *State of Sikkim ***910-C***

Indian Evidence Act, 1872 – S. 35 – Relevancy of Entry in Public Record made in Performance of Duty – A given document may be admissible under S. 35 but the Court is not barred from taking evidence to test the authenticity of the entries made therein – Admissibility of a document is one thing, while proof of its contents is an altogether different aspect – Entries in the School Register/School Leaving Certificate require to be proved in accordance with law, demanding the same standard of proof as in any other criminal case.
Anish Rai* v. *State of Sikkim ***889-B***

Indian Evidence Act, 1872 – Ss. 45 and 51 – Expert Opinion – The opinion of person specially skilled in a particular field being experts are

relevant facts – Medical evidence given by an expert has to be given the weight it deserves and ought not to be brushed aside – This is however not to say that the opinion of an expert is always binding on the Court. The evidence so furnished has to be appreciated in accordance with law and accepted only if found to be trustworthy – The opinion of an expert although relevant would carry little weight with the Court unless it is supported by a clear statement of what he noticed and on what basis his opinion was formed. The expert is required to give an account of the experiments performed by him for the purpose of forming his opinion – The Court is required to be circumspect when accepting the opinion of a Medical Officer especially when unsupported by reasons for the opinion.
Anish Rai* v. *State of Sikkim ***889-C***

Indian Evidence Act, 1872 – S. 67 – Proof of Signature or Handwriting – The definition of "evidence" and "proved" elucidated in S. 3 must be read along with S. 67 which requires that the signature purporting to be that of a particular person must be established by specific evidence.
Anish Rai* v. *State of Sikkim ***889-A***

Indian Evidence Act, 1872 – S. 101 – Burden of Proof – One who alleges must prove the alleged fact. S. 101 harnesses the burden of proving the existence of facts which he asserts on the person who asserts the said fact – It was not the case of the prosecution that there were number of shops in the vicinity where the offence occurred and therefore the cry of the victim during the abuse ought to have been heard by people. It was the defence who desired the Court to give judgment on the existence of the said facts which they asserted and thus it was incumbent upon the defence to discharge the said burden – This burden cannot be harnessed upon the prosecution which did not assert the said facts.
Damber Singh Chettri* v. *State of Sikkim ***783-J***

Indian Evidence Act, 1872 – S. 155 – Impeaching Credit of Witness – All inconsistent statements are not sufficient to impeach the credit of witness. To contradict a witness must be to discredit the particular version of a witness. In arriving at the conclusion about the guilt of the accused the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Even if a major portion of the evidence is deficient, in case the residue is sufficient to prove guilt of the accused his conviction can be maintained – Duty of the Court to separate the grain from the chaff. Exaggerating the rule of benefit of doubt can result in miscarriage

of justice – Just because a close relative is a witness, it is not enough to reject her/his testimony if it is otherwise credible – Evidence can be closely scrutinized to assess whether an innocent person is falsely implicated – Must be done keeping in mind this vital aspect – If the scene of crime is rural and the witnesses are rustics, their behavioural pattern and perceptive habits are required to be judged as such. Very sophisticated approach based on unreal assumptions about human conduct should not be encouraged. Discrepancies and minor contradictions in narrations and embellishments cannot militate against the veracity of the core of the testimony – A trained judicial mind must seek the truth and conformity to probability in the substantial fabric of testimony delivered – Witnesses' do not all have photographic memory – A witness may also be overawed by the Court atmosphere and the piercing cross-examination. Nervousness due to the alien surroundings may lead to the witness being confused regarding sequence of events. Witnesses are also susceptible to filling up details from imagination sometimes on account of the fear of looking foolish or being disbelieved activating the psychological defence mechanism. Quite often improvements are made to the earlier version during trial in order to give a boost to the prosecution case. Discrepancies which do not shake the foundation facts may be discarded – Merely because there are embellishments to the version of the witness the Court should not disbelieve the evidence altogether if it is otherwise trustworthy – Almost impossible in a criminal trial to prove all the elements with scientific precision.
Damber Singh Chettri* v. *State of Sikkim ***783-C***

Maxim – ***falsus in uno fulsus in omnibus*** **– Principle –** Is the common law dating back to the late seventeenth century. Was at one time a mandatory presumption that a witness was unreliable if he had previously lied while offering testimony. During the nineteenth century the English Courts began to advice that such a presumption is not mandatory – In India however, this maxim has not been accepted and witnesses cannot be branded as liars – The Indian Courts have consistently declined to apply the maxim as a general proposition of law. Even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, his conviction can be maintained – This maxim at the most is merely a rule of caution involving the question of weight of evidence which a Court may apply in a given set of circumstances but not what may be called a mandatory rule of evidence. In the Indian context, the doctrine if applied could be dangerous for hardly one comes across any witness whose evidence does not contain a grain of untruth or at any rate exaggeration,

embroideries or embellishment – Each case must be examined as to what extent the evidence is worthy of acceptance.
Damber Singh Chettri* v. *State of Sikkim ***783-A***

Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – The statute of limitation is founded on public policy – Aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression – Seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale.
Branch Manager, Shriram General Insurance Co. Ltd* v. *State of Sikkim ***866-A***

Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – Law of limitation not enacted with the object of destroying the rights of the parties but to ensure that they approach the Court without unreasonable delay – Every remedy should remain alive only till the expiry of the period fixed by the legislature.
Branch Manager, Shriram General Insurance Co. Ltd* v. *State of Sikkim ***866-B***

Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – An unlimited limitation would lead to a sense of insecurity and uncertainty – Limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches.
Branch Manager, Shriram General Insurance Co. Ltd* v. *State of Sikkim ***866-C***

Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – Sufficient Cause – Expression construed liberally in keeping with its ordinary dictionary meaning as adequate or enough – Any justifiable reason resulting in vacation has to be understood as sufficient cause – Necessarily implies an element of sincerity, *bona fide*, and reasonableness – Liberal construction of the expression "sufficient cause" is intended to advance substantial justice – Expression used in statutes is elastic enough to enable the Courts to apply the law in meaningful manner which serves the ends of justice – Expression "sufficient cause" implies the presence of legal and adequate reasons. The word "sufficient" means adequate enough, as much as may be necessary to answer the purpose intended – The test of "sufficient cause" is purely an individualistic test. It is not an objective test.

Therefore, no two cases can be treated alike – The statute of limitation has left the concept of "sufficient cause" delightfully undefined, thereby leaving to the Court a well-intentioned discretion to decide the individual cases whether circumstances exist establishing sufficient cause.
Branch Manager, Shriram General Insurance Co. Ltd* v. *State of Sikkim ***866-D***

Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – Even though a liberal and justice-oriented approach is required to be adopted, the Courts cannot become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.
Branch Manager, Shriram General Insurance Co. Ltd* v. *State of Sikkim ***866-E***

Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – The party should show that besides acting *bona fide*, it had taken all possible steps within its power and control and had approached the Court without any unnecessary delay – In case a party is found to be negligent, or for want of *bona fide* on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No Court could be justified in condoning such an inordinate delay by imposing any condition whatsoever.
Branch Manager, Shriram General Insurance Co. Ltd* v. *State of Sikkim ***866-F***

Motor Vehicles Act, 1988 – S. 173(1) – Condonation of Delay – Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes – Court has no power to extend the period of limitation on equitable grounds.
Branch Manager, Shriram General Insurance Co. Ltd* v. *State of Sikkim ***866-G***

Motor Vehicles Act, 1988 – S. 173(1) – Condonation of Delay – Sufficient Cause – Two important considerations – First is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties – Second, is that this legal right which has accrued to the decree-holder by lapse of time should not be lightheartedly disturbed.

Branch Manager, Shriram General Insurance Co. Ltd* v. *State of Sikkim ***866-H***

Indian Penal Code, 1860 – S. 34 – Common Intention – Evidence – Conspiracy most is always hatched in secrecy and it is seldom that one finds direct evidence to prove it. Such intention can only be inferred from the circumstances appearing from the proved facts of the case.
Md. Ibraj Alam* v. *State of Sikkim ***910-F***

Indian Penal Code, 1860 – S. 34 – Intended to meet circumstances in which it may be difficult to distinguish between the acts of the individual members of a party or to prove exactly what part was taken by each of them in furtherance of the common intention – Is a principle of joint liability in committing a criminal act – To invoke the provisions of S. 34, I.P.C, at least two factors must be established: (i) common intention, and (ii) participation of the accused in the commission of an offence – Does not necessitate overt act to be attributed to the individual accused but before a person is convicted by applying the doctrine of vicarious liability, not only his participation in the crime must be proved but presence of common intention must be established – For proving formation of common intention, direct evidence may not be always available – It is not necessary that the acts of the accused persons charged with commission of the offences jointly must be the same or identically similar. It could be different in character but must have been influenced by one and the same common intention in order to attract the provision of S. 34.
Md. Ibraj Alam* v. *State of Sikkim ***910-B***

Indian Penal Code, 1860 – S. 71 – Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished the offender shall not be punished with the more severe punishment than the Court which tries it could award for any one of such offences – For the same set of facts, the Appellant has been sentenced under S. 8 of the POCSO Act as well as S. 354, I.P.C – In view of S. 71, I.P.C it is impermissible to impose the sentence under S. 354, I.P.C since the Learned Special Judge has imposed the sentence under S. 8 of the POCSO Act which is more sever – Sentence under S. 354, I.P.C set aside – Order on sentence dated 29.12.2016 modified.
Damber Singh Chettri* v. *State of Sikkim ***783-K***

Indian Penal Code, 1860 – S. 361 – S. 361, I.P.C is intended for security and protection of minors and persons of unsound mind – Use of the words "takes" or "entices" makes the intention of the legislation clear – To constitute the offence of kidnapping there is no necessity of force or fraud. No one who is responsible for taking or enticing a child from the keeping of his or her guardian, whether physical or by inducement should escape the penalty of law.
Md. Ibraj Alam* v. *State of Sikkim ***910-A***

Protection of Children from Sexual Offences Act, 2012 – Special and landmark legislation addressing the issue of child sexual abuse in India which had been shrouded in secrecy. Due to negative social conditioning, there is hesitation in reporting sexual abuse on children – Child sexual abuse if not dealt appropriately, the central purpose of the POCSO Act i.e. the interest of the child would be jeopardised – It must be well remembered that in every case of child sexual abuse is the story of the child who has been abused. Who else can relate the story better than the child herself/himself? Due to the stigma attached as well as the fright of the unknown, it is extremely difficult for a child to come out in the open to narrate the story of her/his abuse – The central narrative and account of the crime often comes from the child victim. The child victim and the accused are, in most instances, the only ones present when the crime is committed. In such situation to insist upon yet another direct witness to corroborate the child victim's story would result in equating the victim to an accomplice in crime – Also to be remembered that a skilful cross-examination is almost certain to confuse a child victim even while telling the truth which can lead to inconsistencies in their testimony – Peculiar perspective of the child victim can also affect their recollection but the Courts' duty to assess the evidence in context can only reveal the actual truth. To unnecessarily stigmatise the evidence of the child victim without proof of influence of tutoring would not fulfill the purpose of the POCSO Act sought to be achieved – Tutoring is always a question of fact which requires evidence to prove it. There is no reason to presume that a child would falsely implicate the accused merely because of her/his tender age – To the contrary, the POCSO Act prescribes a mandatory presumption where a person is prosecuted for committing or abetting or attempting to commit any offence under Ss. 3, 5, 7 and 9 that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.
Damber Singh Chettri* v. *State of Sikkim ***783-G***

Regulation of Seniority – The argument that no Rules were available to guide the Respondents on the question of seniority deserves no consideration and cannot be countenanced in view of the Regulation of Seniority Rules 1980 and the Establishment Rules 1974 – Undoubtedly, the aforestated Rules ought to have guided the Respondent on determination of seniority even in the absence of the Nursing Service Rules which came to be enacted only in 1997 and applied in *proprio vigore* with regard to the *inter se* seniority of the persons selected.
Mrs. Suman Rai* v. *State of Sikkim and Others ***930-B***

Sikkim Government Establishment Rules, 1974 – Rule 8 (d) – *Inter se* seniority – 'Merit' as per the Cambridge English Dictionary would be "the advantages something has compared to something else" while the 'date of joining' obviously is the date on which a person would join duty – Merely because a person who is placed lower in the merit list joins duty promptly on issuance of appointment letter would not entitle that person placement at a higher position than what he/she was placed on selection on merit – Date of joining cannot be reckoned for computing seniority – *Inter se* seniority cannot be meddled with once determined.
Mrs. Suman Rai* v. *State of Sikkim and Others ***930-A***

Sikkim State Nursing Service Rules, 1997 – Respondent 7 and 18 have been redesignated as "Sister-in-Charge" of different Wards not promoted – As per the Concise Oxford English Dictionary, Twelfth Edition, Oxford University Press, the meaning of "redesignate" would be "give (someone or something) a different official name, description or title" while, the meaning of "promotion" would be "the action of raising someone to a higher position or rank" – Redesignation is surely not equivalent to promoting a person and there ought not to be any confusion on the nomenclature employed.
Mrs. Suman Rai* v. *State of Sikkim and Others ***930-C***

SLR (2018) SIKKIM 783

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

Crl. A. No. 05 of 2017

Damber Singh Chettri ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENTS

For the Appellant: Mr. Udai P. Sharma, Legal Aid Counsel, Mr. Kusan Limboo, Mr. Amar Bhandari, Mr. Mahendra Thapa and Mr. Madhukar Dhakal, Advocates.

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

Date of decision: 9th July 2018

A. Maxim – ***falsus in uno fulsus in omnibus*** **– Principle – Is the common law dating back to the late seventeenth century. Was at one time a mandatory presumption that a witness was unreliable if he had previously lied while offering testimony. During the nineteenth century the English Courts began to advice that such a presumption is not mandatory – In India however, this maxim has not been accepted and witnesses cannot be branded as liars – The Indian Courts have consistently declined to apply the maxim as a general proposition of law. Even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, his conviction can be maintained – This maxim at the most is merely a rule of caution involving the question of weight of evidence which a Court may apply in a given set of circumstances but not what may be called a mandatory rule of evidence. In the Indian context, the doctrine if applied could be dangerous for hardly one comes across any witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment – Each case must be examined as to what extent the evidence is worthy of acceptance.**

(Paras 2, 3 and 7)

B. Evidence – Appreciation of evidence – Need for the Courts to ascertain the truth – The Court has to punish the guilty and protect the innocent. Investigating agency is required to be fair and efficient. However, any lapse in investigation cannot *per se* be a ground to discard the prosecution case when overwhelming evidence is available to prove the offence. It is vital to examine evidence keeping in mind the setting of the crime – While appreciating the evidence of a witness, the Court must ascertain whether the evidence read as a whole appears to be truthful. It is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court may discard his evidence.

(Para 13)

C. Indian Evidence Act, 1872 – S. 155 – Impeaching Credit of Witness – All inconsistent statements are not sufficient to impeach the credit of witness. To contradict a witness must be to discredit the particular version of a witness. In arriving at the conclusion about the guilt of the accused the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Even if a major portion of the evidence is deficient, in case the residue is sufficient to prove guilt of the accused his conviction can be maintained – Duty of the Court to separate the grain from the chaff. Exaggerating the rule of benefit of doubt can result in miscarriage of justice – Just because a close relative is a witness, it is not enough to reject her/his testimony if it is otherwise credible – Evidence can be closely scrutinized to assess whether an innocent person is falsely implicated – Must be done keeping in mind this vital aspect – If the scene of crime is rural and the witnesses are rustics, their behavioural pattern and perceptive habits are required to be judged as such. Very sophisticated approach based on unreal assumptions about human conduct should not be encouraged. Discrepancies and minor contradictions in narrations and embellishments cannot militate against the veracity of the core of the testimony – A trained judicial mind must seek the truth and conformity to probability in the substantial fabric of testimony delivered – Witnesses' do not all have photographic memory – A witness may also be overawed by the Court atmosphere and the piercing cross-examination. Nervousness due to the alien surroundings may lead to the witness being confused regarding

sequence of events. Witnesses are also susceptible to filling up details from imagination sometimes on account of the fear of looking foolish or being disbelieved activating the psychological defence mechanism. Quite often improvements are made to the earlier version during trial in order to give a boost to the prosecution case. Discrepancies which do not shake the foundation facts may be discarded – Merely because there are embellishments to the version of the witness the Court should not disbelieve the evidence altogether if it is otherwise trustworthy – Almost impossible in a criminal trial to prove all the elements with scientific precision.

(Para 13)

C. Evidence – Beyond a reasonable doubt – Principle Explained – A Court could be convinced of the guilt only beyond the range of a reasonable doubt. Proof beyond a reasonable doubt is the same as proof which affords moral certainty to the Judge. Doubt to be reasonable must be of an honest, sensible and fair-minded man supported by reason with a desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. While appreciating the evidence of a witness the Court must ascertain whether the evidence read as a whole appears to be truthful. It is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court may discard his evidence.

(Para 13)

D. Evidence – How should the Court deal with cases which violate human dignity in sexual crimes? – 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 prosecutrix should not, unless the discrepancies are such which are fatal in nature, be allowed to throw out an otherwise reliable prosecution case – Inherent bashfulness of a woman and her tendency to conceal outrage of sexual aggression should not be ignored. The testimony of a victim in such cases 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 a victim's evidence cannot accepted without corroboration.

(Para 16)

E. Evidence – Appreciation of Evidence of a Child Witness – Law recognises the child as a competent witness – Evidence of a child witness can be considered under S. 118 of the Indian Evidence Act, 1872 provided that such witness is able to understand the questions and able to give rational answers thereof – Incumbent upon the Court to put questions to them to gauge effectively the child's power of comprehension and mental state to speak the truth before the Court – Demeanour of the child witness must also be ascertained and noted. The Court therefore, should always record their opinion regarding the child's ability to understand the duty to speak the truth. A child witness if found competent to depose to the facts and a reliable one, such evidence could be the basis of conviction. Tender age of a child witness makes them susceptible to be swayed by what others tell them and may fall easy prey to tutoring and thus, although not as a general rule to be applied in every case but as a precautionary measure in cases in which there is an element of uncertainty, corroboration may be sought for and the evidence evaluated carefully. This is a rule of prudence and the evidence of child witness cannot be rejected *per se* on the presumption that they are likely to have been tutored. The tender age of a child alone cannot be a ground to discard the evidence of a child.

(Para 26)

F. Evidence – Appreciation of Evidence of Child Victim – A victim of sexual assault is not an accomplice to the crime but a victim of another person's lust – Stands at a higher pedestal than even an injured witness as she/he suffers from emotional injury. In cases of injured witnesses there is injury on the physical form, while in the cases of an injured victim the injury is physical, psychological and emotional – Child victim is a competent witness. Court may convict the accused on the sole testimony of a child victim if it has no reason to doubt its truthfulness and veracity. Corroboration is only a matter or prudence and not a rule – Corroboration can be dispensed with if, in the particular circumstances of a case the Court is satisfied that it is safe to rely upon the sole testimony of a child victim – Where the Court deems it proper to seek corroboration it must be kept in mind that it is not necessary that there should be independent confirmation of every material circumstance. Some

additional evidence rendering it probable may be required to come to the conclusion that it is reasonably safe to act upon the testimony of the child victim as to the guilt of the accused – Corroboration need not be direct – Circumstantial evidence is sufficient if it connects the accused to the crime. Since the victim is a child and therefore may be susceptible to be swayed by what others tell them the Court must remain conscious and assess whether the statement of a child victim is the voluntary expression of the victim and that she was not under influence of others.

(Para 31)

G. Protection of Children from Sexual Offences Act, 2012 – Special and landmark legislation addressing the issue of child sexual abuse in India which had been shrouded in secrecy. Due to negative social conditioning, there is hesitation in reporting sexual abuse on children – Child sexual abuse if not dealt appropriately, the central purpose of the POCSO Act i.e. the interest of the child would be jeopardised – It must be well remembered that in every case of child sexual abuse is the story of the child who has been abused. Who else can relate the story better than the child herself/himself? Due to the stigma attached as well as the fright of the unknown, it is extremely difficult for a child to come out in the open to narrate the story of her/his abuse – The central narrative and account of the crime often comes from the child victim. The child victim and the accused are, in most instances, the only ones present when the crime is committed. In such situation to insist upon yet another direct witness to corroborate the child victim's story would result in equating the victim to an accomplice in crime – Also to be remembered that a skilful cross-examination is almost certain to confuse a child victim even while telling the truth which can lead to inconsistencies in their testimony – Peculiar perspective of the child victim can also affect their recollection but the Courts' duty to assess the evidence in context can only reveal the actual truth. To unnecessarily stigmatise the evidence of the child victim without proof of influence of tutoring would not fulfill the purpose of the POCSO Act sought to be achieved – Tutoring is always a question of fact which requires evidence to prove it. There is no reason to presume that a child would falsely implicate the accused merely because of her/his tender age – To the contrary, the POCSO Act

prescribes a mandatory presumption where a person is prosecuted for committing or abetting or attempting to commit any offence under Ss. 3, 5, 7 and 9 that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

(Para 32)

H. Evidence – Appreciation of Evidence of Child Victim – Presumption that children are more prone to false memory reports than adults and therefore their testimony less reliable no longer holds good – According to current scientific evidence, such views seems to be quite indefensible – It is now quite convincingly argued that adults are more susceptible to false memories compared to children as children depend more heavily on that part of the mind which records what actually happened while adults depends on another part of the mind which records the meaning of what happened – Presumptive unreliability of a child witness and more so a child victim solely on the basis of their tender age therefore, cannot be a general rule for it is equally true that adults are also susceptible to external influences. Today children are perceived to be generally more honest than adult witnesses – Credibility assessment of honesty, memory, suggestibility and communication ability must be applied to all witnesses regardless of age. The development of children's memory as compared to that of adults may require this assessment to be a little different for a child. This is where the Court must ensure proper evaluation on examination of the proved circumstances.

(Para 33)

I. Evidence – Minor discrepancies brought out by clever cross-examination in the present case cannot be equated to substantial infirmities in the evidence of the victim – When there is a variance between direct evidence of the victim tested by cross-examination and the evidence of a witness who heard the victim it is the direct evidence which must be given due weightage.

(Paras 42 and 43)

J. Indian Evidence Act, 1872 – S. 101 – Burden of Proof – One who alleges must prove the alleged fact. S. 101 harnesses the burden of proving the existence of facts which he asserts on the person who

asserts the said fact – It was not the case of the prosecution that there were number of shops in the vicinity where the offence occurred and therefore the cry of the victim during the abuse ought to have been heard by people. It was the defence who desired the Court to give judgment on the existence of the said facts which they asserted and thus it was incumbent upon the defence to discharge the said burden – This burden cannot be harnessed upon the prosecution which did not assert the said facts.

(Para 45)

K. Indian Penal Code, 1860 – S. 71 – Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished the offender shall not be punished with the more severe punishment than the Court which tries it could award for any one of such offences – For the same set of facts, the Appellant has been sentenced under S. 8 of the POCSO Act as well as S. 354, I.P.C – In view of S. 71, I.P.C it is impermissible to impose the sentence under S. 354, I.P.C since the Learned Special Judge has imposed the sentence under S. 8 of the POCSO Act which is more sever – Sentence under S. 354, I.P.C set aside – Order on sentence dated 29.12.2016 modified.

(Para 57)

Appeal dismissed.

Chronological list of cases cited:

1. Ugar Ahir and Others v. The State of Bihar, AIR 1965 SC 277.
2. Sohrab v. State of M.P., (1972) 3 SCC 751
3. Gangadhar Behera v. State of Orissa, (2002) 8 SCC 381.
4. State of Uttar Pradesh v. Krishna Master and Others, (2010) 12 SCC 324.
5. State of Karnataka v. Suvarnamma and Another, (2015) 1 SCC 323.
6. Bhagwan Jagannath Markad v. State of Maharashtra, (2016) 10 SCC 537.
7. State of Punjab v. Gurmit Singh and Others, (1996) 2 SCC 384.

8. Bhupinder Sharma v. State of H.P., (2003) 8 SCC 551.

9. Caetano Piedade Fernandes and Another v. Union Territory of Goa, Daman and Diu Panaji, Goa, (1977) 1 SCC 707.

10. Dattu Ramrao Sakhare and Others v. State of Maharashtra, (1997) 5 SCC 341.

11. Panchhi and Other v. State of U.P., (1998) 7 SCC 177.

12. Suryanarayan v. State of Karnataka, (2001) 9 SCC 129.

13. Bhagwan Singh and Others v. State of M.P., (2003) 3 SCC 21.

14. State of H.P. v. Suresh Kumar, (2009) 16 SCC 697.

15. Yogesh Singh v. Mahabeer Singh, (2017) 11 SCC 195.

16. Satish v. State of Haryana, (2018) 11 SCC 300.

17. Rameshwar v. The State of Rajasthan, AIR 1952 SC 54.

18. State of H.P. v. Shree Kant Shekari, (2004) 8 SCC 153.

19. Mohd. Kalam v. State of Bihar, (2008) 7 SCC 257.

20. Mohd. Imran Khan v. State Government (NCT of Delhi), (2011) 10 SCC 192.

21. Sudhir and Another v. State of Madhya Pradesh, (1985) 1 SCC 559.

22. Manjit Singh and Another v. State of Punjab and Another, (2013) 12 SCC 746.

23. Raju Pandurang Mahale v. State of Maharashtra, (2004) 4 SCC 371.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The Learned Special Judge (POCSO), South Sikkim at Namchi (the Learned Special Judge) in his judgment dated 29.12.2016 while convicting the Appellant for the offences under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) Act and Section 354 of the Indian Penal Code, 1860 (IPC) has also acquitted the Appellant for the offences under Section 6 and 10 of the POCSO Act as well as Section 376 (2) of the IPC. Mr. U.P. Sharma, Learned Counsel for the Appellant

would thus submit that the very fact that the Learned Special Judge would disbelieve the victim's deposition and acquit the Appellant of the offences under Section 6 and 10 of the POCSO Act as well as Section 376 (2) of the IPC should have been adequate ground to give the benefit of doubt to the Appellant with regard to the offences for which the Appellant has been convicted.

falsus in uno fulsus in omnibus.

2. Mr. U.P. Sharma would rely upon the maxim-*falsus in uno fulsus in omnibus*. This would be the pivotal submission of the Learned Counsel for the Appellant which would thus merit immediate consideration. It is said that the origins of the doctrine of the *falsus in uno, falsus in omnibus* is the common law dating back to the late seventeenth century. It was at one time a mandatory presumption that a witness was unreliable if he had previously lied while offering testimony. During the nineteenth century the English Courts began to advice that such a presumption is not mandatory.

3. In India however, this maxim has not been accepted.

4. In the year 1965 itself in re: ***Ugar Ahir & Ors. vs. The State of Bihar***[1] the Supreme Court would hold:

> ***"7.*** *The maxim falsus in uno, falsus in omnibus (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelive the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest. That is what the courts have done in this case. In effect, the courts disbelieved practically the whole version given by the witnesses in regard to the pursuit, the assault*

[1] AIR 1965 SC 277

on the deceased with lathis, the accused going on a bicycle, and the deceased wresting the bhala from one of the appellants and attacking with the same two of the appellants, the case that the accused attacked the witnesses, and the assertion of the witnesses of their being disinterested spectators. If all this was disbelieved, what else remained? To reverse the metaphor, the courts removed the grain and accepted the chaff and convicted the appellants. We, therefore, set aside the conviction of the appellants and the sentence passed on them.”

[Emphasis supplied]

5. In the year 1972 the Supreme Court would once again reiterate in re: ***Sohrab v. State of M.P.***[2] that :

> ***“8.*** *... This Court has held that falsus in uno, falsus in omnibus is not a sound rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In most cases, the witnesses when asked about details venture to give some answer, not necessarily true or relevant for fear that their evidence may not be accepted in respect of the main incident which they have witnessed but that is not to say that their evidence as to the salient features of the case after cautious scrutiny cannot be considered....”*

[Emphasis supplied]

6. In the year 2002 the Supreme Court would have occasion to examine the doctrine of *falsus in uno, falsus in omnibus* ***in re: Gangadhar Behera v. State of Orissa***[3] and hold:

> ***“15****. To the same effect is the decision in State of Punjab v. Jagir Singh [(1974) 3 SCC 277 : 1973 SCC (Cri) 886] and Lehna v. State of Haryana*

[2] (1972) 3 SCC 751
[3] (2002) 8 SCC 381

[(2002) 3 SCC 76 : 2002 SCC (Cri) 526] . Stress was laid by the appellant-accused on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence prayer is to apply the principle of falsus in uno, falsus in omnibus (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno, falsus in omnibus has no application in India and the witnesses cannot be branded as liars. The maxim falsus in uno, falsus in omnibus has not received general acceptance nor has this maxim come to occupy the status of the rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called a mandatory rule of evidence'. (See Nisar Ali v. State of U.P. [AIR 1957 SC 366 : 1957 Cri LJ 550]) Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted

must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. (See Gurcharan Singh v. State of Punjab [AIR 1956 SC 460 : 1956 Cri LJ 827].) The doctrine is a dangerous one especially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab v. State of M.P. [(1972) 3 SCC 751 : 1972 SCC (Cri) 819] and Ugar Ahir v. State of Bihar [AIR 1965 SC 277 : (1965) 1 Cri LJ 256].) An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee

> *Ariel v. State of M.P. [AIR 1954 SC 15 : 1954 Cri LJ 230] and Balaka Singh v. State of Punjab [(1975) 4 SCC 511 : 1975 SCC (Cri) 601] .) As observed by this Court in State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC (Cri) 593] normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi v. State of Bihar [(2002) 6 SCC 81 : 2002 SCC (Cri) 1220] . Accusations have been clearly established against the appellant-accused in the case at hand. The courts below have categorically indicated the distinguishing features in evidence so far as the acquitted and the convicted accused are concerned."*
>
> *[Emphasis supplied]*

7. It is thus clear that the maxim- *falsus in uno, falsus in omnibus* has no application in India and witnesses cannot be branded as liars. The Indian Courts have consistently declined to apply the maxim as a general proposition of law. Even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, his conviction can be maintained. This maxim at the most is merely a rule of caution involving the question of weight of evidence which a Court may apply in a given set of circumstances but not what may be called a mandatory rule of evidence. Keeping in mind the Indian context the doctrine if applied could be dangerous. Each case must be examined as to what extent the evidence is worthy of acceptance. The maxim – *falsus in uno, falsus in omnibus* is not a sound rule and definitely not in the Indian

context for hardly one comes across any witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment.

Appreciation of evidence - Need for the Courts to ascertain the truth

8. The Supreme Court would have occasion to assert the need for the Courts to perform the task of ascertaining the truth from the materials before it and the observations and findings therein would be apt to the present case and therefore reproduced hereunder.

9. In re: ***State of Uttar Pradesh v. Krishna Master & Ors***.[4] the Supreme Court would refer to the criteria for appreciation of oral evidence and hold:

> ***"15.*** *Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is found, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.*

[4] (2010) 12 SCC 324

16. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of the evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless the reasons are weighty and formidable, it would not be proper for the appellate court to reject the evidence on the ground of variations or infirmities in the matter of trivial details. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the police are meant to be brief statements and could not take place of evidence in the court. Small/ Trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it.

17. In the deposition of witnesses, there are always normal discrepancies, howsoever honest and truthful they may be. These discrepancies are 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 and threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit foolishly. Therefore, it is the duty of the court to

> *separate falsehood from the truth. In sifting the evidence, the court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eyewitnesses examined in this case proves the prosecution case."*
>
> *[Emphasis supplied]*

10. In re: ***State of Karnataka vs. Suvarnamma & Anr.***[5] the Supreme Court would hold:

> ***"10.*** *The court dealing with a criminal trial is to perform the task of ascertaining the truth from the material before it. It has to punish the guilty and protect the innocent. Burden of proof is on the prosecution and the prosecution has to establish its case beyond reasonable doubt. Much weight cannot be given to minor discrepancies which are bound to occur on account of difference in perception, loss of memory and other invariable factors. In the absence of direct evidence, the circumstantial evidence can be the basis of conviction if the circumstances are of conclusive nature and rule out all reasonable possibilities of the accused being innocent. Once the prosecution probabilises the involvement of the accused but the accused takes a false plea, such false plea can be taken as an additional circumstance against the accused. Though Article 20(3) of the Constitution incorporates the rule against self-incrimination, the scope and the content of the said rule does not require the court to ignore the conduct of the accused in not correctly disclosing the facts within*

[5] (2015) 1 SCC 323

his knowledge. When the accused takes a false plea about the facts exclusively known to him, such circumstance is a vital additional circumstance against the accused.

11. *It is also well settled that though the investigating agency is expected to be fair and efficient, any lapse on its part cannot per se be a ground to throw out the prosecution case when there is overwhelming evidence to prove the offence."*

[Emphasis supplied]

11. In re: ***Suvarnamma (supra)*** the Supreme Court would also have occasion to consider its various judgments which may be reproduced hereunder for clarity on the settled position of law:-

"12. *We may refer to the well-known observations from decisions of this Court:*

12.1. *Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : (1974) 1 SCR 489] : (SCC p. 801, para 8)*

" 8. Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress

of truth and conformity to probability in the substantial fabric of testimony delivered. The learned Sessions Judge has at some length dissected the evidence, spun out contradictions and unnatural conduct, and tested with precision the time and sequence of the events connected with the crime, all on the touchstone of the medical evidence and the post-mortem certificate. Certainly, the court which has seen the witnesses depose, has a great advantage over the appellate Judge who reads the recorded evidence in cold print, and regard must be had to this advantage enjoyed by the trial Judge of observing the demeanour and delivery, of reading the straightforwardness and doubtful candour, rustic naiveté and clever equivocation, manipulated conformity and ingenious inveracity of persons who swear to the facts before him. Nevertheless, where a Judge draws his conclusions not so much on the directness or dubiety of the witness while on oath but upon general probabilities and on expert evidence, the court of appeal is in as good a position to assess or arrive at legitimate conclusions as the court of first instance. Nor can we make a fetish of the trial Judge's psychic insight."

12.2. *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat [(1983) 3 SCC 217 : 1983 SCC (Cri) 728] : (SCC pp. 222-23, para 5)*

"5. ... We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted

by the learned counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious:

> *(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*
>
> *(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*
>
> *(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.*
>
> *(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.*
>
> *(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very*

precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by the counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him—perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

12.3. *Appabhai v. State of Gujarat [1988 Supp SCC 241 : 1988 SCC (Cri) 559] : (SCC pp. 246-47, para 13)*

"13. ... The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or

observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy...........”

12.4. *State of Haryana v. Bhagirath [(1999) 5 SCC 96 : 1999 SCC (Cri) 658] : (SCC pp. 100-01, paras 8-11)*

> *“8. It is nearly impossible in any criminal trial to prove all the elements with a scientific precision. A criminal court could be convinced of the guilt only beyond the range of a reasonable doubt. Of course, the expression reasonable doubt‘ is incapable of definition. Modern thinking is in favour of the view that proof beyond a reasonable doubt is the same as proof which affords moral certainty to the Judge.*
>
> *9. Francis Wharton, a celebrated writer on criminal law in the United States has quoted from judicial pronouncements in his book Wharton’s Criminal Evidence (at p. 31, Vol. 1 of the 12th Edn.) as follows:*

'It is difficult to define the phrase reasonable doubt." However, in all criminal cases a careful explanation of the term ought to be given. A definition often quoted or followed is that given by Chief Justice Shaw in the Webster case [Commonwealth v. Webster, 5 Cush 295 : 59 Mass 295 (1850)] . He says: "It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that consideration that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

10. In the treatise The Law of Criminal Evidence authored by H.C. Underhill it is stated (at p. 34, Vol. 1 of the 5th Edn.) thus:

'The doubt to be reasonable must be such a one as an honest, sensible and fair-minded man might, with reason, entertain consistent with a conscientious desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way. There must be a candid consideration of all the evidence and if, after this candid consideration is had by the jurors, there remains in the

minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt.'

11. In Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : (1974) 1 SCR 489] this Court adopted the same approach to the principle of benefit of doubt and struck a note of caution that the dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence demand special emphasis in the contemporary context of escalating crime and escape. This Court further said: (SCC p. 799, para 6)

'6. ... The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt."

***12.5.** Leela Ram v. State of Haryana [(1999) 9 SCC 525 : 2000 SCC (Cri) 222] : (SCC pp. 532-33, paras 9-10)*

"9. Be it noted that the High Court is within its jurisdiction being the first appellate court to reappraise the evidence, but the discrepancies found in the ocular account of two witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension,

the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence. In this context, reference may be made to the decision of this Court in State of U.P. v. M.K. Anthony [(1985) 1 SCC 505 : 1985 SCC (Cri) 105] . In para 10 of the Report, this Court observed: (SCC pp. 514-15)

'10. <u>While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth.</u> Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit

rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals.'

10. In a very recent decision in Rammi v. State of M.P. [(1999) 8 SCC 649 : 2000 SCC (Cri) 26] this Court observed: (SCC p. 656, para 24)

'24. When an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two

witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.'

This Court further observed: (SCC pp. 656-57, paras 25-27)

"25. It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. No doubt Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of an inconsistent former statement. But a reading of the section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness. The material portion of the section is extracted below:

***"155. Impeaching credit of witness**.—The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him—*

*(1)-(2) * * **

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;"

26. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of the inconsistent

statement which is liable to be "contradicted" would affect the credit of the witness. Section 145 of the Evidence Act also enables the cross-examiner to use any former statement of the witness, but it cautions that if it is intended to "contradict" the witness the cross-examiner is enjoined to comply with the formality prescribed therein. Section 162 of the Code also permits the cross-examiner to use the previous statement of the witness (recorded under Section 161 of the Code) for the only limited purpose i.e. to "contradict" the witness.

27. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness (vide Tahsildar Singh v. State of U.P. [AIR 1959 SC 1012 : 1959 Cri LJ 1231])"

***12.6.** State of H.P. v. Lekh Raj [(2000) 1 SCC 247 : 2000 SCC (Cri) 147] : (SCC pp. 259-60, para 10)*

"10. The High Court appears to have adopted a technical approach in disposing of the appeal filed by the respondents. This Court in State of Punjab v. Jagir Singh [(1974) 3 SCC 277 : 1973 SCC (Cri) 886] held: (SCC pp. 285-86, para 23)

'23. A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is

> *charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures.'*

The criminal trial cannot be equated with a mock scene from a stunt film. The legal trial is conducted to ascertain the guilt or innocence of the accused arraigned. In arriving at a conclusion about the truth, the courts are required to adopt a rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The hypertechnicalities or figment of imagination should not be allowed to divest the court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstance keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth. The courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional

dogmatic hypertechnical approach has to be replaced by a rational, realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be a utopian thought but have to be considered as part and parcel of the human civilisation and the realities of life. The courts cannot ignore the erosion in values of life which are a common feature of the present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and mankind."

12.7 *xxxxxxxxxxxx*

12.8. *xxxxxxxxxxxx*

12.9. *Zahira Habibullah Sheikh (5) v. State of Gujarat [(2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] : (SCC pp. 395-97, paras 37 & 40)*

> *"37. A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon*

judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny.

*   *   *

40. ... Consequences of defective investigation have been elaborated in Dhanaj Singh v. State of Punjab [(2004) 3 SCC 654 : 2004 SCC (Cri) 851] . It was observed as follows: (SCC p. 657, paras 5-7)

'5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. (See Karnel Singh v. State of M.P. [(1995) 5 SCC 518 : 1995 SCC (Cri) 977])

6. In Paras Yadav v. State of Bihar [(1999) 2 SCC 126 : 1999 SCC (Cri) 104] it was held that if the lapse or omission is committed by the investigating agency or because of negligence the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not, the contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts; otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

> *7. As was observed in Ram Bihari Yadav v. State of Bihar [(1998) 4 SCC 517 : 1998 SCC (Cri) 1085] if primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law-enforcing agency but also in the administration of justice. The view was again reiterated in Amar Singh v. Balwinder Singh [(2003) 2 SCC 518 : 2003 SCC (Cri) 641]."*
>
> *[Emphasis supplied]*

12. In re: ***Bhagwan Jagannath Markad vs. State of Maharashtra***[6] the Supreme Court would hold:

> ***"19.*** *While appreciating the evidence of a witness, the court has to assess whether read as a whole, it is truthful. In doing so, the court has to keep in mind the deficiencies, drawbacks and infirmities to find out whether such discrepancies shake the truthfulness. Some discrepancies not touching the core of the case are not enough to reject the evidence as a whole. No true witness can escape from giving some discrepant details. Only when discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence. Section 155 of the Evidence Act enables the doubt to impeach the credibility of the witness by proof of former inconsistent statement. Section 145 of the Evidence Act lays down the procedure for contradicting a witness by drawing his attention to the part of the previous statement which is to be used for contradiction. The former statement should have the effect of discrediting the present statement but merely because the latter statement is at variance to the former to some extent, it is*

[6] (2016) 10 SCC 537

not enough to be treated as a contradiction. It is not every discrepancy which affects the creditworthiness and the trustworthiness of a witness. There may at times be exaggeration or embellishment not affecting the credibility. The court has to sift the chaff from the grain and find out the truth. A statement may be partly rejected or partly accepted [Leela Ram v. State of Haryana, (1999) 9 SCC 525, pp. 532-35, paras 9-13 : 2000 SCC (Cri) 222]. Want of independent witnesses or unusual behaviour of witnesses of a crime is not enough to reject evidence. A witness being a close relative is not enough to reject his testimony if it is otherwise credible. A relation may not conceal the actual culprit. The evidence may be closely scrutinised to assess whether an innocent person is falsely implicated. Mechanical rejection of evidence even of a "partisan" or "interested" witness may lead to failure of justice. It is well known that principle "falsus in uno, falsus in omnibus" has no general acceptability [Gangadhar Behera v. State of Orissa, (2002) 8 SCC 381, pp. 392-93, para 15 : 2003 SCC (Cri) 32] . On the same evidence, some accused persons may be acquitted while others may be convicted, depending upon the nature of the offence. The court can differentiate the accused who is acquitted from those who are convicted. A witness may be untruthful in some aspects but the other part of the evidence may be worthy of acceptance. Discrepancies may arise due to error of observations, loss of memory due to lapse of time, mental disposition such as shock at the time of occurrence and as such the normal discrepancy does not affect the credibility of a witness.

20. *Exaggerated to the rule of benefit of doubt can result in miscarriage of justice. Letting the guilty escape is not doing justice. A Judge*

> *presides over the trial not only to ensure that no innocent is punished but also to see that guilty does not escape."*
>
> *[Emphasis supplied]*

13. Certain salutary principles of criminal jurisprudence in appreciating evidence must be noted from the judgments rendered by the Supreme Court. The Court is mandated to perform the task of ascertaining the truth from the materials before it. The Court has to punish the guilty and protect the innocent. The investigating agency is required to be fair and efficient. However, any lapse in investigation cannot *per se* be a ground to discard the prosecution case when overwhelming evidence is available to prove the offence. It is vital to examine evidence keeping in mind the setting of the crime. Appreciation of deposition of witnesses must be done keeping in mind this vital aspect. If the scene of crime is rural and the witnesses are rustics their behavioural pattern and perceptive habits are required to be judged as such. Very sophisticated approach based on unreal assumptions about human conduct should not be encouraged. Discrepancies and minor contradictions in narrations and embellishments cannot militate against the veracity of the core of the testimony. However, a trained judicial mind must seek the truth and conformity to probability in the substantial fabric of testimony delivered. Overmuch importance cannot be given to minor discrepancies. Witnesses' do not all have photographic memory and sometimes, more often than not, are overtaken by events. A witness may also be overawed by the Court atmosphere and the piercing cross-examination. Nervousness due to the alien surroundings may lead to the witness being confused regarding sequence of events. Witnesses are also susceptible to filling up details from imagination sometimes on account of the fear of looking foolish or being disbelieved activating the psychological defence mechanism. Quite often improvements are made to the earlier version during trial in order to give a boost to the prosecution case. Discrepancies which do not shake the foundation facts may be discarded. Merely because there are embellishments to the version of the witness the Court should not disbelieve the evidence altogether if it is otherwise trustworthy. It is almost impossible in a criminal trial to prove all the elements with scientific precision. A Court could be convinced of the guilt only beyond the range of a reasonable doubt. Proof beyond a reasonable doubt is the same as proof which affords moral certainty to the Judge. Doubt to be reasonable must be of an honest, sensible and fair-minded man

supported by reason with a desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. While appreciating the evidence of a witness the Court must ascertain whether the evidence read as a whole appears to be truthful. It is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court may discard his evidence. Section 155 of the Indian Evidence Act, 1872 indicates that all inconsistent statements are not sufficient to impeach the credit of the witness. To contradict a witness must be to discredit the particular version of a witness. In arriving at the conclusion about the guilt of the accused the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Even if a major portion of the evidence is deficient, in case the residue is sufficient to prove guilt of the accused his conviction can be maintained. It is the duty of the Court to separate the grain from the chaff. Exaggerating the rule of benefit of doubt can result in miscarriage of justice. Just because a close relative is a witness it is not enough to reject her/his testimony if it is otherwise credible. A relation may not conceal the actual culprit. The evidence can be closely scrutinized to assess whether an innocent person is falsely implicated.

How should the Court deal with cases which violate human dignity in sexual crimes?

14. In re: ***State of Punjab vs. Gurmit Singh & Ors***.[7] referred to an relied upon by Mr. S. K. Chettri, Learned Assistant Public Prosecutor for the State the Supreme Court would opine as to how the Court should deal with cases which violates human dignity in sexual crimes and hold:

> *"**8.** ………… The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such*

[7] (1996) 2 SCC 384

which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a

requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In State of Maharashtra v. Chandraprakash Kewalchand Jain [(1990) 1 SCC 550 : 1990 SCC (Cri) 210] Ahmadi, J. (as the Lord Chief Justice then was) speaking for the Bench summarised the position in the following words: (SCC p. 559, para 16)

> *"A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with*

the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

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*"**21.** Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of*

sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

[Emphasis supplied]

15. In re: ***Bhupinder Sharma v. State of H.P.***[8] the Supreme Court would decry the insistence on corroboration in cases involving of rape or sexual molestation and hold:

"12. *To insist on corroboration except in the rarest of rare cases is to equate one who is a victim of the lust of another with an accomplice*

[8] (2003) 8 SCC 551

> *to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars as in the case of an accomplice to a crime. (See State of Maharashtra v. Chandraprakash Kewalchand Jain [(1990) 1 SCC 550 : 1990 SCC (Cri) 210 : AIR 1990 SC 658] .) Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance."*
>
> *[Emphasis supplied]*

16. The Supreme Court thus has categorically held 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 prosecutrix should not, unless the discrepancies are such which are fatal in nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of a woman and her tendency to conceal outrage of sexual aggression should not be ignored. The testimony of a victim in such cases 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 a victim's evidence cannot accepted without corroboration.

Appreciation of evidence of a child witness.

17. Mr. U.P. Sharma would also contend that the victim being a child witness it is necessary that her testimony must be approached with great caution and on examination of the conflicting versions given by the victim as well as her mother (P.W.4) it may not be safe to rely upon the sole testimony of the victim for the purpose of conviction of the Appellant. To buttress his submission he would rely upon the judgment of Supreme Court In re***: Caetano Piedade Fernandes & Anr. vs. Union Territory of Goa, Daman & Diu Panaji, Goa*[9]*.*** In the year 1977 the Supreme Court would have occasion to examine a criminal appeal against the judgment of the

[9] (1977) 1 SCC 707 29

Additional Judicial Commissioner Goa convicting the Appellant under Section 302 read with Section 34 of the IPC. One of the witnesses of the prosecution was a child witness of 6 years of age. The Supreme Court would hold:

> ***"5.** Turning first to the evidence of Xavier, it may be pointed out straightaway that he was a child witness aged only 6 years at the time when he gave evidence. His evidence is, therefore, to be approached with great caution. He was, according to the prosecution, the only eyewitness to the crime. We have carefully gone through his evidence, but we are constrained to observe that even after making the utmost allowance in his favour in view of the fact that he is a child witness, we find it difficult to accept his testimony. There are several contradictions from which his evidence suffers, such as who had which weapon, but it is not merely on account of these contradictions of a minor character that we are inclined to reject his evidence. There are serious infirmities affecting his evidence and of them, the most important is that he is supposed to have given the name of Appellant 2 as the assailant of the deceased even though he had never seen him before the date of the incident. ……………..''*
>
> *[Emphasis supplied]*

18. In re: ***Dattu Ramrao Sakhare & Ors. vs. State of Maharashtra***[10] the Supreme Court in the year 1997 would examine Section 118 of the Indian Evidence Act, 1872 and the competency and credibility of a child witness and hold:-

> ***"5.** The entire prosecution case rested upon the evidence of Sarubai (PW 2) a child witness aged about 10 years. It is, therefore, necessary to find out as to whether her evidence is corroborated from other evidence on record. A child witness if*

[10] (1997) 5 SCC 341

> *found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record. In the light of this well-settled principle we may proceed to consider the evidence of Sarubai (PW 2).”*
>
> *[Emphasis supplied]*

19. In re: ***Panchhi & Ors. vs. State of U.P.***[11]: the Supreme Court would hold:

> ***“11.*** *Shri R.K. Jain, learned Senior Counsel, contended that it is very risky to place reliance on the evidence of PW 1, he being a child witness. According to the learned counsel, the evidence of a child witness is generally unworthy of credence. But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found*

[11] (1998) 7 SCC 177

reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.

12. *Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law (vide Prakash v. State of M.P. [(1992) 4 SCC 225 : 1992 SCC (Cri) 853] ; Baby Kandayanathil v. State of Kerala [1993 Supp (3) SCC 667 : 1993 SCC (Cri) 1084] ; Raja Ram Yadav v. State of Bihar [(1996) 9 SCC 287 : 1996 SCC (Cri) 1004 : AIR 1996 SC 1613] and Dattu Ramrao Sakhare v. State of Maharashtra [(1997) 5 SCC 341 : 1997 SCC (Cri) 685]).”*

[Emphasis supplied]

20. In re: ***Suryanarayan vs. State of Karnataka***[12] the Supreme Court would examine a case in which a child witness would be the sole witness and hold:

“5. *Admittedly, Bhavya (PW 2), who at the time of occurrence was about four years of age, is the only solitary eyewitness who was rightly not given the oath. The time and place of the occurrence and the attending circumstances of the case suggest no possibility of there being any other person as an eyewitness. The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of PW 2 cannot be discarded only on*

[12] (2001) 9 SCC 129

the ground of her being of tender age. The fact of PW 2 being a child witness would require the court to scrutinise her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not."

[Emphasis supplied]

21. In re: ***Bhagwan Singh & Ors. vs. State of M.P.***[13] the Supreme Court would examine the evidence of a child witness of a tender age of 6 years in a case relating to a conviction of the Appellants therein for offences under Section 302/34, 396, 460, 404 IPC and Section 11/13 of the M.P. (Dacoity Vihavaran Kshetra) Adhiniyam, 1981 and hold:

"19. *The law recognises the child as a competent witness but a child particularly at such a tender age of six years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the court to be a witness whose*

[13] (2003) 3 SCC 21

sole testimony can be relied upon without other corroborative evidence. The evidence of a child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony. (See Panchhi v. State of U.P. [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561])

20. *In the case before us, the trial Judge has recorded the demeanour of the child. The child was vacillating in the course of his deposition. From a child of six years of age, absolute consistency in deposition cannot be expected but if it appears that there was a possibility of his being tutored, the court should be careful in relying on his evidence. We have already noted above that Agyaram, maternal uncle of the child, who first met him after the incident and took him along with his younger brothers to his father's village, has not been produced by the prosecution as a witness in the court. It was most unlikely that if the child had seen the incident and identified the three accused, he would not have narrated it to Agyaram as the latter would have naturally inquired about the same. The conduct of his father Radheyshyam who was produced as a witness by the prosecution is also unnatural that before recording the statement of the child by the police, he made no enquiries from the child."*

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"22. *It is hazardous to rely on the sole testimony of the child witness as it is not available immediately after the occurrence of the incident and before there were any possibility of coaching and tutoring him. (See paras 14-15 of State of Assam v. Mafizuddin Ahmed [(1983) 2*

SCC 14 : 1983 SCC (Cri) 325] .) In that case evidence of a child witness was appreciated and held unreliable thus: (SCC p. 20)

> *"14. The other direct evidence is the deposition of PW 7, the son of the deceased, a lad of 7 years. The High Court has observed in its judgment:*
>
> *'... the evidence of a child witness is always dangerous unless it is available immediately after the occurrence and before there were any possibility of coaching and tutoring.'*
>
> *15. A bare perusal of the deposition of PW 7 convinces us that he was vacillating throughout and has deposed as he was asked to depose either by his nana or by his own uncle. It is true that we cannot expect much consistency in the deposition of this witness who was only a lad of 7 years. But from the tenor of his deposition it is evident that he was not a free agent and has been tutored at all stages by someone or the other."*
>
> *[Emphasis supplied]*

22. In re: ***State of H.P. vs. Suresh Kumar***[14] the Supreme Court would find the evidence of two witnesses firm and convincing. It would also find no reason as to why a child of age 5 to 12 would get an innocent person named for an offence which was undisputedly committed on her.

23. In re: ***Yogesh Singh vs. Mahabeer Singh***[15] the Supreme Court would hold:

> ***"Testimony of child witnesses***
>
> ***22.*** *It is well settled that the evidence of a child witness must find adequate corroboration,*

[14] (2009) 16 SCC 697
[15] (2017) 11 SCC 195

> *before it is relied upon as the rule of corroboration is of practical wisdom than of law. (See Prakash v. State of M.P. [Prakash v. State of M.P., (1992) 4 SCC 225 : 1992 SCC (Cri) 853] , Baby Kandayanathil v. State of Kerala [Baby Kandayanathil v. State of Kerala, 1993 Supp (3) SCC 667 : 1993 SCC (Cri) 1084] , Raja Ram Yadav v. State of Bihar [Raja Ram Yadav v. State of Bihar, (1996) 9 SCC 287 : 1996 SCC (Cri) 1004] , Dattu Ramrao Sakhare v. State of Maharashtra [Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341 : 1997 SCC (Cri) 685] , State of U.P. v. Ashok Dixit [State of U.P. v. Ashok Dixit, (2000) 3 SCC 70 : 2000 SCC (Cri) 579] and Suryanarayana v. State of Karnataka [Suryanarayana v. State of Karnataka, (2001) 9 SCC 129 : 2002 SCC (Cri) 413].)*
>
> ***23.** However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. (Vide Panchhi v. State of U.P. [Panchhi v. State of U.P., (1998) 7 SCC 177 : 1998 SCC (Cri) 1561])"*
>
> *[Emphasis supplied]*

24. A perusal of the judgments rendered by the Supreme Court and referred to by Mr. U. P. Sharma it is noticed that all the said judgments related to child witnesses who were not victims of crime.

25. In re: ***Satish v. State of Haryana***[16] the Supreme Court in the year 2018 would confirm the conviction of a woman for the murder of a husband based on the sole testimony of her 12 year old son who witnessed the murder and would observe:

[16] (2018) 11 SCC 300

> *"**8.** PW 2 was the son of the appellant Anita. He was a school-going child aged 12 years. Both, the trial court and the High Court have found him to be reliable and convincing. We do not find anything from his evidence to make it suspicious as the result of any tutoring by PW 4. The witness has clearly mentioned that his mother was present in the room when the assault was taking place and she asked them to leave the room on the bidding of one of the assailants. We do find it a little strange, according to normal human behaviour, that at the dead of night, the appellant after witnessing an assault on her own husband, did not rush to the house of PW 1 for informing the same and sent her minor son for the purpose. The fact that she created no commotion by shouting and seeking help reinforces the prosecution case because of her unnatural conduct. We also cannot lose sight of the fact that the child witness was not deposing against another family member or a stranger, but his own mother. It would call for courage and conviction to name his own mother, as the child was grown up enough to understand the matter as a witness to a murder.*
>
> ***9.** The witness has clearly identified the other two appellants also in the dock, having seen them during the occurrence. The number of injuries on the deceased is itself indicative that the assault lasted for some time enabling identification and did not end in a flash. We, therefore, find no reason to interfere with the conviction."*
>
> *[Emphasis supplied]*

26. Certain salutary observations of the Supreme Court whilst appreciating the evidence of a child witness must be taken note of. The law recognises the child as a competent witness. The evidence of a child witness

can be considered under Section 118 of the Indian Evidence Act, 1872 provided that such witness is able to understand the questions and able to give rational answers thereof. Keeping this in mind it is incumbent upon the Court to put questions to them to gauge effectively the child's power of comprehension and mental state to speak the truth before the Court. The demeanour of the child witness must also be ascertained and noted. The Court therefore, should always record their opinion regarding the child's ability to understand the duty to speak the truth. A child witness if found competent to depose to the facts and a reliable one, such evidence could be the basis of conviction. The tender age of a child witness makes them susceptible to be swayed by what others tell them and may fall easy prey to tutoring and thus, although not as a general rule to be applied in every case but as a precautionary measure in cases in which there is an element of uncertainty, corroboration may be sought for and the evidence evaluated carefully. This is a rule of prudence and the evidence of child witness cannot be rejected *per se* on the presumption that they are likely to have been tutored. The tender age of a child alone cannot be a ground to discard the evidence of a child.

Appreciation of evidence of a child victim.

27. In re: ***Rameshwar vs. The State of Rajasthan***[17]***; Vivian Bose, J.*** of the Supreme Court would have occasion to examine the evidence of a young girl, eight years of age who had been raped by the Appellant therein and hold:

> *"There is a class of cases which considers that though corroboration should ordinarily be required in the case of a grown-up woman it is unnecessary in the case of a child of tender years. Bishram v. Emperor([A.I.R. 1944 Nag. 363.]) is typical of that point of view. On the other hand, the Privy Council has said in Mohamed Sugal Esa v. The King([A.I.R. 1946 P.C. 3 at 5.]) that as a matter of prudence a conviction should not ordinarily be based on the uncorroborated evidence of a child witness. <u>In my opinion, the true rule is that in every case of this type the rule about the advisability of corroboration should be</u>*

[17] AIR 1952 SC 54

present to the mind of the judge. In a jury case he must tell the jury of it and in a non-jury case he must show that it is present to his mind by indicating that in his judgment. But he should also point out that corroboration can be dispensed with if, in the particular circumstances of the case before him, either the jury, or, when there is no jury, he himself, is satisfied that it is safe to do so. The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained. The tender years of the child, coupled with other circumstances appearing in the case, such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.

I turn next to the nature and extent of the corroboration required when it is not considered safe to dispense with it. Here, again, the rules are lucidly expounded by Lord Reading in Baskerville's case([[1916] 2 K.B. 658.]) at pages 664 to 669. It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with

circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear.

First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. As Lord Reading says—

"Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony."

All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it."

Secondly, the independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime. This does not mean that the corroboration as to identity must extend to all the circumstances necessary to identify the accused with the offence. Again, all that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness's story that the accused was the one, or among those, who committed the offence. The reason for this part of the rule is that—

> *"a man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all...It would not at all tend to show that the party accused participated in it."*

> *Thirdly, the corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. But of course the circumstances may be such as to make it safe to dispense with the necessity of corroboration and in those special circumstances a conviction so based would not be illegal. I say this because it was contended that the mother in this case was not an independent source.*

> *Fourthly, the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. Were it otherwise, many crimes which are usually committed between accomplices in secret, such as incest, offences with females (or unnatural offences) could never be brought to justice.*"

> *[Emphasis supplied]*

28. In re: ***State of H.P. vs. Shree Kant Shekari***[18] the Supreme Court would hold:

> ***"21.*** *It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands on a higher pedestal than*

[18] (2004) 8 SCC 153

an injured witness. In the latter case, there is injury on the physical form, while in the former it is physical as well as psychological and emotional. However, if the court on facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration, as understood in the context of an accomplice, would suffice."

[Emphasis supplied]

29. In re: ***Mohd. Kalam vs. State of Bihar***[19] the Supreme Court would hold:

> ***"7.*** *In Panchhi v. State of U.P. [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561] it was observed by this Court that the evidence of a child witness cannot be rejected outright but the evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. The court has to assess as to whether the statement of the victim before the court is the voluntary expression of the victim and that she was not under the influence of others."*

[Emphasis supplied]

30. In re: ***Mohd. Imran Khan v. State Government (NCT of Delhi)***[20] the Supreme Court in the year 2011 would hold:

> ***"Evidence of the prosecutrix***
>
> ***22.*** *It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from*

[0] (2008) 7 SCC 257

[20] (2011) 10 SCC 192

emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Evidence Act, 1872 (hereinafter called the Evidence Act), nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 of the Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

23. *The court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. Rape is not merely a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other*

witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence. (Vide State of Maharashtra v. Chandraprakash Kewalchand Jain [(1990) 1 SCC 550 : 1990 SCC (Cri) 210 : AIR 1990 SC 658] , State of U.P. v. Pappu [(2005) 3 SCC 594 : 2005 SCC (Cri) 780 : AIR 2005 SC 1248] and Vijay v. State of M.P. [(2010) 8 SCC 191 : (2010) 3 SCC (Cri) 639])

24. *Thus, the law that emerges on the issue is to the effect that statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.*

25. *The trial court came to the conclusion that there was no reason to disbelieve the prosecutrix, as no self-respecting girl would level a false charge of rape against anyone by staking her own honour. The evidence of rape stood fully corroborated by the medical evidence. The MLC of the prosecutrix, Ext. PW-2/A was duly supported by Dr. Reeta Rastogi (PW 2). This view of the trial court stands fortified by the judgment of this Court in State of Punjab v. Gurmit Singh [(1996) 2 SCC 384 : 1996 SCC (Cri) 316 : AIR 1996 SC 1393] , wherein this Court observed that: (SCC p. 395, para 8)*

> *"8. ... the courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her."*

> ***26.*** *Similarly, in Wahid Khan v. State of M.P. [(2010) 2 SCC 9 : (2010) 1 SCC (Cri) 1208] , it has been observed as under: (SCC p. 13, para 17)*
>
> *"17. It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of the repercussions flowing therefrom. If she is found to be false, she would be looked at by the society with contempt throughout her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the danger of being ostracised by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forward-looking as the western countries are."*
>
> *[Emphasis supplied]*

31. The settled law which emerges from the conspectus of the afore-quoted judgments of the Supreme Court is 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/he suffers from emotional injury. In cases of injured witnesses there is injury on the physical form, while in the cases of an injured victim the injury is physical, psychological and emotional. A child victim is a competent witness. The Court may convict the accused on the sole testimony of a child victim if it has no reason to doubt its truthfulness and veracity. Corroboration is only a matter or prudence and not a rule. In a case relating to a child victim corroboration can be dispensed with if, in the particular circumstances of a case the Court is satisfied that it is safe to rely upon the sole testimony of a child victim. The advisability of corroboration should always be in the mind of the Court as a matter of prudence. It is not a rule of practice that in every case there must be corroboration before a conviction. Where the

Court deems it proper to seek corroboration it must be kept in mind that it is not necessary that there should be independent confirmation of every material circumstance. Some additional evidence rendering it probable may be required to come to the conclusion that it is reasonably safe to act upon the testimony of the child victim as to the guilt of the accused. The corroboration need not be direct and circumstantial evidence is sufficient if it connects the accused to the crime. Since the victim is a child and therefore may be susceptible to be swayed by what others tell them the Court must remain conscious and assess whether the statement of a child victim is the voluntary expression of the victim and that she was not under influence of others.

The POCSO Act.

32. The POCSO Act is a special and landmark legislation addressing the issue of child sexual abuse in India which had been shrouded in secrecy. Due to negative social conditioning there is hesitation in reporting sexual abuse on children. Child sexual abuse if not dealt appropriately the central purpose of the POCSO Act i.e. the interest of the child would be jeopardised. It must be well remembered that in every case of child sexual abuse is the story of the child who has been abused. Who else can relate the story better than the child herself/himself ? Due to the stigma attached as well as the fright of the unknown it is extremely difficult for a child to come out in the open to narrate the story of her/his abuse. The central narrative and account of the crime often comes from the child victim. The child victim and the accused are, in most instances, the only ones present when the crime is committed. In such situation to insist upon yet another direct witness to corroborate the child victim's story would result in equating the victim to an accomplice in crime. It is also to be remembered that a skilful cross-examination is almost certain to confuse a child victim even while telling the truth which can lead to inconsistencies in their testimony. Peculiar perspective of the child victim can also affect their recollection but the Courts' duty to assess the evidence in context can only reveal the actual truth. To unnecessarily stigmatise the evidence of the child victim without proof of influence of tutoring would not fulfil the purpose of the POCSO Act sought to be achieved. Tutoring is always a question of fact which requires evidence to prove it. There is no reason to presume that a child would falsely implicate the accused merely because of her/his tender age. However, to the contrary, the POCSO Act prescribes a mandatory

presumption where a person is prosecuted for committing or abetting or attempting to commit any offence under Section 3,5,7 and 9 thereof that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.

33. Over the years the world view regarding children's testimony seems to be changing. The presumption that children are more prone to false memory reports than adults and therefore their testimony less reliable no longer holds good and it is said that according to current scientific evidence the principle that children's testimony is necessarily more polluted with false memories than adults seems to be quite indefensible. In fact it is now quite convincingly argued that adults are more susceptible to false memories compared to children as children depend more heavily on that part of the mind which records what actually happened while adults depends on another part of the mind which records the meaning of what happened. The presumptive unreliability of a child witness and more so a child victim solely on the basis of their tender age therefore, cannot be a general rule for it is equally true that adults are also susceptible to external influences. Today children are perceived to be generally more honest than adult witnesses. Credibility assessment of honesty, memory, suggestibility and communication ability must be applied to all witnesses regardless of age. The development of children's memory as compared to that of adults may require this assessment to be a little different for a child. This is where the Court must ensure proper evaluation on examination of the proved circumstances. Continues training of Special Judges manning the POCSO Act jurisdiction on children psychology amongst other things may lead to deeper understanding of a child's behavioral pattern and mental state to effectively analyze their evidence correctly and with absolute certainty.

Consideration.

34. The FIR dated 29.04.2015 which set in motion the criminal investigation against the Appellant was lodged by the victim's mother (P.W.4) stating that the Appellant had molested her daughter-the victim on 28.04.2015. The investigation resulted in filing of a charge-sheet dated 22.07.2015 concluding the commission of offences under section 354 A (i) of the IPC read with Section 8 of the POCSO Act. It was alleged that the Appellant touched the private part of the victim and fondled her body with sexual intent. On 25.09.2015 the Learned Special Judge heard the Learned

Counsels for the prosecution as well as the defence on charge. On 19.10.2015 the Learned Special Judge on examination of the charge-sheet and hearing the Learned Counsel for the prosecution as well as the defense framed two charges under Section 9(l), (m) of the POCSO Act punishable under Section 10 thereof and under Section 354 IPC. Pursuant thereto the trial commenced and summonses were issued to prosecution witnesses for the examination including the victim. On 18.11.2015 the victim was examined. In the victim's examination she also deposed that the Appellant had put his finger inside her vagina and thus the Learned Special Judge opined that the charges framed are required to be altered from section 9(l), (m)/10 of the POCSO Act to Section 5 (l), (m)/6 of the POCSO Act and from Section 354 IPC to Section 376 (2) (i), (n) of the IPC. Therefore, on 19.11.2011 the four charges were framed. The first charge alleged commission of aggravated sexual assault on the victim aged about 8 years on 28.04.2015 by repeatedly putting his hands all over her body including her private parts with sexual intent and thereby committing offence under Section 9 (l), (m) of the POCSO Act and punishable under Section 10 thereof. The second charge alleged use of criminal force against the victim intending to outrage her modesty on 28.04.2015 by repeatedly putting his hands on her body including her private parts/molesting her and thereby committing an offence punishable under Section 354 IPC. The third charge alleged commission of aggravated penetrative sexual assault on the victim on 28.04.2015 by repeatedly putting his finger inside her vagina and thereby committing offences under Section 5 (l), (m) of the POCSO Act and punishable under Section 6 thereof. The last charge alleged commission of repeated rape on the victim on 28.04.2015 by inserting his finger inside the victim's vagina repeatedly and thereby committing offence under Section 376 (2) IPC. On the Appellant pleading not guilty the trial ensued. Eight witnesses including the Investigation Officer were examined and cross-examined. The victim was examined twice, once on 18.11.2015 as P.W.1 and thereafter on 19.12.2015 as P.W.3. Dr. S. N. Adhikari was also examined as P.W.1 although the victim had already been examined earlier on 18.11.2015 as P.W.1. The Learned Special Judge must be cautious during trial and while allotting witness numbers for identification and convenience. On examination of the two depositions of the victim recorded on 18.11.2015 and 19.12.2015 although the examination-in-chief is identical the cross-examinations have minor variances. The Appellant was then examined under Section 313 Cr.P.C. and after hearing the Learned Counsel for the parties the Learned Special Judge vide judgment dated 29.12.2016

acquitted the Appellant under Section 6/10 of the POCSO Act as well as Section 376 (2) of IPC but convicted him under Section 354 IPC as well as under Section 8 of the POCSO Act. The Appellant is aggrieved by the order of conviction and hence the present appeal. The State is however, not aggrieved by the acquittal. The order on sentence dated 29.12.2016 is also under challenge by which the Appellant has been sentenced to undergo simple imprisonment of 3 years under Section 8 of the POCSO Act and to pay a fine of ₹ 10,000/- and in default of payment of fine to undergo further simple imprisonment of 3 months. The Appellant has also been sentenced to undergo simple imprisonment of 1 year under Section 354 IPC and to pay a fine of ₹ 5000/- and in default of the payment of fine to undergo further simple imprisonment of 1 month. Both the sentences has been directed to be run concurrently and the period of imprisonment undergone by the Appellant if any was directed to be set of against the period of imprisonment imposed.

35. The victim (P.W.3) in her deposition would state :

> *"I know accused Damber Singh bajey who is present before this Court. He has a shop at Mazigaon and I often used to buy sweets from there. In fact, my father had told me that whenever I wanted sweets I could go and take it from the accused's shop. On many occasions the accused put his hands all over my body including my chest and pishab garney (vagina). He used to put his finger inside my pishab garney. I did not tell about it to anyone. It was only recently that I told my mother about it."*
>
> *[Emphasis supplied]*

36. On examination of the evidence of the victim as well as her mother (P.W.4) the Learned Special Judge would hold:

> *"**17.** PW3 is the minor victim and PW4 is the mother of the minor victim. In her evidence minor victim has deposed that as her father had told her to go to the shop of the accused whenever she wanted to have sweets, she used to*

visit the shop of the accused. She has deposed that on many occasions accused put his hands all over her body including her chest and in her private parts. She has further deposed that accused used to put his finger inside her vagina. The mother of minor victim has also deposed that when she found ₹ 500/- note in the bag of the minor victim she inquired about the same and the minor victim told her that it was given by the accused. She has also deposed that minor victim told her that the accused used to put his fingers in her vagina PW3 and 4 have also proved that their statements were recorded by a Judge at Gyalshing and they have proved their respective signatures in their statements marked Exhibits 2 and Exhibit-6. In cross-examination Ld. Defence Counsel has not been able to demolished the above evidence of PWs3 and 4.

***18**. In the case in hand, the medical report of minor victim marked Exhibit 1 and Exhibit10 does not suggest that minor victim had sustained any injury in her private parts. There appears no injuries in the vagina of the minor victim which is clear from the medical reports. In the statement given before the Ld. Judicial Magistrate, West (PW 2) also the minor victim and her mother have not deposed regarding insertion of finger by the accused. Although minor victim and her mother have deposed regarding insertion of finger in the vagina by the accused, the fact that minor victim (PW 3) and her mother (PW4) have not stated about insertion of finger into the vagina of the minor victim before Ld. JM, West coupled with the fact that there is no injury on the private parts of minor victim, it is amply clear that the prosecution has failed to establish commission of penetrative sexual assault by the accused.*

> ***19.*** *However, it is clearly established from the evidence of minor victim (PW 3) and her mother (PW 4) that the accused used to put his hand all over the body of the minor victim and he used to fondle and touch the body and the private parts of minor victim. This evidence is not demolished in cross-examination. The evidence of minor victim and her mother regarding the molestation by the accused remains consistent and it is supported by their statement recorded by PW 2 under section 164 Cr.P.C. Even in the FIR marked Exhibit-8 which is proved by the mother of minor victim (PW 4), the registering officer (PW7) and the IO of the case (PW8), it is clearly stated that minor victim was molested by the accused and the contents of FIR duly supports the evidence of PW 3 and PW 4. The fabric of prosecution case as to molestation of the minor victim by the accused is not destroyed and there is nothing on record to doubt the evidence of the minor victim and her mother so far as molestation of minor victim by the accused is concerned.”*

37. The primary submission of Mr. U.P. Sharma is that the victim's statement is not reliable. To make good the said submission he would take this Court to the statements of victim recorded under Section 164 Cr.P.C. and point out that in the said statement the victim had nowhere stated about insertion of the Appellant's fingers in her vagina. However, it is pointed out that in the deposition before the Court the victim had categorically stated so. Mr. U.P. Sharma would also submit that from the deposition of the victim it is quite evident that she was not speaking the truth since she had in her examination-in-chief as well as in cross-examination stated that she had narrated about the incident to the *"Judge Madam"* as well as the police although from the record of the proceeding under Section 164 Cr.P.C. it is seen that she had not stated anything of that to the Learned Magistrate (P.W.2) and from the cross-examination of the Investigating Officer (P.W.8) it is also evident that the victim had not in fact stated so either in the statement recorded by the police under Section 161 Cr.P.C. or by the

Learned Magistrate under Section 164 Cr.P.C. Mr. U.P. Sharma would draw the attention of this Court to the findings of the Learned Special Judge more particularly to paragraphs 17 and 18 thereof and submit that having found the evidence of the victim regarding insertion of the finger in the vagina of the victim to be unreliable the evidence of the same victim regarding the Appellant touching her all over her body including her vagina cannot also be believed and ought to be rejected. Mr. U. P. Sharma would also contend that the victim alleges in her deposition that there was repeated assault on her by the Appellant by insertion of his finger on her vagina. He would submit if it was so than there would be evidence of that when she was examined two days later. However, the evidence of the Doctor (P.W.1) read with the Medical Report (exhibit-10) does not reflect that there was any injury on her person including her vagina.

38. The Learned Special Judge has not rejected the evidence of the victim as unreliable. The Learned Special Judge has held that the prosecution has failed to establish the commission of penetrative sexual assault by the Appellant. The evidence of the child victim fulfilling the ingredients of the offence remains unimpeached. On examination of the victim's deposition it is noticed that the defence has failed to cross-examine the victim regarding the discrepancy in the statement made by her before the Learned Magistrate under Section 164 Cr.P.C. and the examination-in-chief in spite of two opportunities to cross-examine the victim. In fact to a suggestion made by the defence the victim has asserted that she had told the *"Judge Madam"* as well as the police that the Appellant had inserted his finger in her vagina. A statement of a witness including a victim recorded under Section 164 Cr.P.C. is not a substantive piece of evidence whereas the deposition in Court tested by cross-examination is. The Learned Special Judge who has had the opportunity to conduct the trial and observe the demeanor of the witnesses has come to a conclusion that the prosecution has established the commission of offences under Section 8 of the POCSO Act and Section 354 IPC but has failed to establish the commission of penetrative sexual assault by the Appellant. The evidence of the victim that the Appellant on many occasions put his hands all over her body including her chest and vagina has been consistent during the investigation and the trial. The Learned Special Judge has believed the deposition of the victim and found corroboration from the deposition of the victim's mother (P.W.4) and the FIR (exhibit-8). The victim as well as the victim's mother (P.W.4) hails from a humble background. The evidence suggests that the victim's

mother (P.W.4) and her father were living separately. The victim, a student of class IV and aged about 8 years was staying with the mother. Social conditioning is an important area for appreciating evidence given by witnesses. The FIR dated 29.04.2015 lodged by the victim's mother (P.W.4) immediately after the incident alleged that the victim had been molested by the Appellant. The spontaneity of the FIR itself assures the credibility of the evidence of the victim. Most disclosures in child sexual abuse cases are made to family members. It was natural of the victim to have disclosed about the incident to the mother who immediately lodged the FIR. The victim was examined by the Learned Magistrate on 07.05.2015 and her statement recorded under Section 164 Cr.P.C. after just about a week from the lodging of the FIR in which she categorically alleged that the Appellant put his hand on her private part. Thereafter the victim appeared in Court on 18.11.2015 and deposed that the Appellant had on many occasions put his hand all over her body including her chest and vagina. The child victim also identified the Appellant as Damber Singh "*bajey*" *(grandfather in Nepali)*. The records reveal that the victim was examined and cross-examined again on 19.12.2015 on which date she once again deposed that the Appellant had on many occasions put his hands all over her body including her chest and vagina. She once again identified the Appellant. The identification of the Appellant by the victim as well as other witnesses is not disputed. It is also not in dispute that the Appellant has a shop from where the victim would often buy sweets. Although the Appellant has denied the factum of the victim having known him in his statement under Section 313 Cr.P.C. it is the defence of the Appellant that the victim used to take away money from his shop without his knowledge and when the school informed the victim's mother (P.W.4) about the victim having so much money she falsely implicated the accused. This was a fact asserted by the Appellant and therefore, it was incumbent upon the Appellant to prove it. No evidence whatsoever has been put forth even to probabilise the said assertion of false implication. The false defence must also be considered and would provide a vital link. On the very day of the lodging of the FIR the victim was produced before the Medical Officer, Dr. S. N. Adhikari who also states in cross-examination that the victim had told him that the Appellant had tried to touch her private part with his finger. The evidence of the Learned Magistrate (P.W.2) who recorded the statement of the victim under Section 164 Cr.P.C. assures the Court that the victim had also voluntarily given the statement implicating the Appellant of having tried to put his hand on her private part. There is an element of truth in the natural

statement of the victim's mother (P.W.4) as to how she first realized that the victim had been sexually abused by the Appellant by putting his fingers in her vagina. There is no denial by the defence with regard to the same although opportunity of cross-examination had been availed. In fact there is no denial of the assertion of the victim's mother (P.W.4) that immediately after she was informed by the victim about the incident she had confronted the Appellant after having been pointed out by the victim about the incident and also slapped him. The victim's deposition is adequately corroborated.

39. It is true that P.W.5 the Gynaecologist who examined the victim and gave his Medical Report (exhibit-10) did not find anything to suggest recent vaginal or anal penetration nor did Dr. S. N. Adhikari find any injury on the person of the victim including her private parts. However, this Court is reluctant to surmise therefore, that the evidence of the victim is false on the ground that if the victim had been sexually assaulted repeatedly by the Appellant on her vagina there ought to have been injury. The deposition of the victim relied upon by the Learned Special Judge and found true to convict the Appellant is the allegation that the Appellant had put his hands all over her body including her chest and vagina. Mere touch would not result in injury but coupled with sexual intent it would bring home the offence.

40. The Learned Special Judge has correctly scrutinized the evidence carefully and separated the grain from the chaff. The substratum of the prosecution case and the material parts of the evidence has been believed by the Learned Special Judge. The version of insertion of the Appellant's finger into the vagina of the victim stated for the first time in Court by the victim has been discarded. In such circumstances it may be extremely difficult to apply the maxim-*falsus in uno, falsus in omnibus* and ignore the consistent evidence of the victim as well as the victim's mother (P.W.4) from the time of the lodging of the FIR till the end of the trial that it was the Appellant who had on many occasions put his hands all over the victim's body including her chest and vagina. The said maxim-*falsus in uno, falsus in omnibus* is *"neither a sound rule of law nor a rule of practice*."

41. Mr. U. P. Sharma would rely upon a judgment of the Supreme Court rendered on appreciation of the sole testimony of a victim which suffered from substantial infirmities and inconsistencies and held that on the

basis of that conviction cannot be sustained. In re: ***Sudhir & Anr. vs. State of Madhya Pradesh***[21] the Supreme Court would hold:

> *“**3.** Immediately after the assault Kamal went to a police station but, according to his own admission, though enquiries were made of him at the police station as to what had happened to him and how he came to receive the injuries, he did not tell the police as to who assaulted him. A few hours thereafter, he lodged his first information report which is described in the proceedings as a “village complaint.” The story narrated by him in the FIR is that the appellants and one of the other three accused, namely, Premlal, came from behind; that Appellant 1 stabbed him on his back two times; and that, Appellant 2 and Premlal assaulted him with a danda. The evidence of the doctor shows that there were no injuries on Kamal’s person which could be caused by a danda. In fact, Kamal admitted in his evidence that Appellant 2 did not beat him with a danda and that he had only beaten him with fists. Kamal has also stated in his evidence, which is contrary to his statement in the FIR, that he had not seen as to which of the accused persons had caused the knife injuries to him. He gave a plausible explanation of his inability to identify his assailants by saying that since injuries were caused to him from behind, he could not identify the persons who caused those injuries. Suprisingly, Kamal virtually jettisoned the FIR by saying that he had stated that two persons were armed with knives while two others had lathis. He admitted that he had not mentioned their names in the FIR, and that, all that he had disclosed when the FIR was recorded was that he was assaulted with a knife.*
>
> ***4.** In view of these infirmities in the evidence of Kamal, whose testimony alone could*

[21] (1985) 1 SCC 559

> *sustain the conviction of the appellants, the appeal has to be allowed and the order of conviction and sentence in regard to both the appellants has to be set aside. The bail bonds of the appellants are cancelled."*

42. The minor discrepancies brought out by clever cross-examination in the present case cannot be equated to substantial infirmities in the evidence of the victim as pointed out in the afore-quoted paragraphs 3 and 4 of the judgment of the Supreme Court in re: ***Sudhir & Anr. (supra)***.

43. Mr. U.P. Sharma would also contend that the Doctor who examined the victim in cross-examination very clearly stated that the victim had stated before him that the Appellant had tried to touch her private part with his fingers and not that he had actually done so. Dr. S. N. Adhikari was the Medical Officer at the Primary Health Centre who examined the victim on 29.04.2015 for a medical examination with an alleged history of having been molested by an elderly person on 28.04.2015. He exhibited his Medical Report (exhibit-1). In the said medical report Dr. S. N. Adhikari had recorded that *"as per the statement of victim, the accused person tried to touch her private parts with his finger"*. In cross-examination the said Dr. S. N. Adhikari admitted that the victim had stated before him that the Appellant had tried to touch her private part with his finger. Quite cleverly the defence did not confront the said witness with the discrepancy in the evidence of the victim. When there is a variance between direct evidence of the victim tested by cross-examination and the evidence of a witness who heard the victim it is the direct evidence which must be given due weightage. In any event even if the version of Dr. S. N. Adhikari in cross-examination is to be considered alone it would still not take the Appellant out of the mischief of Section 8 of the POCSO Act as the definition of *Sexual Assault* in Section 7 of the POCSO Act would also include the act of trying to touch the victims private part with his finger which would be covered by the later part of the said Section i.e. "*….or does any other act with sexual intent which involves physical contact without penetration*". The act of trying to touch the victim's private part may also involve physical contact with sexual intent. The act of the Appellant, an elderly shop owner of trying to touch an eight year old girl child victim's private part with his finger when she would visit his shop would itself establish the sexual intent. Section 7 of the POCSO Act reads thus:

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

44. Mr. U.P. Sharma would also submit that material witness in the present case have not been examined by the prosecution creating serious doubt in the prosecution case. He would refer to the statement of the victim recorded under section 164 Cr.P.C. and point out that the victim had stated before the Learned Magistrate that she had come to meet her father who lived near the river side and that it was her father who introduced her to the Appellant. She had also stated that she had reported the incident to her father. However, the father of the victim was not examined by the prosecution. Furthermore, it is submitted that the school authorities from whom the entire story for the prosecution unfolded have also not been examined by the prosecution. It is submitted by Mr. U. P. Sharma that the victim in her deposition had categorically stated when the Appellant sexually assaulted her she had cried. However, strangely not a single person from the vicinity or otherwise heard the victim's cries.

45. A perusal of the list of witnesses to the charge-sheet filed under Section 173 Cr.P.C. proposed to be examined by the prosecution would reflect that the father of the victim was not named therein. Thus, it is clear that the prosecution never projected that the evidence of the father would be material to establish the case against the Appellant. P.W.8 was the Investigating Officer. She was cross examined by the defence. The defence did not cross-examine the Investigating Officer on the aspect of withholding of the evidence of the father of the victim as being a material witness. The Principal of the School in which the victim was studying at the relevant time was examined as (P.W.6.). No question was put to the said Principal to even probabilise the defence version that it was because of the teachers of his school having discovered ₹ 1000/- with the victim that the victim made a false accusation against the Appellant. The investigation of the case commenced after the lodging of the FIR (exhibit-9) by the victim's mother (P.W.4.). In the said FIR it was alleged that the Appellant had molested her 8 years old daughter-the victim. The prosecution version was that on one

particular day, the victim's mother (P.W.4) noticed that her daughter was frequently passing urine which seemed unusual to her, so she asked her daughter-the victim if she was having any problem. The victim refused to tell anything. The mother checked the child's school bag wherefrom she found two ₹ 500/- notes. When scolded, the victim first said the money came from her father but the mother did not believe her and beat her whereafter the victim narrated the incident of how she was physically abused by the Appellant. It was not the case of the prosecution therefore, that the story of the crime unfolded from the teachers at the victim school finding ₹ 1000/- with the victim and reporting it to the victim's mother (P.W.4). This version was a defence version sought to be introduced during the cross-examination of the victim. Similarly, it was the defence version introduced in cross-examination by a suggestion that the victim would cry out for help during the time when the Appellant used to abuse her. It is trite that one who alleges must prove the alleged fact. Section 101 of the Indian Evidence Act, 1872 harnesses the burden of proving the existence of facts which he asserts on the person who asserts the said fact. It was not the case of the prosecution that there were number of shops in the vicinity where the offence took place and therefore the cry of the victim during the abuse ought to have been heard by people. It was the defence who desired the Court to give judgment on the existence of the said facts which they asserted and thus it was incumbent upon the defence to discharge the said burden. This burden cannot be harnessed upon the prosecution which did not assert the said facts. A similar question of the failure of the prosecution to examine purported material witnesses came up before the Supreme Court in re: ***Manjit Singh & Anr. vs. State of Punjab & Anr.***[22]. The Supreme Court would examine various judgments rendered by it on the said issue and hold:

> ***"17.*** *The first submission of Mr U.U. Lalit is that the non-examination of two crucial witnesses, namely, Didar Singh and Malkiat Singh creates a great doubt in the prosecution version which makes it absolutely incredible. On a perusal of the material on record it is clear that Didar Singh had come to the spot along with Rajinderpal Singh, PW 2, and had arranged a car to take the deceased and the injured to the hospital and at his instance the site plan was prepared. As far as Malkiat Singh is concerned, the assertion is that*

[22] (2013) 12 SCC 746

he had carried the deceased and the injured to the hospital but the evidence in this regard is extremely sketchy. Be that as it may, thrust of the matter is whether non-examination of these two witnesses materially affects the trustworthiness of the prosecution version or to put it differently, whether it really creates a dent in the testimony of the other eyewitnesses and the surrounding circumstances on which the prosecution has placed reliance to bring home the guilt of the accused.

***18.** In this context, a passage from Masalti v. State of U.P. [AIR 1965 SC 202 : (1965) 1 Cri LJ 226] may fruitfully be reproduced: (AIR p. 209, para 12)*

> *"12. In the present case, however, we are satisfied that there is no substance in the contention which Mr Sawhney seeks to raise before us. It is not unknown that where serious offences like the present are committed and a large number of accused persons are tried, attempts are made either to terrorise or win over prosecution witnesses, and if the prosecutor honestly and bona fide believes that some of his witnesses have been won over, it would be unreasonable to insist that he must tender such witnesses before the court. It is undoubtedly the duty of the prosecution to lay before the court all material evidence available to it which is necessary for unfolding its case; but it would be unsound to lay down as a general rule that every witness must be examined even though his evidence may not be very material or even if it is known that he has been won over or terrorised."*

19. In Namdeo v. State of Maharashtra [(2007) 14 SCC 150 : (2009) 1 SCC (Cri) 773] it has been laid down that: (SCC p. 161, para 28)

> *"28. ... Neither the legislature (Section 134 of the Evidence Act, 1872) nor the judiciary mandates that there must be particular number of witnesses to record an order of conviction against the accused. The legal system [in this country] has always laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses."*
>
> *(emphasis in original)*

20. In Bipin Kumar Mondal v. State of W.B. [(2010) 12 SCC 91 : (2011) 2 SCC (Cri) 150] the Court reiterated the principle stating that (SCC p. 99, para 31) it is not the quantity, but the quality thatis material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible, trustworthy and reliable.

21. In State of H.P. v. Gian Chand [(2001) 6 SCC 71 : 2001 SCC (Cri) 980] it has been ruled that: (SCC p. 81, para 14)

> *"14. ... Non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court levelled against the prosecution should be examined in the background of*

the facts and circumstances of each case so as to find whether the witnesses are available for being examined in the court and were yet withheld by the prosecution.”

22. *In Takhaji Hiraji v. Thakore Kubersing Chamansing [(2001) 6 SCC 145 : 2001 SCC (Cri) 1070] the Court has opined that: (SCC p. 155, para 19)*

“19. ... It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself—whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was

being withheld from the court? If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses."

23. *In Dahari v. State of U.P. [(2012) 10 SCC 256 : (2013) 1 SCC (Cri) 22] while discussing about the non-examination of material witness, the Court has ruled that when the witness was not the only competent witness who would have been fully capable of explaining the factual situation correctly, and the prosecution case stood fully corroborated by the medical evidence and the testimony of other reliable witnesses, no adverse inference could be drawn against the prosecution. Similar principle has been reiterated in Harivadan Babubhai Patel v. State of Gujarat [(2013) 7 SCC 45 : (2013) 3 SCC (Cri) 27] .*

24. *From the aforesaid exposition of law, it is quite clear that it is not the number and quantity, but the quality that is material. It is the duty of the Court to consider the trustworthiness of evidence on record which inspires confidence and the same has to be accepted and acted upon and in such a situation no adverse inference should be drawn from the fact of non-examination of other witnesses. That apart, it is also to be seen whether such non-examination of a witness would carry the matter further so as to affect the evidence of other witnesses and if the evidence of a witness is really not essential to the unfolding of the prosecution case, it cannot be*

> *considered a material witness (see State of U.P. v. Iftikhar Khan [State of U.P. v. Iftikhar Khan, (1973) 1 SCC 512 : 1973 SCC (Cri) 384]"*

46. The evidence of the father of the victim would at the most be a reiteration of what the victim told her mother who has been examined as a prosecution witness. This Court is of the view that the evidence on record is trustworthy and inspires confidence and the same has to be accepted and acted upon and in such a situation no adverse inference should be drawn from the fact of non-examination of other witnesses. Examination of the father of the victim, the teachers of the school where the victim was studying who allegedly discovered ₹ 1000/- with the victim and the alleged persons allegedly in the vicinity of the place of occurrence would not carry the matter further so as to affect the evidence of the victim and her mother as well as other witnesses examined by the prosecution. This Court is also of the view that the evidence of the persons introduced by the defence in cross-examination of prosecution witnesses are really not essential to the unfolding of the prosecution case and therefore, cannot be considered as material witnesses.

47. Mr. U.P. Sharma would further submit that the victim's deposition read with the deposition of her mother makes it amply clear that she has made conflicting and diverse statement regarding the money in her possession by giving an explanation to the mother at one point of time as having been given by the father and yet in another blaming the Appellant for it. It is submitted that this also makes it evident that the victim was quite in the habit of making false statement and cumulatively the effect of it would be to render the evidence of the victim unreliable. Let us thus examine the said evidence of the victim as well as her mother and analyze if it would make any material difference in the prosecution case. The victim did not state anything about the money during her examination-in-chief. However, in cross-examination the victim admitted the suggestion of the defence and stated:-

> *"It is true that during the time of the above incident the school authorities had found ₹ 1000/- with me and they intimated my mother about it. It is true that my mother had also found ₹ 1000/- in my bag at home. Witness volunteer to*

> *say, the accused used to give me money after sexually abusing me. It was later found with me in the school and at my house. He gave money on many occasions. I was asked about this case by the police and the Judge Madam. It is true that I had told the police and the Judge Madam that the accused used to give me money after abusing me on different occasions. It is true that during the time when the accused used to abuse me I used to cry out for help. Besides my mother I had not divulged about the incident to anyone. It is true that I had stated to the Judge Madam that I had divulged about the incident to my father who, however, did not listen to me. It is true that when my mother initially asked me why the accused had given me money I told her that he used to abuse me and for that he gave me money. It is true I had also stated the said fact to the police and the Judge Madam. It is not a fact that the accused person did not abuse me sexually. It is true that initially I had not divulged about the incident to my mother. It was only when she started hitting me on finding money in my bag that I told her that the accused had abused me."*

48. The subsequent cross-examination of the victim on 19.12.2015 being almost identical and having no material difference from the one quoted above it is not felt necessary to quote the said deposition too. However, this Court has examined and considered the said cross-examination also. The deposition of the victim's mother (P.W.4) was recorded by the Learned Special Judge. In the said deposition contrary to the mandate of Section 33(7) of the POCSO Act the name of the victim has been disclosed which is illegal and unwarranted. The said deposition is required to be quoted herein. This Court has therefore, withheld the name of the victim as well as her father found in the deposition of the victim's mother (P.W.4) to ensure that the identity of child is not disclosed. The victim's mother (P.W.4) in her examination-in-chief itself deposed that:-

> *"On 28.04.2015, sometime during the daytime I saw **xxx** (name of the victim withheld) frequently to the toilet. I asked her if she has any problem. She did not tell me anything. After sometime when I was checking her bag I found two ₹ 500/- notes in her bag. I asked her about it on which she told me that her father **xxx** (name of the father withheld) had given it to her. Since I knew the financial condition of my husband, with whom I have already separated, I told **xxx** (name of the victim withheld) that her father could not have given the said money. As she was reluctant to tell me anything I started beating her on which she told me that one bajey had given her the said money. She also told me that the said bajey used to put his fingers in her pishab garney. I then told her to show me that bajey on which she took me to the shop of the accused and pointed towards the accused. Even in front of the accused **xxx** (name of the victim withheld) told me that he was the one to give her money after putting his fingers in her pishab garney. I then charged the accused and also slapped him. ……………. Prior to the above incident I had once found a ₹ 1,000/- note in the hands of **xxx** (name of the victim withheld). On inquiry she told me that it had been given by her father. I did not inquire further. …………"*

49. The victim's mother (P.W.4) in cross-examination would state:

> ***<u>"Cross-examination on behalf of the accused</u>***
>
> *"It is true that on the relevant day (28.04.2015) my daughter came home at around 1:30 p.m. and went to the toilet. It is true that I spent the two ₹ 500/- notes which were found inside the bag of my daughter on 28.04.2015. It is true that when I found the ₹ 1,000/- note on*

> *earlier occasion. I did not beat my daughter. I asked her about it on which she told me that it was given to her by her father/my husband. It is true that I had stated before the Judge Madam and the police that my daughter had told me that the accused had inserted his finger into her pishab garney. It is true that the school authorities had intimated me about my daughter carrying ₹ 1000 in school (on earlier occasion). It is not a fact that on finding the two ₹ 500/- notes I had straightaway asked my daughter if she had been sexually assaulted by the accused on which she simply answered in the affirmative. It is not a fact that after lodging the report (Exhibit-8) my daughter told me that she had in fact been taking money from the shop of the accused without his knowledge. It is not a fact that I am deposing falsely."*

50. The evidence of the victim during cross-examination regarding the money suggests that during the time of the incident the school authorities had found ₹ 1,000/- with her and informed the mother about it. The evidence of the victim's mother (P.W.4) also corroborates the evidence of the victim during cross-examination that in fact the school authorities had found ₹ 1,000/- with her and informed the mother about it. The evidence of the victim in cross-examination also suggests that the mother had also found ₹ 1,000/- in her bag at home. The witness volunteered to say that the Appellant used to give her money after sexually abusing her and that it was later found with her both in school and at her home. The victim also volunteered to depose that the Appellant had given money to her on many occasions. The defence did not even take a denial of the aforesaid deposition of the victim. On a suggestion made by the defence the victim in fact stated that she had told the police as well as the *"Judge Madam"* that the Appellant used to give her money after abusing her on different occasions. The suggestion makes it evident that there was no denial of either the sexual abuse or the giving of money to the victim by the Appellant after the abuse. Mr. U. P. Sharma would submit that the very fact that the Investigating Officer as well as the Learned Magistrate who recorded the Section 164 Cr.P.C. statement of the victim did not record the factum of the

giving of money by the Appellant to the victim in the statements recorded would amply reflect that in fact the victim had not made such a statement regarding money either to the police or to the Learned Magistrate. The victim was cross-examined by the defence. However, the defence did not deem it necessary to confront the victim with her statement recorded under Section 161 as well as Section 164 Cr.P.C. The Learned Magistrate who recorded the statement of the victim was examined as P.W.2. She was cross-examined. She stated that the victim did not mention that the Appellant used to give her money after alleged sexual abuse on her. The Investigating Officer who conducted the investigation was also cross-examined. She also agreed that the victim had not stated about ₹ 500/- notes being found in her bag in her statement recorded under Section 161 Cr.P.C. The failure of the defence to confront the victim with the purported statement recorded under Section 161 Cr.P.C. or the Section 164 Cr.P.C. statement recorded by the Learned Magistrate deprives this Court from knowing the truth as to why the victim did not state about the money while giving the said statements. The examination of the deposition of the victim reflects that she did not state anything about money even during her examination-in-chief in Court. However, on the intrusive cross-examination by the defence she narrated about the money. The victim's mother (P.W.4) however, has very cogently deposed that she had discovered two ₹ 500/- notes in her bag which initially the victim said was given by her father but later on admitted that the said money was in fact given by the Appellant to the victim after he had sexually abused her. The cross-examination of the victim's mother (P.W.4) did not demolish this version. In fact the victim's mother (P.W.4) asserted the truthfulness of the suggestion of the defence that the said two ₹ 500/- notes which were found inside the victim's bag on 28.04.2015 were spent by her. On the suggestion of the defence the victim's mother (P.W.4) also asserted that it was true that the school authorities had intimated her about her daughter carrying ₹ 1,000/- in school on earlier occasion. The substratum of the prosecution case found proved by the Learned Special Judge is the commission of the offence of sexual assault on the victim as well as the commission of the offence of assault or criminal force to woman with intent to outrage her modesty. It is the consistent evidence of the victim that the Appellant had on many occasions put his hands all over her body including her chest and vagina. The defence has not been able to demolish these facts. The establishment of the factum of the Appellant giving money to the victim after the commission of the crime only fortifies the case of sexual abuse if proved. The failure to recover

the money is of no consequence as on the suggestion of the defence the victim's mother (P.W.4) deposed that she had used the same. The victim's hesitation to state about the money and who gave it to her and when confronted by the victim's mother (P.W.4) is understandable. As per the evidence available the victim having been given the money by the Appellant after the sexual abuse had not disclosed it to her mother. It is quite evident that the victim of sexual abuse by the Appellant having received money was reluctant to disclose the fact. The minor discrepancies appearing in the evidence of the victim and her mother about the money does not shake the foundational facts establishing the ingredients of the offence of sexual assault or assault on the victim with intent to outrage her modesty.

51. The Learned Special Judge has also found that the evidence put forth by the prosecution was sufficient to establish a case against the Appellant under Section 354 IPC. Section 354 IPC reads thus:-

> ***"354. Assault or criminal force to woman with intent to outrage her modesty**.—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

52. The ingredients required to be established to bring an accused within the mischief of Section 354 IPC are:- (i) Assault or use of criminal force on a woman. (ii) The said assault or use of criminal force must be intended to outrage or knowing it to be likely that he will thereby outrage her modesty.

53. Section 10 IPC provides :

> ***"10**. "Man," "Woman." – The word man denotes a male human being of any age; the word "woman" denotes a female human being of any age."*

54. Section 351 IPC defines assault as :

> *"**351. Assault**.—Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.*
>
> *Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault."*

55. In re: ***Raju Pandurang Mahale v. State of Maharashtra***[23] the Supreme Court would hold:

> *"**11.** Coming to the question as to whether Section 354 of the Act has any application, it is to be noted that the provision makes penal the assault or use of criminal force on a woman to outrage her modesty. The essential ingredients of offence under Section 354 IPC are:*
>
> *(a) That the assault must be on a woman.*
>
> *(b) That the accused must have used criminal force on her.*
>
> *(c) That the criminal force must have been used on the woman intending thereby to outrage her modesty.*
>
> ***12**. What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this section is an attribute associated with female human beings as a class. It is a virtue which*

[23] (2004) 4 SCC 371

attaches to a female owing to her sex. The act of pulling a woman, removing her saree, coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman; and knowledge, that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word modesty is not defined in IPC. The Shorter Oxford Dictionary (3rd Edn.) defines the word "modesty" in relation to a woman as follows:

"Decorous in manner and conduct; not forward or lewd; Shamefast; Scrupulously chaste."

13. *Modesty is defined as the quality of being modest; and in relation to a woman, "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct." It is the reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions. As observed by Justice Patteson in R. v. James Lloyd [(1836) 7 C&P 317 : 173 ER 141]:*

In order to find the accused guilty of an assault with intent to commit a rape, court must be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on her part.

The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her.

14. *Webster's Third New International Dictionary of the English language defines modesty as "freedom from coarseness, indelicacy or indecency: a regard for propriety in dress, speech or conduct." In the Oxford English Dictionary (1933 Edn.), the meaning of the word "modesty" is given as womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions."*

15. *In State of Punjab v. Major Singh [AIR 1967 SC 63 : 1967 Cri LJ 1] a question arose whether a female child of sevenand-a-half months could be said to be possessed of modesty which could be outraged. In answering the above question the majority view was that when any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that must fall within the mischief of Section 354 IPC. Needless to say, the "common notions of mankind" referred to have to be gauged by contemporary societal standards. It was further observed in the said case that the essence of a woman's modesty is her sex and from her very birth she possesses the modesty which is the attribute of her sex. From the above dictionary meaning of "modesty" and the interpretation given to that word by this Court in Major Singh case [AIR 1967 SC 63 : 1967 Cri LJ 1] the ultimate test for ascertaining whether modesty has been outraged is whether the action of the offender is such as could be perceived as one which is capable of shocking the sense of decency of a woman. The above position was noted in Rupan Deol Bajaj v. Kanwar Pal Singh Gill [(1995) 6 SCC 194 : 1995 SCC (Cri) 1059]. When the above test is applied in the present*

> *case, keeping in view the total fact situation, the inevitable conclusion is that the acts of the accused-appellant and the concrete role he consistently played from the beginning proved combination of persons and minds as well and as such amounted to "outraging of her modesty" for it was an affront to the normal sense of feminine decency. It is further to be noted that Section 34 has been rightly pressed into service in the case to fasten guilt on the accused-appellant, for the active assistance he rendered and the role played by him, at all times sharing the common intention with A-77 4 and A-2 as well, till they completed effectively the crime of which the others were also found guilty."*
>
> *[Emphasis supplied]*

56. The evidence of the victim clearly satisfies the commission of assault on the victim to outrage her modesty punishable under Section 354 IPC.

57. This Court is of the firm view that the judgment of conviction dated 29.12.2016 sought to be assailed by the Appellant need no interference. Accordingly the judgment dated 29.12.2016 passed by the Learned Special Judge, of the POCSO Act South Sikkim at Namchi in Sessions Trial (POCSO) Case No.16 of 2015 is upheld. However, the provision of Section 71 IPC must be taken into consideration which provides where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished the offender shall not be punished with the more severe punishment than the Court which tries it could award for any one of such offences. A perusal of the evidence proved by the prosecution makes it amply clear that for the same set of facts the Appellant has been sentenced under Section 8 of the POCSO Act as well as Section 354 IPC which is not permissible. The Learned Special Judge has sentenced the Appellant to undergo simple imprisonment of 3 years under Section 8 of the POCSO Act and to pay a fine of ₹ 10,000/- and in default of payment of fine to undergo further simple imprisonment of 3 months which is the more severe punishment compared to the sentence imposed under Section 354 IPC to undergo simple imprisonment of 1 year and to pay a fine of ₹ 5000/- and in default

of payment of fine to undergo further simple imprisonment of 1 month. In view of Section 71 IPC it is impermissible to impose the sentence under Section 354 IPC since the Learned Special Judge has imposed the sentence under Section 8 of the POCSO Act which is more severe and therefore, the sentence under Section 354 IPC is set aside. The period of imprisonment undergone by the Appellant is directed to be set of against the period of imprisonment imposed. The order on sentence dated 29.12.2016 is modified to the above extent. This Court has examined the order on sentence dated 29.12.2016 relating to the offence punishable under Section 8 of the POCSO Act and is also of the view that the sentence passed against the Appellant is commensurate with the gravity of the offence proved and hence requires no interference. The said order dated 29.12.2016 to the said extent is also upheld. The Appellant is in jail and shall continue there to serve out the remaining sentence as modified.

58. The Learned Special Judge even while coming to the conclusion of the guilt of the Appellant and convicting the Appellant for the offences punishable under Section 8 of the POCSO Act and Section 354 IPC has not determined the quantum of compensation which ought to have been granted to the victim under the Sikkim Compensation to Victims or his Dependents Schemes, 2011. The Sikkim State Legal Services Authority is therefore directed to pay an amount of ₹ 50,000/- to the victim as compensation. The said amount of ₹ 50,000/- shall be kept in fixed deposit in the name of the victim payable on her attaining majority.

SLR (2018) SIKKIM 866
(Before Hon'ble Mr. Justice Bhaskar Raj Pradhan)

I. A. No. 01 of 2018
in
MAC App. No. 04 of 2018

Branch Manager,
Shriram General Insurance Co. Ltd. ..... **APPELLANT**

Versus

Shri Navin Chettri and Others ..... **RESPONDENTS**

For the Appellant: Mr. Yadev Sharma, Advocate.

For the Respondents: Ms. Pritima Sunam and Ms. Tashi Doma Bhutia, Advocates

Date of decision: 18th July 2018

A. Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – The statute of limitation is founded on public policy – Aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression – Seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale.

(Para 12 (i))

B. Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – Law of limitation not enacted with the object of destroying the rights of the parties but to ensure that they approach the Court without unreasonable delay – Every remedy should remain alive only till the expiry of the period fixed by the legislature.

(Para 12 (ii))

C. Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – An unlimited limitation would lead to a sense of insecurity and

uncertainty – Limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches.

(Para 12 (iii))

D. Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – Sufficient Cause – Expression construed liberally in keeping with its ordinary dictionary meaning as adequate or enough – Any justifiable reason resulting in vacation has to be understood as sufficient cause – Necessarily implies an element of sincerity, *bona fide*, and reasonableness – Liberal construction of the expression "sufficient cause" is intended to advance substantial justice – Expression used in statutes is elastic enough to enable the Courts to apply the law in meaningful manner which serves the ends of justice – Expression "sufficient cause" implies the presence of legal and adequate reasons. The word "sufficient" means adequate enough, as much as may be necessary to answer the purpose intended – The test of "sufficient cause" is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike – The statute of limitation has left the concept of "sufficient cause" delightfully undefined, thereby leaving to the Court a well-intentioned discretion to decide the individual cases whether circumstances exist establishing sufficient cause.

(Para 12 (iv), (vi), (vii), (viii), (xi) and (xvi))

E. Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – Even though a liberal and justice-oriented approach is required to be adopted, the Courts can not become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.

(Para 12 (x))

F. Motor Vehicles Act, 1988 – S. 173 (1) – Condonation of Delay – The party should show that besides acting *bona fide*, it had taken all possible steps within its power and control and had approached the Court without any unnecessary delay – In case a party is found to be negligent, or for want of *bona fide* on his part in the facts and

circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No Court could be justified in condoning such an inordinate delay by imposing any condition whatsoever.

(Para 12 (xii) and (xvii))

G. Motor Vehicles Act, 1988 – S. 173(1) – Condonation of Delay – Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes – Court has no power to extend the period of limitation on equitable grounds.

(Para 12 (xiv))

H. Motor Vehicles Act, 1988 – S. 173(1) – Condonation of Delay – Sufficient Cause – Two important considerations – First is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties – Second, is that this legal right which has accrued to the decree-holder by lapse of time should not be lightheartedly disturbed.

(Para 12 (xv))

Application and appeal dismissed.

Chronological list of cases cited:

1. N. Balakrishnan v. M. Krishnamurthy, (1988) 7 SCC 123.
2. Surinder Singh Sibia v. Vijay Kumar Sood, (1992) 1 SCC 70.
3. Sankaran Pillai v. V.P. Venuguduswami, (1999) 6 SCC 396.
4. Balwant Singh v. Jagdish Singh, (2010) 8 SCC 685.
5. Martin Burn Ltd. v. Corpn. of Calcutta, (1966) 1 SCR 543.
6. Ramlal v. Rewa Coalfields Limited, AIR 1962 SC 361.
7. R.B. Ramlingam v. R.B. Bhvaneswari, (2009) 2 SCC 689.
8. Maniben Devraj Shah v. Municipal Corpn. of Brihan Mumbai, (2012) 5 SCC 157.
9. Basawaraj v. Land Acquisition Officer, (2013) 14 SCC 81.

10. Shriram General Insurance Co. Ltd v. Mr. Kezang Kazi and Another, 2018 SCC OnLine Sikk 128.

ORDER

Bhaskar Raj Pradhan, J

1. Heard Mr. Yadev Sharma, learned Counsel for the Applicant and Ms. Pritima Sunam, learned Counsel for the Respondent No.1 and 2. The present application was listed for hearing on 04.07.2018 when the learned Counsel for the Applicant sought time to prepare for the matter and the application was listed for hearing on 09.07.2018. Mr. Yadev Sharma would seek to rely upon the Judgment of the Supreme Court in re: ***N. Balakrishnan v. M. Krishnamurthy***[1], in which it was held:

> *"**11**. Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis Mum (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time."*

[1] (1988) 7 SCC 123

2. This is an application seeking condonation of delay for a period of 122 days in filing the Appeal against the judgment of the Motor Accident Claims Tribunal, West Sikkim at Gyalzing (Motor Accident Claims Tribunal) preferred under Section 173(1) of the Motor Vehicles Act, 1988 (the said Act) which provides:

> *"**173**. Appeals.-(1) Subject to the provisions of sub-section (2) any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court:*
>
> *Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees or fifty per cent of the amount so awarded, whichever is less, in the manner directed by the High Court.*
>
> *Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time."*

3. Section 173(1) of the said Act therefore mandates that any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an Appeal to the High Court. The proviso thereto however, gives discretion to the High Court to entertain the Appeal after the expiry of the said period of 90 days, if it is satisfied that the Appellant was prevented by sufficient cause from preferring the Appeal in time. What is *"sufficient cause"* is although not explained in the said Act is however, well understood. The expression *"sufficient cause"* is used in different Acts. The Supreme Court has explained the expression *"sufficient cause"* appearing in different Acts in the following manner:

4. **In re:** ***Surinder Singh Sibia v. Vijay Kumar Sood***[2] the Supreme Court would interpret the expression *"sufficient cause"* as appearing in

[2] (1992) 1 SCC 70

Section 14 (3) of the Himachal Pradesh Requisition and Acquisition of Immovable Property Act, 1972 in the following manner:

> *“**2.** Sub-section (3) of Section 14 is extracted below:*
>
> > *“14. (3) A landlord may apply to the Controller for an order directing the tenant to put the landlord in possession—*
>
> *(a) in the case of a residential building, if—*
>
> *(i) he requires it for his own occupation:*
>
> *Provided that he is not occupying another residential building owned by him, in the urban area concerned:*
>
> *Provided further that he has not vacated such a building without sufficient cause within five years of the filing of the application, in the said urban area;”*
>
> *It enables a landlord to obtain an order for eviction of the tenant if he requires the building for his own occupation and he has no other building in the area concerned. This right however stands deferred under second proviso for a period of five years if the landlord has vacated a building in his use without sufficient cause. The question is how the expression, ‘he has not vacated such building without sufficient cause’ in the second proviso should be construed. It has two aspects one whether the proviso applies to voluntary vacation only or it extends to vacating under pressure of legal proceedings such as requisition order by competent authority. Second even assuming that the expression ‘vacate such building’ is given wide interpretation does giving up possession in consequence of a requisition order amount to vacation without sufficient cause? Vacate, normally, means to go away, to*

leave. The setting or context in which the word has been used does not indicate any different meaning. Nor it is necessary to decide if it applies to voluntary vacation only as it was urged that even assuming that giving up possession in pursuance of requisition order is included in the proviso can it be said to be without sufficient cause. Sufficient cause is an expression which is found in various statutes. It has been construed liberally in keeping with its ordinary dictionary meaning as adequate or enough. That is, any justifiable reason resulting in vacation has to be understood as sufficient cause. For instance economic difficulty or financial stringency or family reasons may compel a landlord to let out a building in his occupation. So long as it is found to be genuine and bona fide it would amount to vacating a building for sufficient cause. And the bar of second proviso stands lifted. In other words if the vacation of the building was not a pretence or pretext the proviso could not frustrate the right of landlord to approach the Controller for necessary direction to tenant to hand over possession to him."

[Emphasis supplied]

5. In re: ***Sankaran Pillai v. V.P. Venuguduswami***[3] the Supreme Court would once again examine the expression "*sufficient cause*" used in a Rent Act Legislation and interpret it thus:

"**3.** *A perusal of the aforesaid provisions shows that where an application for eviction has been filed against a tenant on the ground of default in payment of rent the tenant is required (i) to deposit all the arrears of rent due in respect of the building with the Controller or the appellate authority, as the case may be; (ii) the tenant is further required to pay or deposit the rent which may subsequently fall due in respect of*

[3] (1999) 6 SCC 396

the building until the termination of the proceedings; (iii) the said deposit of rent is required to be paid or deposited within the time provided and in the manner prescribed; and (iv) if the deposit of rent is not made, the Controller or the appellate authority, as the case may be, shall, unless the tenant shows sufficient cause to the contrary, stop all proceedings and pass an order of eviction against the tenant. It is true that the Controller or the appellate authority, as the case may be, if the tenant shows sufficient cause may permit the tenant to contest the application filed by the landlord for his eviction. The question that is required to be seen is, what does the expression "sufficient cause" mean in sub-section (4) of Section 11 of the Act. It is no doubt true that the expression "sufficient cause" has to be liberally construed to do substantial justice between the parties. But the expression "sufficient cause" necessarily implies an element of sincerity, bona fide, and reasonableness. It has to be shown by the tenant who has not deposited the rent within time, as directed by the Controller, that non-deposit of the rent was beyond his control and there was no element of negligence or inaction or lack of bona fides on his part in not depositing the rent within time. Viewed in this light, what we find in the present case is that the tenant was required to deposit the rent by 3-8-1990. But the arrears of rent were not deposited by that date. On 7-8-1990, when the order of eviction was passed, no application was moved by the tenant before the Rent Controller for revoking the order striking out defence as he could not deposit the arrears of rent on account of reasons beyond his control. On the contrary, the tenant denied the relationship of landlord and tenant before the Rent Controller. The tenant's subsequent deposit of the arrears of rent before the appellate

> *authority being requirement of law for hearing the appeal on merits, cannot be treated as bona fide deposit. Further, the tenant did not deposit the month to month rent as required under Section 11(1) of the Act and reiterated his stand that he is a landlord and not a tenant of the premises in dispute. Even before the High Court it was not the case of the tenant that under some bona fide mistake he could not deposit the arrears and month to month rent and, therefore, delay may be condoned. It appears that, after the Supreme Court affirmed the dismissal of the suit filed by the tenant for specific performance of the agreement, the tenant has now come forward with a plea that since he under mistaken belief did not deposit arrears and month to month rent and, therefore, default may be condoned. As noticed earlier, this plea of non-depositing of arrears of rent on account of sufficient cause was not a case set up by the tenant before the Rent Controller, the appellate authority and the High Court. The tenant's consistent stand was that he was not required under law to deposit any arrears of rent and month to month rent as he himself was the landlord of the premises. This plea of the tenant now advanced is an afterthought and is not bona fide and, therefore, we do not find it to constitute "sufficient cause" as to condone the non-deposit of arrears and also month to month rent which was required to be deposited by the tenant. We, therefore, do not find any merit in the submission of the learned counsel for the appellants."*
>
> *[Emphasis supplied]*

6. In re: ***Balwant Singh v. Jagdish Singh***[4] the Supreme Court would have occasion to explain the expression *"sufficient cause"* appearing in the provisions of Order 22 Rule 9(2) of the Code of Civil Procedure, 1973 (CPC) and Section 5 of the Limitation Act, 1963:

[4] (2010) 8 SCC 685

"34. *Liberal construction of the expression "sufficient cause" is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable. There can be instances where the court should condone the delay; equally there would be cases where the court must exercise its discretion against the applicant for want of any of these ingredients or where it does not reflect "sufficient cause" as understood in law. (Advanced Law Lexicon, P. Ramanatha Aiyar, 2nd Edn., 1997)*

35. *The expression "sufficient cause" implies the presence of legal and adequate reasons. The word "sufficient" means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a plentitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the court, in exercise of its judicial discretion, to treat the delay as an excusable one. These provisions give the courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated.*

36. *We find it unnecessary to discuss the instances which would fall under either of these classes of cases. The party should show that besides acting bona fide, it had taken all possible steps within its power and control and had approached the court without any unnecessary delay. The test is whether or not a cause is sufficient to see whether it could have been avoided*

> *by the party by the exercise of due care and attention. (Advanced Law Lexicon, P. Ramanatha Aiyar, 3rd Edn., 2005)"*
>
> *[Emphasis supplied]*

7. In re: ***Martin Burn Ltd. v. Corpn. of Calcutta***[5] the Supreme Court would hold:

> *"**14.** We can now deal with the reasoning on which the High Court in the present case justified its order of remand. It realised that by making the order it was depriving the appellant of one of its chances to object to the valuation, namely, the chance under Section 139, but it felt that by upholding that right of the appellant it would be depriving the Corporation of its rates wholly as the time-limit prescribed by Section 131(2)(b) had expired. It thought that it was faced with two evils and that it would be choosing the lesser of the two if it allowed the Corporation a chance to collect its rates. With great respect, we find this line of reasoning altogether unsupportable. A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a court likes the result or not. When the High Court found that Section 131(2)(b) had been attracted to the case, it had no power to set that provision at nought."*
>
> *[Emphasis supplied]*

8. In re: ***Ramlal v. Rewa Coalfields Limited***[6] the Supreme Court would hold that after expiry the period of limitation to file any specific proceeding before the appropriate forum a valuable right which has been accrued in favour of other party could not be disturbed or struck down unless sufficient cause is made out. The Apex Court would hold as under:-

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[5] (1966) 1 SCR 543

[6] AIR 1962 SC 361

> *"In construing section 5, it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties and this legal right which has accrued to the decree-holder by lapse of time should not be lightheartedly disturbed."*
>
> *[Emphasis supplied]*

9. In re: ***R.B. Ramlingam v. R.B. Bhvaneswari***[7] the Supreme Court would hold:

> *"**6.** A large number of judgments were cited before us by learned counsel. It is not necessary at this stage to discuss each and every judgment cited before us for the simple reason that Section 5 of the Limitation Act, 1963 does not lay down any standard or objective test. The test of "sufficient cause" is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of limitation has left the concept of "sufficient cause" delightfully undefined, thereby leaving to the court a well-intentioned discretion to decide the individual cases whether circumstances exist establishing sufficient cause. There are no categories of sufficient cause. The categories of sufficient cause are never exhausted. Each case spells out a unique experience to be dealt with by the court as such."*
>
> *[Emphasis supplied]*

10. In re: ***Maniben Devraj Shah v. Municipal Corpn. of Brihan Mumbai***[8] the Supreme Court would explain expression *"sufficient cause"* used in Section 5 of the Limitation Act, 1963 in the following manner:

[7] (2009) 2 SCC 689
[8] (2012) 5 SCC 157

*"**14.** We have considered the respective arguments/submissions and carefully scrutinised the record. The law of limitation is founded on public policy. The Limitation Act, 1963 has not been enacted with the object of destroying the rights of the parties but to ensure that they approach the court for vindication of their rights without unreasonable delay. The idea underlying the concept of limitation is that every remedy should remain alive only till the expiry of the period fixed by the legislature. At the same time, the courts are empowered to condone the delay provided that sufficient cause is shown by the applicant for not availing the remedy within the prescribed period of limitation.*

***15.** The expression "sufficient cause" used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice. No hard-and-fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years this Court has advocated that a liberal approach should be adopted in such matters so that substantive rights of the parties are not defeated merely because of delay.*

xxxxxxxxxxxx

***23.** What needs to be emphasised is that even though a liberal and justice-oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.*

> ***24.*** *What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."*
>
> *[Emphasis supplied]*

11. In re: ***Basawaraj v. Land Acquisition Officer***[9] the Supreme Court would have occasion to examine the expression *"sufficient cause"* once again and hold:

> ***"11.*** *The expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done, but only so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned, whether or not sufficient cause has been furnished, can be decided on the facts of a particular case and no straitjacket formula is possible. (Vide Madanlal v. Shyamlal [(2002) 1 SCC 535 : AIR 2002 SC 100] and Ram Nath Sao v. Gobardhan Sao [(2002) 3 SCC 195 : AIR 2002 SC 1201].)*
>
> ***12.*** *It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. "A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what*

[9] (2013) 14 SCC 81

it considers a distress resulting from its operation." The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim dura lex sed lex which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

13. *The statute of limitation is founded on public policy, its aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale. According to Halsbury's Laws of England, Vol. 28, p. 266:*

"605. Policy of the Limitation Acts.—The courts have expressed at least three differing reasons supporting the existence of statutes of limitations namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim, and (3) that persons with good causes of actions should pursue them with reasonable diligence."

An unlimited limitation would lead to a sense of insecurity and uncertainty, and therefore, limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches. (See Popat and Kotecha Property v. SBI Staff Assn. [(2005) 7 SCC 510] , Rajender Singh v. Santa Singh [(1973) 2 SCC 705 : AIR 1973 SC

2537] and Pundlik Jalam Patil v. Jalgaon Medium Project [(2008) 17 SCC 448 : (2009) 5 SCC (Civ) 907].)

***14.** In P. Ramachandra Rao v. State of Karnataka [(2002) 4 SCC 578 : 2002 SCC (Cri) 830 : AIR 2002 SC 1856] this Court held that judicially engrafting principles of limitation amounts to legislating and would fly in the face of law laid down by the Constitution Bench in Abdul Rehman Antulay v. R.S. Nayak [(1992) 1 SCC 225 : 1992 SCC (Cri) 93 : AIR 1992 SC 1701].*

***15.** The law on the issue can be summarised to the effect that where a case has been presented in the court beyond limitation, the applicant has to explain the court as to what was the "sufficient cause" which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bona fide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this Court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the legislature."*

[Emphasis supplied]

12. A composite and a wholesome reading of the judgments of the Supreme Court would draw the following principles:-

i. *The statute of limitation is founded on public policy, its aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale.*

ii. *The law of limitation has not been enacted with the object of destroying the rights of the parties but to ensure that they approach the court for vindication of their rights without unreasonable delay. The idea underlying the concept of limitation is that every remedy should remain alive only till the expiry of the period fixed by the legislature.*

iii. *An unlimited limitation would lead to a sense of insecurity and uncertainty, and therefore, limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence or laches.*

iv. *Sufficient cause is an expression which is found in various statutes. It has been construed liberally in keeping with its ordinary dictionary meaning as adequate or enough. That is, any justifiable reason resulting in vacation has to be understood as sufficient cause.*

v. *The reasons must be found to be genuine and bona fide.*

vi. *The expression "sufficient cause" necessarily implies an element of sincerity, bona fide, and reasonableness.*

vii. *Liberal construction of the expression "sufficient cause" is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable.*

viii. *The expression "sufficient cause" used in statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice.*

ix. *There can be instances where the court should condone the delay; equally there would be cases where the court must exercise its discretion against the applicant for want of any of these ingredients or where it does not reflect "sufficient cause" as understood in law.*

x. *What needs to be emphasised is that even though a liberal and justice-oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.*

xi. *The expression "sufficient cause" implies the presence of legal and adequate reasons. The word "sufficient" means adequate enough, as much as may be necessary to answer the purpose intended.*

xii. *The party should show that besides acting bona fide, it had taken all possible steps within its power and control and had approached the court without any unnecessary delay.*

xiii. *A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a court likes the result or not.*

xiv. *It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds.*

xv. It is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties and this legal right which has accrued to the decree-holder by lapse of time should not be lightheartedly disturbed.

xvi. The test of "sufficient cause" is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of limitation has left the concept of "sufficient cause" delightfully undefined, thereby leaving to the court a well-intentioned discretion to decide the individual cases whether circumstances exist establishing sufficient cause.

xvii. In case a party is found to be negligent, or for want of bona fide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever.

13. In the application under consideration for seeking condonation of delay it has been pleaded that there is a delay of 122 days in filing the Appeal. In fact it is pertinent to examine the pleadings of the applicant which is reproduced below:

"1. That the Appellants has filed the above said Appeal in this Honble High Court under Section 173 of the Motor Vehicle Act, 1988 against the Judgment and award dated 17.08.17 passed by the Learned Member, Motor Accidents Claims Tribunal, West Sikkim at Gyalshing in M.A.C.T. Case No. 23 of 2016 as has been stated in the different paragraphs of the said memorandum of appeal.

2. *That there is only "122" Days delay in filing the above said Appeal due to the following reasons:*

   a. *That, the Impugned award was passed by the Learned Member, Motor Accidents Claims Tribunal, West Sikkim at Gyalshing in M.A.C.T. Case No. 23 of 2016 on 17.08.17.*

   b. *That the order/ award was pronounced on 17.08.17 as such the appeal ought to have been filed within a period of 90 days.*

   c. *That the Kolkata Branch office after receiving the award/judgment copies forwarded the same to the Jaipur Head Office for preferring the instant appeal.*

   d. *That as per the internal procedure the Jaipur Head office had again sent back the file to Kolkata division office for appointing an advocate for defending the instant case, but due to other practical problems, the file took considerable amount of time to reach the Kolkata Branch office.*

   e. *That finally the appellant had appointed the undersigned counsel for defending the instant case.*

   f. *That the judgment had been pronounced by the Learned Member, Motor Accidents Claims Tribunal, West Sikkim at Gyalshing in M.A.C.T. Case No. 23 of 2016 on 17.08.17. The Appellant was forwarded the copy of the judgment through the court of the Ld. Motor Accident Tribunal on 19.08.2017.*

   g. *That after receiving the said mail the appellant had immediately applied for the certified copy which was applied by the appellant on 25.08.2017 and the same was ready on 25.08.2017 itself.*

3. *That the reason assigned in filing the appeal constitutes sufficient cause and there is no deliberate delay. The Honble Court may kindly take liberal approach in this regard.*

4. *That, it is settled position of law, that Government and Governments undertaking has been permitted some flexibility in case of condonation of delay due to the fact that it takes time to get papers processed by such offices and the Honble Apex Court as well as the Honble High Court has upheld the said view in condoning the delay commissioned by such institution.*

5. *That the appellants submit that it has a good case and the Appellants will suffer irreparable loss and injury if the delay in filing the above said Appeal is not condoned.*

6. *That the award impugned in the present appeal suffers serious defects as well as it is against the law laid down by the various courts.*

7. *That the delay in filing the abovesaid Appeal is neither intentional nor willful but due to the good and sufficient reasons shown hereinabove. Interest of justice demands that the present application is allowed and the delay in filing the Appeal is condoned so that the matter can be adjudicated upon on its merit.*

8. *That the present application is made bonafide and has been made for the interest of justice."*

14. The said application is contested by the Respondents No. 1 and 2. The contesting Respondents pleads that the Applicant has failed to furnish neither relevant details nor the relevant dates to the facts stated in the application. It is pleaded that the judgment was pronounced on 17.08.2017 and copy thereof was forwarded to the Applicant on 19.08.2017 itself. It is also pleaded that certified copy of the judgment was applied for on 25.08.2017 which was ready on the same date itself and therefore even though the judgment was received on time by the Applicant no *"sufficient cause"* has been shown by the Applicant and thus the claim of the Applicant that there was *"sufficient cause"* in approaching this Court after the delay appears to be false. The Learned Counsel for the contesting

Respondents would draw the attention of this Court to the order passed by a Single Judge of this Court in re: ***Shriram General Insurance Co. Ltd v. Mr. Kezang Kazi and another***[10] in which on identical facts the application for delay of 115 days of the Applicant had been rejected. A perusal of the said order makes it evident that the callous attitude is repetitive even in the present case.

15. The Applicant seeks to assail the judgment of the Motor Accident Claims Tribunal, dated 17.08.2017. In paragraph 6 of the said judgment it is noted:

> *"**6.** The O.P. No.3 failed to appear either through pleader or through any authorized person to contest/refute the claim despite due service of notice (which as reflected in order dated 04.02.2017 was found to have been duly delivered at the office of the O.P. No. 3 at Siliguri on 25.01.2017, as per the track record obtained from the India Post-site). Hence, when the matter was posted for hearing on settlement of issue, on 02.03.2017, the O.P. No. 3 being absent, was accordingly proceeded exparte."*

16. It is seen that despite service on 25.01.2017 the Applicant has deliberately chosen to stay away from the proceedings before the Motor Accident Claims Tribunal during the entire period till the impugned judgment was rendered on 17.08.2017. It seems quite clear that the Applicant didn't even bother to find out the result of the proceedings although they were aware of it. Application for certified copy was made only on 16.10.2017 well two months after the date of judgment although the Applicant was notified about the passing of the judgment on 19.08.2017. Even after the Motor Accident Claims Tribunal notified the Applicant of the judgment rendered by it the pleadings in the application praying to condone the delay smacks of negligence, insincerity, lack of bonafides and genuineness. The reasons pleaded not only fails to satisfy the test of "*sufficient cause*" as laid down above but suffers from vice of utter callousness and devil may care attitude. There is no legal or adequate reason to invoke the discretionary power of this Court in spite of construing the expression

[10] 2018 SCC OnLine Sikk 128

"sufficient cause" liberally. The reasons pleaded do not answer the purpose intended viewed from the standards of a practical and cautious litigant. There is not even an attempt to show that it had taken all possible steps within its power and control and had approached the Court without any unnecessary delay even if this Court were to apply the law in a meaningful manner which serves the ends of justice. Although it is evident that the delay is more than 122 days and not as pleaded by the Applicant even the admitted delay of 122 days has not been sufficiently explained and there is not an element of sincerity or genuineness in the pleadings. In fact the sequence of facts of the present case suggests that the Applicant is resorting to dilatory tactics to delay payment.

17. This Court has also perused the pleadings in the Appeal. The applicant very candidly admits in paragraph 2 thereof:

> *"That on 02.03.2017 the Appellant/Insurer remained absent despite due service of notice therefore, the Appellant/Insurer was proceeded exparte."*

18. In fact there is not even a semblance of explanation as to why the applicant had not appeared in the proceedings before the Motor Accident Claims Tribunal giving a clear indication that it was not beyond their control and that it was in fact deliberate. When the Applicant who has suffered an *ex-parte* judgment is absolutely nonchalant about it there is no reason for this Court to permit the beneficiary of the judgment to suffer any further.

19. For all the aforesaid reasons this Court is of the view that it would not be justified in condoning the delay deliberately caused by the Applicant. The application for condonation of delay i.e. I.A.No.01 of 2018 in Mac Appeal No.04 of 2018 is rejected.

20. Consequently MAC Appeal No. 04 of 2018 is dismissed.

SLR (2018) SIKKIM 889

(Before Hon'ble the Acting Chief Justice and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. A. No. 35 of 2017

Anish Rai	…..	**APPELLANT**

Versus

State of Sikkim	…..	**RESPONDENT**

For the Appellant: Mr. Gulshan Lama, Advocate (Legal Aid Counsel).

For the Respondent: Mr. Karma Thinlay and Mr. Thinlay Dorjee, Additional Public Prosecutors.

Date of decision: 20th July 2018

A. Indian Evidence Act, 1872 – S. 67 – Proof of Signature or Handwriting – The definition of "evidence" and "proved" elucidated in S. 3 must be read along with S. 67 which requires that the signature purporting to be that of a particular person must be established by specific evidence.

(Para 10)

B. Indian Evidence Act, 1872 – S. 35 – Relevancy of Entry in Public Record made in Performance of Duty – A given document may be admissible under S. 35 but the Court is not barred from taking evidence to test the authenticity of the entries made therein – Admissibility of a document is one thing, while proof of its contents is an altogether different aspect – Entries in the School Register/School Leaving Certificate require to be proved in accordance with law, demanding the same standard of proof as in any other criminal case.

(Para 13)

C. Indian Evidence Act, 1872 – Ss. 45 and 51 – Expert Opinion – The opinion of person specially skilled in a particular field being experts are relevant facts – Medical evidence given by an expert has to be given the weight it deserves and ought not to be brushed aside – This is however not to say that the opinion of an expert is always binding on the Court. The evidence so furnished has to be appreciated in accordance with law and accepted only if found to be trustworthy – The opinion of an expert although relevant would carry little weight with the Court unless it is supported by a clear statement of what he noticed and on what basis his opinion was formed. The expert is required to give an account of the experiments performed by him for the purpose of forming his opinion – The Court is required to be circumspect when accepting the opinion of a Medical Officer especially when unsupported by reasons for the opinion.

(Paras 15 and 16)

Appeal allowed.

Chronological list of cases cited:

1. Jarnail Singh v. State of Haryana, (2013) 7 SCC 263.
2. Jaya Mala v. Home Secretary, Govt. of Jammu & Kashmir and Others, AIR 1982 SCC 1297.
3. Mahadeo S/o Kerba Maske v. State of Maharashtra and Another, (2013) 14 SCC 637.
4. Vishnu v. State of Maharashtra, 2006 Cri. L.J. 303.
5. Birad Mal Singhvi v. Anand Purohit, AIR 1988 SC 1796.
6. Madan Mohan Singh and Others v. Rajni Kant and Another, (2010) 9 SCC 209.
7. Madan Gopal Kakkad v. Naval Dubey and Another, (1992) 2 SCR 921.

JUDGMENT

The Judgment of the Court was delivered by ***Hon'ble Mrs. Justice Meenakshi Madan Rai, ACJ***

1. The Appellant is before this Court assailing the Judgment and Order on Sentence of the learned Special Judge (POCSO), South Sikkim at Namchi, in Sessions Trial Case No. 5 of 2016, both dated 20.09.2017. The impugned Order on Sentence handed out, rigorous imprisonment of ten years under Section 5(l)/6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act'), rigorous imprisonment of ten years under Section 376(2)(n)/376(2) of the Indian Penal Code, 1860 (for short 'the IPC') and under Section 354(B) of the IPC, rigorous imprisonment of three years and a fine of ₹ 5000/- (Rupees five thousand) only, with a default clause of imprisonment. The Sentences were ordered to run concurrently, setting off the period of imprisonment already undergone by the convict.

2. The grounds raised in Appeal are that the age of the Victim was not proved as the parameters laid out for the purposes of arriving at the age of the Victim in terms of the Juvenile Justice (Care and Protection of Children) Rules, 2007, were not complied with. On this count, the attention of this Court was drawn to the ratio of the Hon'ble Supreme Court in ***Jarnail Singh vs. State of Haryana***[1]. That, the evidence of PW-2, the Victim's father, pertaining to the age of the Victim as likely to have been above eighteen years was disregarded by the learned Trial Court. It was also urged that the birth certificate as per the evidence on record was said to be in the possession of the Victim's sister at Delhi but no steps were initiated by the Prosecution to obtain the document as evidence. That, Exhibit-13, the report of the Radiologist is inconclusive since the experience of the Radiologist was not placed before the Court apart from which the expert failed to consider factors such as the environment while estimating the bone age of the Victim. Urging for an acquittal of the Appellant, it was contended that the alleged sexual act was consensual as evident from the fact that on the Appellant calling the Victim to various locations, she of her own free will complied with his requests. Besides, PW-14, the Gynaecologist who examined the Victim, opined that the vaginal swab of the Victim did not contain any motile or non-motile spermatozoa thereby revealing no evidence of recent sexual assault on the Victim and also opined that the hymen of the female could be lax due to other physical reasons besides sexual intercourse. In view of the entirety of the evidence, the impugned Judgment and the Order on Sentence be set aside and the Appellant be acquitted.

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[1] (2013) 7 SCC 263

3. Opposing the arguments of learned Counsel for the Appellant, learned Additional Public Prosecutor drew the attention of this Court to Paragraph 27 of the impugned Judgment wherein the learned Trial Court relying on the decision of ***Jaya Mala vs. Home Secretary, Govt. of Jammu & Kashmir & Ors.***[2], held that one can take judicial notice of the fact that the margin of error in age ascertained by Radiological examination is two years on either side. That, on such consideration, the age of the minor Victim could be about sixteen years but below eighteen years at the time of the offence, duly confirmed by the evidence of the minor Victim asserting her date of birth as 13.01.2000. The evidence of the Victim herself would indicate that the appellant had taken her into "Karfectar jungle" where he committed penetrative sexual assault on her. Thereafter, after a week or so, she was again called to another location in Naya Bazaar where once again he committed the act on her, a week later he also violated her at Jorethang. That, there is no reason to doubt the bone age estimation of the Victim as conducted by PW-10, the Radiologist, who had sufficient experience in her field. Agreeing with the finding of the learned Trial Court that the consent of a minor is no consent in the eyes of law, it was canvassed that the Judgment of the learned Trial Court suffers from no illegality and the Appeal deserves a dismissal.

4. Having thus heard the rival arguments put forth by learned Counsel for the parties *in extenso* and examining the evidence and documents meticulously, what requires determination by this Court is;

(i) Whether the Prosecution was able to establish that the Victim was a minor?

(ii) Whether the act of the Victim was consensual or was she under coercion?

(iii) Whether the learned Trial Court was in error in convicting the Appellant?

5. PW-2, the father of the alleged minor Victim PW-1, on 11.12.2015, lodged a written complaint, Exhibit-3, before the Jorethang Police Station, South Sikkim, complaining therein that PW-1 had been sexually assaulted by the Appellant on several occasions at various places. On the same day, the Complaint was registered against the Appellant as Jorethang Police Station

[2] AIR 1982 SCC 1297

Case FIR No. 62/2015, under Section 6 of the POCSO Act and investigation taken up. It was revealed thereof that the Appellant came to know PW-1 through a friend of hers after which they spoke to each other on the phone and agreed to meet. The Victim was on a subsequent day called to Namchi road by the Appellant who drove her in his car, took her to a nearby jungle in "Karfectar" and sexually assaulted her. This incident was followed by another act of sexual assault in the Appellant's car, a week later at Naya Bazaar, West Sikkim, when PW-6, the Appellant's friend, drove the Appellant's car and stopped at the road side. Later, PW-6 reached her home. The third incident occurred on 04.12.2015 at Dzongri Hotel, Jorethang. On 10.12.2015, the wife of the Appellant came to learn of the illicit relationship between her husband and the Victim, whom she confronted. The Appellant and his wife had a verbal altercation leading to the matter being reported at the Naya Bazaar Police Station by the Appellant's wife where PW-2 came to learn that his daughter had been sexually assaulted by the Appellant. The incidents having occurred under the jurisdiction of Jorethang Police Station the matter came to be forwarded therein. On conclusion of investigation, chargesheet was submitted against the Appellant under Section 5(l) and Section 5(p) of the POCSO Act.

6. The learned Trial Court thereupon proceeded to frame charge against the Appellant under Section 5(l) of the POCSO Act, and Section 376(2)(i)(n) of the IPC and Section 354B of the IPC. 16 (sixteen) witnesses were examined by the Prosecution which was followed by the examination of the Appellant under Section 313 of the Code of Criminal Procedure, 1973, providing him an opportunity of explaining the incriminating evidence against him. Rival submissions by learned Counsel for the parties were advanced and the trial culminated in the impugned Judgment and the Order on Sentence.

7. Taking up the first question for consideration, in this context according to the Victim, her date of birth is 13.01.2000, the first incident of sexual assault between the Appellant and the Victim is said to have occurred in the month of November 2015, which would make her fifteen years ten months at the time of the incident. However, PW-2, the Victim's father under cross-examination unequivocally stated that he did not know the exact date of birth of his daughter and it was possible that she was above eighteen years of age during September-November 2015. Admittedly, the birth certificate of the Victim is not in the records of the case and while

reverting to the evidence of the Victim, she admitted under cross-examination that her father had applied for her birth certificate which was with her elder sister, who was in New Delhi. According to PW-16, the Investigating Officer (for short 'the I.O.'), as no birth certificate was available he obtained a certificate from the school attended by the minor Victim and identified Exhibit-31 as the Certificate issued by the Principal of the Senior Secondary School, where the minor Victim had read upto class 5. The said certificate reflected the Victim's date of birth to be 01.12.2001, contrary to 13.01.2000 as stated by the Victim herself. Despite having obtained the aforesaid certificate, the I.O. under crossexamination insisted that the date of birth of the alleged Victim was 13.01.2000, while at the same time admitting that no documents were produced by him to substantiate this statement. The I.O. would admit that apart from the bone age estimation report, which according to him was correct, there was no document on record to prove that the alleged Victim was a minor during the alleged incidents. The I.O., as evident from his deposition was aware that the Victim's birth certificate was with her elder sister who was in New Delhi, but failed to furnish any reasons to justify non furnishing of the document in evidence. It is also his admission that he had not submitted any application or requisition letter to conduct the ossification test of the alleged Victim in connection with the case. Apart from admitting that the School Register or the School Admission Register was not produced by him to prove the existence of Exhibit-31, the Principal who issued the document was not examined to establish its probative value.

8. We may now turn our attention to the decision of the Hon'ble Supreme Court in ***Jarnail Singh*** (*supra*). While considering the procedure for determining the minor's age reference was made to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, and held as follows;

> "**22.** On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforestated 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

12. Procedure to be followed indetermination of Age.—

(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in Rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be, the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by acorporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of Clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the Clauses (a) (i), (ii), (iii) or in the absence whereof, Clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in Sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7A, Section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in Subrule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in Sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in Sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated

in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.

24. .... In the scheme contemplated under Rule 12(3) of the 2007 Rules, it is not permissible to determine age in any other manner, and certainly not on the basis of an option mentioned in a subsequent clause.

....”

9. In ***Mahadeo S/o Kerba Maske vs. State of Maharashtra and Another***[3], the Hon'ble Supreme Court would hold that;

> **"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."

It may of course be clarified here that Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is now incorporated in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

10. On the edifice of these observations, while examining whether the law was complied with in the instant matter, it becomes apparent that the Victim had read upto class 5 only, hence the question of obtaining a matriculation certificate does not arise. In the absence of matriculation or an equivalent certificate, the Rule provides that the date of birth certificate from the school (other than a play school) first attended be obtained. This is what the I.O. appears to have resorted to by seizing Exhibit-31, showing the Victim's date of birth as 01.12.2001, contrary to date of birth mentioned by the Victim herself viz; 13.01.2000. What is lacking in the exercise of the I.O. is the absence of seizure of the Admission Register coupled with the fact that the Principal was not examined. It needs no reiteration that the definition of "evidence" and "proved" elucidated in Section 3 of the Indian Evidence Act, 1872, must be read along with Section 67 of the same statute which requires that the signature purporting to be that of a particular person must be established by specific evidence. Hence, Exhibit-31 remained unproved. Exhibit-31 was stated to be issued on the requisition of the I.O., which however is unavailable in the records. Even assuming that as Exhibit-31 remained unassailed at the time of evidence, it ought to be taken into consideration by this Court, the Victim herself has given evidence contrary to the document by stating, "...................... *My date of birth is*

[3] (2013) 14 SCC 637

13.01.2000." While her father, PW-2, would depose that, *"I do not know the exact date of birth of my daughter it was (sic 'is') possible that she was above eighteen years of age during September-November 2015."* On this point relevant reference can be made to the ratiocination in ***Vishnu vs. State of Maharashtra***[4], wherein the Hon'ble Supreme Court held as follows;

> **"24.** In the case of determination of date of birth of the child, the best evidence is of the father and the mother. In the present case, the father and the mother – PW-1 and PW-13 categorically stated that PW-4 the prosecutrix was born on 29.11.1964, which is supported by the unimpeachable documents, as referred to above in all material particulars. These are the statements of facts. If the statements of facts are pitted against the so-called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. Even as per the doctor's opinion in the ossification test for determination of age, the age varies. In the present case, therefore, the ossification test cannot form the basis for determination of the age of the prosecutrix on the face of witness of facts tendered by PW-1 and PW-13, supported by unimpeachable documents. Normally, the age recorded in the school certificate is considered to be the correct determination of age provided the parents furnish the correct age of the ward at the time of admission and it is authenticated. ...."
>
> [emphasis supplied]

11. Without further ado, we may also refer to the Judgement of ***Birad Mal Singhvi vs. Anand Purohit***[5]**,** wherein the Hon'ble Supreme Court while discussing Exhibits 8, 9, 10 and 11, entries in the scholar's register,

[4] 2006 Cri. L.J. 303
[5] AIR 1988 SC 1796

counterfoil of Secondary Education Certificate of one Hukmi Chand Bhandari, copy of tabulation record of the Secondary School Examination 1974 and copy of tabulation of record of Secondary School Examination of 1977 respectively, observed as follows;

> **"14.** .... Neither the admission form nor the examination form on the basis of which the aforesaid entries relating to the date of birth of Hukmi Chand and Suraj Prakash Joshi were recorded was produced before the High Court. No doubt, Exs. 8, 9, 10, 11 and 12 are relevant and admissible but these documents have no evidentiary value for purpose of proof of date of birth of Hukmi Chand and Suraj Prakash Joshi as the vital piece of evidence is missing, because no evidence was placed before the Court to show on whose information the date of birth of Hukmi Chand and the date of birth of Suraj Prakash Joshi were recorded in the aforesaid document. As already stated neither of the parents of the two candidates nor any other person having special knowledge about their date of birth was examined by the respondent to prove the date of birth as mentioned in the aforesaid documents. Parents or near relations having special knowledge are the best person to depose about the date of birth of a person. If entry regarding date of birth in the scholars register is made on the information given by parents or someone having special knowledge of the fact, the same would have probative value. The testimony of Anantram Sharma and Kailash Chandra Taparia merely prove the documents but the contents of those documents were not proved.
>
> The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person

having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value.

Merely because the documents Exs. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmichand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouch safe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi.

...."

[emphasis supplied]

12. In ***Madan Mohan Singh and Others vs. Rajni Kant and Another***[6]**,** the Hon'ble Supreme Court while distinguishing between admissibility of a document and its probative value observed as follows;

"**18.** Therefore, a document may be admissible, but as to whether the entry containedtherein has any probative value may still be

[6] (2010) 9 SCC 209

required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in *Ram Prasad Sharma v. State of Bihar* [(1969) 2 SCC 359 : AIR 1970 SC 326], *Ram Murti v. State of Haryana* [(1970) 3 SCC 21 : 1970 SCC (Cri) 371 : AIR 1970 SC 1029], *Dayaram v. Dawalatshah* [(1971) 1 SCC 358 : AIR 1971 SC 681], *Harpal Singh v. State of H.P.* [(1981) 1 SCC 560 : 1981 SCC (Cri) 208 : AIR 1981 SC 361], *Ravinder Singh Gorkhi v. State of U.P.* [(2006) 5 SCC 584 : (2006) 2 SCC (Cri) 632], *Babloo Pasi v. State of Jharkhand* [(2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266], *Desh Raj v. Bodh Raj* [(2008) 2 SCC 186 : AIR 2008 SC 632] and *Ram Suresh Singh v. Prabhat Singh* [(2009) 6 SCC 681 : (2010) 2 SCC (Cri) 1194]. In these cases, it has been held that even if the entry was made in an official record by the official concerned in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.

19. Such entries may be in any public document i.e. school register, voters' list or family register prepared under the Rules and Regulations, etc. in force, and may be admissible under Section 35 of the Evidence Act as held in *Mohd. Ikram Hussain v. State of U.P.* [AIR 1964 SC 1625 : (1964) 2 Cri LJ 590] and *Santenu Mitra v. State of W.B.* [(1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587].

20. So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, **they**

may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in school register/school leaving certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

21. For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, government hospital/nursing home, etc., the entry in the school register is to be discarded. (Vide *Brij Mohan Singh v. Priya Brat Narain Sinha* [AIR 1965 SC 282], *Birad Mal Singhvi v. Anand Purohit* [1988 Supp SCC 604 : AIR 1988 SC 1796], *Vishnu v. State of Maharashtra* [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217] and *Satpal Singh v. State of Haryana* [(2010) 8 SCC 714 : JT (2010) 7 SC 500].

22. If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60 and 61, etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time, etc. mentioned therein. (Vide *Updesh Kumar v. Prithvi Singh* [(2001) 2 SCC 524 : 2001 SCC (Cri) 1300 : 2001 SCC (L&S) 1063] and *State of Punjab v. Mohinder Singh* [(2005) 3 SCC 702 : AIR 2005 SC 1868].)"

[emphasis supplied]

13. A careful reading of the extracts *supra* would clarify that a given document may be admissible under Section 35 of the Evidence Act, but the Court is not barred from taking evidence to test the authenticity of the entries made therein. It needs no reiteration that admissibility of a document is one thing, while proof of its contents is an altogether different aspect. In fact, the ratio supra emphasises that the entries in School Register/School Leaving Certificate require to be proved in accordance with law, demanding the same standard of proof as in any other criminal case.

14. Although, the above discussions clear the air on the aspect of the Victim's age, however, we cannot ignore the evidence of PW-10, the medical expert which too merits a discussion. The Prosecution at no point of time has established that the Victim was forwarded for bone age estimation to PW- 10. Evidently, it was on the direction of PW-14, the Gynaecologist who examined the Victim that she was sent to PW-10, needless to observe that PW-10 was not authorised by the investigating agency to verify the age of the Victim. PW-10, the Radiologist, in her evidence would state that she had conducted the bone age estimation test of the minor Victim. She has, *inter alia*, stated as follows;

> *" .... On the basis of the concerned X-rays I came to the following findings;*
>
> *1. Left knee – The lower end of femur had fused;*
>
> *2. Right wrist – Lower end of radius and ulna had not fused;*
>
> *3. Right elbow – Medical epicondyle had fused;*
>
> *4. Right shoulder – Acromion had not fused.*
>
> *5. Right hip – Ilac crest had just appeared.*
>
> *I thus came to the opinion that the approximate bone age of the minor victim was between 15 to 15.8 years as on the date of the test i.e., 02.02.2016. Exhibit-13 (which runs*

> *overleaf) is the concerned document in that regard. Exhibit-13(a) is my signature. Exhibit-14 (in four numbers) are the concerned X-ray films."*

15. Having perused the said report, we may usefully refer to Section 45 and Section 51 of the Indian Evidence Act, 1872, which provides as follows;

> **"45. Opinions of experts.**—When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts.
>
> **"51. Grounds of opinion, when relevant.**— Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant."

Thus, the opinion of person specially skilled in a particular field as described in the Section being experts are relevant facts. Medical evidence given by an expert has to be given the weight it deserves and ought not to be brushed aside. This is however not to say that the opinion of an expert is always binding on the Court. The evidence so furnished has to be appreciated in accordance with law and accepted only if found to be trustworthy. It would be trite to reiterate that the opinion of an expert although relevant would carry little weight with the Court unless it is supported by a clear statement of what he noticed and on what basis his opinion was formed. The expert is required to give an account of the experiments performed by him for the purpose of forming his opinion. In the instant matter, it was incumbent on PW-10 to have first demonstrated her expertise in the field by way of evidence and thereafter, to testify as to how she had formed her opinion regarding the age of the Victim. Undoubtedly, the X-ray gives the details of the stages of the fusion of the bone but this by itself does not suffice to form her opinion or for the Court to reach a conclusion. The witness ought to have clarified and elaborated on what the various stages of the fusion of the bone signified and how consequently she

had reached her finding of the bone age of the Victim to enable the Court to reach a decision with clarity and to appreciate her efforts.

16. In ***Madan Gopal Kakkad v. Naval Dubey and Anr.***[7], the Hon'ble Supreme Court observed as follows;

> "**34.** A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the experts opinion is accepted, it is not the opinion of the medical officer but of the Court."

This would, therefore, mean that the Court is required to be circumspect when accepting the opinion of the medical officer especially when unsupported by reasons for the opinion.

17. In such circumstances of the matter, it is evident that besides the failure of the Prosecution to establish the minority of the Victim either by Exhibit-31 or expert evidence, an adverse inference can be drawn by this Court under Section 114(g) of the Indian Evidence Act, 1872, since the I.O. despite knowledge failed to collect the birth certificate of the Victim from her sister. The birth certificate issued by the school having held no evidentiary value, the prosecution ought to have furnished the birth certificate given by a corporation, municipal authority, or a panchayat, failing which only then can resort be taken to bone age estimation, which in any event in the instant matter is otiose.

18. While addressing the second question as to whether the act of the Victim was consensual or was she under coercion, her evidence suffices to explain their aspect. In the first instance, she has admitted that she had "an

[7] (1992) 2 SCR 921

affair" with the Appellant and it was her statement that after she saw him in Jorethang when she was with her friend, she took his number from her friend and gave the Appellant a missed call, to which he responded. As requested by the Appellant, she met him near the Jorethang bridge and proceeded together towards "Karfectar" jungle. Her cross-examination does not demolish this evidence. The evidence of PW-6, who had driven the Appellant and the Victim in his vehicle, would also reveal that the Victim had travelled in the vehicle driven by him along with the Appellant. The Victim raised no objection to being with the Appellant neither did she make any complaint to the witness nor was there any allegation that the Appellant had forcefully taken her or kept her in his custody. There is nothing inchoate in her statement that, "...... *It is true that I did not reveal my love affair with the accused to my father or any of my family members. It is also true that I did not inform them that the accused person was having physical relations with me. It is true when I was called by the police in connection with this case I did not complain to the police concerning any physical relations between me and the accused. ....*" The evidence on record as emerges supra, is clearly indicative of the free will of the Victim in accompanying the Appellant and consenting to the acts between them. The learned Trial Court has correctly observed in the impugned Judgment at Paragraph 21 that the sexual intercourse appears to be a consensual one. If the victim was afraid or was being forced into an act of sexual assault by the Appellant she could have sought help from PW-6 or for that matter she could have refrained/desisted from meeting him in the first instance at Jorethang bridge or on other occasions as already reflected hereinabove. It is also evident that the Appellant did not employ physical force on the Victim. Thus, there is no other conclusion save the fact that the act of the Victim was consensual.

19. Needless to add while summing up the entire gamut of facts and evidence on record, for the reasons discussed succinctly, we have no qualms in arriving at the finding that the learned Trial Court was in error in convicting the Appellant, which thereby sets to rest the third question.

20. Consequently, the impugned Judgment and Order on Sentence is set aside. The Appeal succeeds and the Appellant is acquitted of the offences charged with.

21. Consequently, the Appellant be set at liberty forthwith, unless required in any other case.

22. Fine, if any, deposited by the Appellant as per the assailed Order on Sentence of the learned Trial Court, be refunded to him.

23. Copy of this Judgment be transmitted to the learned Trial Court for information and compliance.

24. Records be remitted forthwith.

SLR (2018) SIKKIM 910

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

Crl. A. No. 19 of 2017

Md. Ibraj Alam ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

With

Crl. A. No. 20 of 2017

Md. Tabrej Alam *alias* Roshan ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellants: Mr. Zangpo Sherpa, Legal Aid Counsel and Ms. Mon Maya Subba, Advocate.

For the Respondents: Mr. S. K Chettri, Assistant Public Prosecutor.

Date of decision: 24th July 2018

A. Indian Penal Code, 1860 – S. 361 – S. 361, I.P.C is intended for security and protection of minors and persons of unsound mind – Use of the words "takes" or "entices" makes the intention of the legislation clear – To constitute the offence of kidnapping there is no necessity of force or fraud. No one who is responsible for taking or enticing a child from the keeping of his or her guardian, whether physical or by inducement should escape the penalty of law.

(Paras 13 and 14)

B. Indian Penal Code, 1860 – S. 34 – Intended to meet circumstances in which it may be difficult to distinguish between the acts of the individual members of a party or to prove exactly what part was taken by each of them in furtherance of the common intention – Is a principle of joint liability in committing a criminal act – To invoke the provisions of S. 34, I.P.C, at least two factors must be established: (i) common intention, and (ii) participation of the accused in the commission of an offence – Does not necessitate overt act to be attributed to the individual accused but before a person is convicted by applying the doctrine of vicarious liability, not only his participation in the crime must be proved but presence of common intention must be established – For proving formation of common intention, direct evidence may not be always available – It is not necessary that the acts of the accused persons charged with commission of the offences jointly must be the same or identically similar. It could be different in character but must have been influenced by one and the same common intention in order to attract the provision of S. 34.

(Para 19)

C. Evidence – Minor contradictions which do not go to the root of the evidence and make it doubtful should not deter the Court from accepting evidence which is otherwise reliable, cogent and truthful.

(Para 23)

D. Indian Evidence Act, 1872 – Child Witness – Appreciation of Evidence – The law recognises the child as a competent witness. The evidence of a child witness can be considered under S. 118 of the Indian Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof – Child witness if found competent to depose to the facts and is a reliable one, his evidence could form the basis of conviction – Tender age of a child witness may make them susceptible to be swayed by what others tell them and may fall easy prey to tutoring and thus, although not as a general rule to be applied in every case but as a precautionary measure, in cases in which there is an element of uncertainty, corroboration may be sought for and the evidence evaluated carefully. This is a rule of prudence – Evidence of child

witness cannot be rejected *per se* on the presumption that they are likely to have been tutored.

(Para 24)

E. Indian Evidence Act, 1872 – Evidence – The victim stands at a higher pedestal than even an injured witness as he suffers from emotional injury. In cases of injured witnesses there is injury on the physical form, while in the cases of an injured victim the injury is physical, psychological and emotional – Court may convict the accused on the sole testimony of a child victim if it has no reason to doubt its truthfulness and veracity. Corroboration is only a matter or prudence and not a rule – In a case relating to a child victim corroboration can be dispensed with if, in the particular circumstances of a case the Court is satisfied that it is safe to rely upon the sole testimony of a child victim – Where the Court deems it proper to seek corroboration, it must be kept in mind that it is not necessary that there should be independent confirmation of every material circumstance – Corroboration need not be direct and circumstantial evidence is sufficient if it connects the accused to the crime.

(Para 25)

F. Indian Penal Code, 1860 – S. 34 – Common Intention – Evidence – Conspiracy most is always hatched in secrecy and it is seldom that one finds direct evidence to prove it. Such intention can only be inferred from the circumstances appearing from the proved facts of the case.

(Para 23)

Appeals dismissed.

Chronological list of cases cited:

1. Hamza v. Muhammedkutty *alias* Mani and Others v. State of Kerala, (2013) 11 SCC 150.

2. Laxman Anaji Dhundale and Another v. State of Maharasthra, (2007) 10 SCC 771.

3. State of U.P. v. Rohan Singh and Another, (1996) Cri L J 2884.

4. Mohd. Kalam v. State of Bihar, (2008) 7 SCC 257.
5. Alagupandi *alias* Alagupandian v. State of Tamil Nadu, (2012) 10 SCC 451.
6. Damber Singh Chettri v. State of Sikkim, 2018 SCC OnLine Sikk 132.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The testimony of a 12 year old child, a victim of crime, is sought to be questioned by the Appellants who have been convicted on the ground that since he is but a child, corroboration is a must. Quite evidently this is not the correct proposition in law. Should the victim's deposition be held to be wanting merely because of the fact that he is a child although the same inspires confidence? The answer is obviously in the negative.

2. The First Information Report (FIR) (exhibit-1) lodged on 11.04.2016 by the father of the victim-P.W.1 (first informant) after his son-the victim who had gone missing since the morning of the day before was found by beat Constables of the Singtam Police Station at Singtam would initiate an investigation by the Mangan Police. Resultantly a charge-sheet would be filed and thereafter charges framed on 30.08.2016 against Md. Ibraj Alam (Appellant in Criminal Appeal No. 19 of 2017) as well as Md. Tabrej Alam *alias* Roshan (Appellant in Criminal Appeal No. 20 of 2017) by the Sessions Judge, North Sikkim at Mangan (Learned Sessions Judge). Charges under Section 363/34 IPC; 342/ 34 IPC; Section 323 IPC and Section 307 IPC would be framed against Md. Ibraj Alam and against Md. Tabrej Alam *alias* Roshan (jointly the Appellants) charges would be framed under Section 363/34 IPC, 342/ 34 IPC. The trial would result in conviction of both the Appellants who would prefer the present Appeals against the common judgment of conviction rendered by the learned Sessions Judge on 19.04.2017 convicting Md. Ibraj Alam under Section 363/34 IPC as well as Section 323 IPC and Md. Tabrej Alam *alias* Roshan under Section 363 IPC. Accordingly Md. Ibraj Alam and Md. Tabrej Alam *alias* Roshan would be sentenced to undergo simple imprisonment for a period of three and a half years and to pay a fine of ₹ 10,000/- (Rupees Ten Thousand) each for the offence under Section 363/

34 IPC and in default to pay the amount of fine to undergo further simple imprisonment for a period of 3 months. Md. Ibraj Alam would also be sentenced to undergo simple imprisonment for a period of 6 months under Section 323 IPC. The period of imprisonment was to run concurrently and the incarceration already suffered by the Appellants was to be set off against the sentence imposed. The total amount of fine payable was directed to be applied for the payment of compensation to the minor victim.

3. Mr. Zangpo Sherpa, Learned Counsel for the Appellants would seek to assail the impugned judgment as well as the order on sentence both dated 19.04.2017 rendered by the Sessions Judge on the ground that the Learned Sessions Judge would convict the Appellants in spite of the fact that the sole testimony was that of the victim-a child witness of 11 years of age although he himself had come to the conclusion that there were minor contradictions in the victim's statement.

4. Mr. Zangpo Sherpa would also draw the attention of this Court to the deposition of the two beat Constables - P.W.5 and P.W.6 and their admission that it was not at the instance of the victim that Md. Ibraj Alam had been apprehended. Mr. Zangpo Sherpa would also submit that strangely the victim was admittedly not crying when Md. Ibraj Alam was apprehended which would be unnatural considering the fact that there was an allegation that Md. Ibraj Alam had allegedly attempted strangulation upon the victim a few hours ago. The fact that the child did not raise any alarm even while seeing the Police Officers is a cause of suspicion which therefore, ought to have led the Learned Sessions Judge to seek corroboration of his statement as has been held by the Supreme Court in re: ***Hamza v. Muhammedkutty alias Mani & Ors. v. State of Kerala***[1]:

> *"**30.** The learned counsel for the State is right that the consistent version of PW 1 is that A-1 and A-2 have committed murder of the deceased. But the High Court has rightly relied on the observations of this Court in Suresh v. State of U.P. [(1981) 2 SCC 569 : 1981 SCC (Cri) 559] that children mix up what they see and what they like to imagine to have seen. Glanville Williams says in his book The Proof of Guilt, 3rd Edn., published by Stevens & Sons:*

[1] (2013) 11 SCC 150

"Children are suggestible and sometimes given to living in a world of make-believe. They are egocentric, and only slowly learn the duty of speaking the truth."

31. *Hence, the proposition laid down by the courts that as a rule of practical wisdom, the evidence of child witness must find adequate corroboration. (Panchhi v. State of U.P. [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561])*

32 [Ed.*: Para 32 corrected vide Official Corrigendum No. F.3/Ed.B.J./49/2013 dated 8-8-2013.] . In Suresh v. State of U.P. [(1981) 2 SCC 569 : 1981 SCC (Cri) 559] cited by Mr Deepak, the evidence of child witness Sunil was corroborated by the conduct of the accused and from the pattern of crime committed by him and hence this Court maintained the conviction of the accused servant for the murder of the mistress of the house Geeta and her son Anil on the basis of evidence of a child witness, Sunil, as corroborated by other evidence. This Court specifically observed that if the case was to rest solely on Sunil's uncorroborated testimony, the Court might have found it difficult to sustain the conviction of the accused, but there were unimpeachable and most eloquent materials on record which lent an unfailing assurance that Sunil is a witness of truth and not a witness of imagination as most children of that age generally are.*

33. *Similarly, in Promode Dey v. State of W.B. [(2012) 4 SCC 559 : (2012) 2 SCC (Cri) 513] cited by Mr Deepak, the Court found that soon after the incident on 23-2-2002, the girl child had told her grandmother and her father that it was the accused who had killed the deceased and her grandmother and father had*

deposed before the court in their evidence that they had been told by this child witness that the accused had killed the deceased with a dao. The evidence of this child witness was also corroborated by the fact that the bloodstained dao was recovered on the very day of the incident from a jungle by the side of the house of the accused. The evidence of the girl child that the accused had killed her mother by striking on her head, back, fingers and throat with a dao was thus believed by the Court because her evidence was adequately corroborated.

34. *In the present case, as we have found, the evidence of PW 1 is not adequately corroborated.”*

5. Mr. Zangpo Sherpa would also draw the attention of the Court to the cross- examination of the Investigating Officer and his admission that there is no witness who had heard the two accused person planning/ conspiring to kidnap the minor victim for ransom. He would thus submit that in the circumstances Md. Tabrej Alam *alias* Roshan could not have been convicted merely with the help of Section 34 IPC sans any evidence whatsoever of the alleged conspiracy. In support of his submission he would seek reliance upon the judgment of the Supreme Court in ***Laxman Anaji Dhundale & Anr V. State of Maharasthra***[2] in which it was held:

“10. *As regards invocation of Section 34 IPC, it was held by the Privy Council in Mahbub Shah v. Emperor [(1944-45) 72 IA 148 : AIR 1945 PC 118] (AIR at p. 120) as follows: (IA p. 153)*

“To invoke the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the

[2] (2007) 10 SCC 771

principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, *and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case."*

(emphasis supplied)

11. *In Hamlet v. State of Kerala [(2003) 10 SCC 108 : (2006) 2 SCC (Cri) 518] (vide SCC para 17) this Court held that to establish the common intention of several persons to attract Section 34 IPC, the following two fundamental facts have to be established: (i) common intention, and (ii) participation of the accused in commission of the offences. In the present case, neither common intention nor participation of the appellants in the commission of the offence has been established beyond reasonable doubt.*

12. *No doubt, as held by this Court in Anil Sharma v. State of Jharkhand [(2004) 5 SCC 679 : 2004 SCC (Cri) 1706] (vide SCC para 17) direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case. However, in order to bring home the charge of common intention the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34. In the present case*

there is no credible evidence, direct or circumstantial, that there was such a plan or meeting of minds of all the accused persons to commit the offence in question. Hence, in our opinion, the charge under Section 34 IPC has not been established."

6. Mr. Zangpo Sherpa would also submit that mere presence of Md. Tabrej Alam a*lias* Roshan is not enough to draw the inference of common intention and to satisfy the ingredients of Section 34 IPC, keeping in mind that the allegation against Md. Tabrej Alam *alias* Roshan was that he was admittedly not the person who took the child victim from Mangan and further that the Md. Ibraj Alam and the child victim had got into the taxi on which the Md. Tabrej Alam *alias* Roshan was travelling in. To buttress his submission Mr. Zangpo Sherpa would rely upon the judgment of Supreme Court in re: ***State of U.P. v. Rohan Singh & Anr.***[3] in which it was held:

*"**4.** From the statement of Mashooq Khan, PW2, it transpires that Rohan Singh had fired on him and at the same time Dulare had fired a shot by his unauthorized single barrel gun on Naqi Raza. Neither Rohan Singh assaulted Naqi Raza, deceased nor did Dulare fire any shot at Mashooq Khan, PW.2. After analysing the evidence led by the prosecution, we are of the opinion, that the most that can be said in favour of the prosecution is that the two respondents shared a similar intention to shoot at the two victims but from the material on record, it is not possible to positively attribute to them the common intention to commit the crime. There is a material difference between the sharing of similar intention and common intention. Section 34, IPC can be attracted only if the accused share a common intention and not where they share only similar intention. There are no circumstances on the record from which it may be possible to draw the inference that the respondents had shared the common intention. Mere presence together is not sufficient to hold that they both shared the*

[3] (1996) CRI. L.J. 2884

> *common intention to murder Naqi Raza and injured Mashooq Khan. In this view of the matter, we find that the judgment of the High Court does not call for any interference. The reasons recorded by the High Court are sound and cogent and the same have appealed to us."*

7. Mr. S. K. Chettri, Learned Counsel for the State would however, submits that the evidence of the victim is cogent and thus reliable. The victim has given a detailed account of the facts from the time when he was taken by the Md. Ibraj Allam from Mangan and thereafter when the Md. Tabrej Alam *alias* Roshan joined them at Rangpo and proceeded to Siliguri. He would submit that the defence has not been able to demolish the evidence of the victim which clearly establishes the commission of the offences alleged. He would further submit that the evidence of the victim would also coherently satisfy the ingredients of Section 34 IPC against the Md. Tabrej Alam *alias* Roshan. Mr. S. K. Chettri would also draw the attention of this Court to the deposition of the child witness (P.W.3) who had also deposed that in the year 2016 when he had gone to play cricket near one bank at Mangan he met Md. Ibraj Alam who he also identified in Court as *"Piyaji uncle"* who told him to accompany him thrice to move around ("*ghumnu*"-roam around in nepali) which was rejected by him. Mr. S.K. Chettri would submit that this fact would be relevant to consider his past conduct. Mr. S. K. Chettri would also rely upon two judgments of the Supreme Court to submit how the evidence of a child witness must be considered. In re: ***Mohd. Kalam v. State of Bihar***[4] the Supreme Court would hold:

> *"**7.** In Panchhi v. State of U.P. [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561] it was observed by this Court that the evidence of a child witness cannot be rejected outright but the evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. The court has to assess as to whether the statement of the victim before the court is the voluntary expression of the victim and that she was not under the influence of others.*

[4] (2008) 7 SCC 257

> ***8.*** *The trial court and the High Court have found the evidence of the child witness cogent, credible and had grain of truth. The High Court found that the evidence of victim was free from any influence. Therefore, the trial court and the High Court have relied upon the evidence of the victim. Additionally, it would be appropriate to take note of the observations of this Court in Rameshwar v. State of Rajasthan [AIR 1952 SC 54] . At para 25 it reads as follows: (AIR p. 58)*
>
> *"25. Next, I turn to another aspect of the case. The learned High Court Judges have used Mt. Purni's statement to her mother as corroboration of her statement. The question arises, can the previous statement of an accomplice or a complainant be accepted as corroboration?"*
>
> *The answer was, it was to be treated as corroborative."*

8. In re: ***Alagupandi Alias Alagupandian v. State of Tamil Nadu***[5] the Supreme Court would hold:

> ***"36.*** *It is a settled principle of law that a child witness can be a competent witness provided statement of such witness is reliable, truthful and is corroborated by other prosecution evidence. The court in such circumstances can safely rely upon the statement of a child witness and it can form the basis for conviction as well. Further, the evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and that there exists no*

[5] (2012) 10 SCC 451

> *likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. (Dattu Ramrao Sakhare v. State of Maharashtra [(1997) 5 SCC 341 : 1997 SCC (Cri) 685] and Panchhi v. State of U.P. [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561])"*

9. Mr. S. K. Chettri would submit that Md. Tabrej Alam *alias* Roshan has been correctly identified in the Test Identification Parade conducted by the Learned Judicial Magistrate, First Class, North Sikkim at Mangan and chronicled in the report (exhibit-17).

10. Section 363 IPC provides:

> *"**363**. **Punishment for kidnapping**.-Whoever kidnaps any person from [India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

11. To fall within the mischief of Section 363 IPC the accused should have kidnapped any person from India or from lawful guardianship. The allegation in the present case is that the victim was kidnapped from his lawful guardianship. Section 363 IPC merely prescribes a penalty for the two offences described in Section 360 and 361 IPC. Since Section 360 IPC is not applicable in the present case, it is important to examine Section 361 IPC.

12. Section 361 IPC provides:

> *"**361**. Kidnapping from lawful guardianship.—Whoever takes or entices any*

minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

(Exception) —This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose."

13. Section 361 IPC is intended for the protection of minors and persons of unsound mind. The object of the provision is to provide security and protection to minors and persons of unsound mind. The ingredients of the offence are:

(i) There must be taking or enticing of a minor or of a person of unsound mind;

(ii) The minor must be under 16 years of age, if a male, or under 18 years of age if a female;

(iii) The taking or enticing must be out of the keeping of the lawful guardian of the minor or person of unsound mind; and

(iv) The taking or enticing must be without the consent of such guardian.

14. The use of the words *"takes"* or *"entices"* in Section 361 IPC makes the intention of the legislation clear. In order to constitute the offence

of kidnapping there is no necessity of force or fraud. No one who is responsible for taking or enticing a child from the keeping of his or her guardian, whether physical or by inducement should escape the penalty of law.

15. Section 323 IPC provides:

> *"**323. Punishment for voluntarily causing hurt**.—Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both."*

16. Section 323 IPC is therefore, intended to provide for punishment for those voluntarily causing hurt upon another in all cases except in the case provided for by Section 334 IPC.

17. Section 319 IPC defines *"hurt"* and provides:

> *"**319**. **Hurt**.-Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt."*

18. Section 34 IPC provides:

> *"**34. Acts done by several persons in furtherance of common intention.**—When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."*

19. Section 34 is intended to meet circumstances in which it may be difficult to distinguish between the acts of the individual members of a party or to prove exactly what part was taken by each of them in furtherance of the common intention. It is a principle of joint liability in doing a criminal act. Act done by two or more persons with the common intention can be taken as if it is committed by each of them individually. To invoke the provisions of Section 34 IPC, at least two factors must be established; (1) common intention, and (2) participation of the accused in the commission of

an offence. The aforementioned purpose does not necessitate overt act to be attributed to the individual accused but before a person is convicted by applying the doctrine of vicarious liability not only his participation in the crime must be proved but presence of common intention must be established. For proving formation of common intention, direct evidence may not be always available. To attract the said provision, prosecution is under a bounden duty to prove that the participants had shared a common intention. It is also well settled that only the presence of the accused by itself would not attract the provisions of Section 34 IPC. Other features and elements should also be taken into consideration for arriving at the said deduction. It is not necessary that the acts of the accused persons charged with commission of the offences jointly must be the same or identically similar. It could be different in character but must have been influenced by one and the same common intention in order to attract the provision of Section 34 IPC.

20. A scrutiny of the deposition of the victim makes it apparent that the evidence is reliable, cogent and truthful. The victim, although a child of 11 years, has given a detailed narration of what transpired with him on that fateful day when Md. Ibraj Alam took him from Mangan to Siliguri and back to Singtam where he was apprehended by the beat Constables of the Singtam Police Station with the victim. The victim has given a vivid description of every little incident, names of specific places where the victim had been taken and what occurred there. The narration of facts leaves no room for doubt that it could be a figment of the victim's imagination. The victim's evidence makes it unreservedly certain that Md. Ibraj Alam had taken the victim out of the keeping of his lawful guardian without the consent of the guardian. The victim's evidence also makes the role of Md. Tabrej Alam *alias* Roshan in the crime clear. The victim identified the said Md. Tabrej Alam *alias* Roshan during the Test Identification Parade conducted by P.W.13-the then Learned Judicial Magistrate, North Sikkim at Mangan on 07.05.2016 at the State Jail Rongneck, East Sikkim. The victim once again identified Md. Tabrej Alam *alias* Roshan in Court on 06.09.2016 as the person who came in a vehicle from Gangtok to Rangpo in which Md. Ibraj Alam put the victim and proceeded to Siliguri. The Appellants thereafter took him to a lodge near Chota Masjid but the hotel owner refused to give them room as they did not have identity card. Thereafter, the victim was taken by the Appellants to Pala's lodge where they booked a room. The Appellants then went out locking the victim inside, came back after sometime, took him and returned to Singtam in a vehicle.

At Singtam Md. Ibraj Alam and the victim got down and Md. Tabrej Alam *alias* Roshan proceeded to Gangtok in the same vehicle. On reaching Singtam Md. Ibraj Alam had suddenly *"squeezed"* the victim's neck with his hands making it difficult for the victim to breathe properly while he was sitting on a bench. The victim somehow managed to free himself. Md. Ibraj Alam once again *"squeezed"* the victim's neck near the bridge due which he sustained lacerated injury on his neck. This resulted in the victim being unable to eat food properly for almost a week.

21. The first informant i.e. the father of the victim states the age of the victim as 11 years. P.W.18-the founder Principal of the school attended by the victim would prove the date of birth of the victim by producing the School Admission Register maintained by the School. This confirmed that the date of birth of the victim in the said register was 12.12.2003. Copies of the relevant portions/entries of the said School Admission Register have been exhibited as Exhibit-20 after comparison with the original. A certificate to that effect issued by the Principal would be also exhibited as Exhibit-19 confirming the date of birth as entered in the said School Admission Register. The minority of the child and his age is not contested by the Appellants. The age of the victim thus would have been 12 years 3 months and 29 days exactly at the time of the incident. The Learned Sessions Judge has held the age of the victim as 12 years. For the purpose of Section 361 IPC the victim would thus be considered as a minor male *"under 16 years of age"*.

22. The fact that the victim went missing from Mangan on 10.04.2016 after 11 a.m. and was found at Singtam after 09.30 p.m. has been cogently established by the evidence of the first informant. The fact that the victim was taken by Md. Ibraj Alam from Mangan thereafter by both the Appellants from Rangpo has also been proved by the victim. P.W.8-a resident of Mangan, who had also searched for the victim on the relevant day, confirms the search. P.W.12-also a resident of Mangan and a relative of the first informant and the victim had also searched for the victim on 10.04.2016 since the victim had gone missing. He also confirms the phone call received by the first informant at around 1.a.m. from the Singtam Police Station and having accompanied the first informant to the said Police Station where he had seen both Md. Ibraj Alam and the victim. P.W.9 narrates what the victim told him about the incident and how Md. Ibraj Alam had taken the victim away from Mangan bazaar to Siliguri and their return the same day to Singtam where Md. Ibraj Alam had *"squeezed"* the neck of

the victim twice. P.W.12 confirms having noticed that the victim had sustained black scar mark on his neck due to the squeezing. As per the deposition of P.W.12 Md. Ibraj Alam was taken into custody and thereafter the first informant went to the Mangan Police Station and lodged the FIR. P.W.14-the Medical Officer at the Mangan District Hospital who examined the victim on 11.04.2016 itself noticed superficial laceration present over right side of his eyebrow and bruises present over his neck. P.W.4-the driver of the taxi vehicle bearing registration No.SK-03-T-0146 Alto-800 (red in colour) confirms that Md. Ibraj Alam had hired the said taxi in which Md. Ibraj Alam and one minor child had boarded from near the bank situated at Mangan bazaar and he had taken them till the Rangpo stand at Singtam. P.W.5 posted at Singtam Police Station as Nayak confirms that on 10.04.2016 while on patrolling duty along with P.W.6 at Singtam at around 12:30 a.m. Md. Ibraj Alam was apprehended by them. P.W.5 noticed the minor child nervous and took both the minor child and Md. Ibraj Alam to Singtam Police Station and handed them over to the duty officer. P.W.6 the Constable confirms the facts narrated by P.W.5. P.W.9-the then Sub-Inspector at the Singtam Police Station confirms the fact that P.W.5 and P.W.6 had on 11.04.2016 between 1 to 1.30 a.m. informed him that they had found Md. Ibraj Alam suspiciously loitering around at Singtam bazaar with a small child. After being informed that the victim was nervous P.W.9 had directed them to bring both Md. Ibraj Alam and the victim to the Singtam Police Station. After interrogating the victim P.W.9 had called his guardian and called him and confirmed that the victim was missing from Mangan, North Sikkim. The guardian informed P.W.9 that they would be coming to Singtam Police Station immediately. P.W.9 detained Md. Ibraj Alam and the victim was kept at the Thana until the first informant arrived along with other relatives and confirmed that the child in custody of the Singtam Police Station was in fact his missing child. P.W.9 further confirms that he handed over Md. Ibraj Alam to police personnel from the Mangan Police Station who came for investigation.

23. Minor contradictions which do not go to the root of the evidence and make it doubtful should not deter the Court from accepting evidence which is otherwise reliable, cogent and truthful.

24. Appreciation of the evidence of a child witness has come up for consideration before the Supreme Court in a number of occasions and the

law is well settled. This Court has had occasion to examine the law pertaining to appreciation of the evidence of a child witness who was also a victim of crime in a recent judgment rendered in re: ***Damber Singh Chettri v. State of Sikkim***[6]. The law recognises the child as a competent witness. The evidence of a child witness can be considered under Section 118 of the Indian Evidence Act, 1872 provided that such witness is able to understand the questions and able to give rational answers thereof. A child witness if found competent to depose to the facts and is a reliable one, his evidence could form the basis of conviction. The tender age of a child witness may make them susceptible to be swayed by what others tell them and may fall easy prey to tutoring and thus, although not as a general rule to be applied in every case but as a precautionary measure, in cases in which there is an element of uncertainty, corroboration may be sought for and the evidence evaluated carefully. This is a rule of prudence and the evidence of child witness cannot be rejected per se on the presumption that they are likely to have been tutored. The tender age of a child alone cannot be a ground to discard the evidence of a child.

25. It is also equally well settled that the victim stands at a higher pedestal than even an injured witness as he suffers from emotional injury. In cases of injured witnesses there is injury on the physical form, while in the cases of an injured victim the injury is physical, psychological and emotional. The Court may convict the accused on the sole testimony of a child victim if it has no reason to doubt its truthfulness and veracity. Corroboration is only a matter or prudence and not a rule. In a case relating to a child victim corroboration can be dispensed with if, in the particular circumstances of a case the Court is satisfied that it is safe to rely upon the sole testimony of a child victim. The advisability of corroboration should always be in the mind of the Court as a matter of prudence. It is not a rule of practice that in every case there must be corroboration before a conviction. Where the Court deems it proper to seek corroboration it must be kept in mind that it is not necessary that there should be independent confirmation of every material circumstance. Some additional evidence rendering it probable may be required to come to the conclusion that it is reasonably safe to act upon the testimony of the child victim as to the guilt of the accused. The corroboration need not be direct and circumstantial evidence is sufficient if it connects the accused to the crime. Since the victim is a child and therefore may be susceptible to be swayed by what others tell them the Court must remain

[6] 2018 SCC Online Sikk 132

conscious and assess whether the statement of a child victim is the voluntary expression of the victim and that he was not under influence of others.

26. In the present case not only the deposition of the victim is reliable, cogent and truthful and its veracity unblemished but there is adequate corroboration from equally competent prosecution witnesses who have proved the sequence of events beyond reasonable doubt.

27. The Learned Sessions Judge has put questions to the victim before recording his deposition and endorsed his satisfaction that the victim is able to answer the questions put to him and tender his evidence. The ability of the victim to understand the question and give rational answers to those questions because of his tender age is not under question. As per the evidence of the victim Md. Tabrej Alam *alias* Roshan came in a taxi and joined Md. Ibraj Alam at Rangpo shortly after they had reached there. Md. Ibraj Alam had put the victim in the vehicle in which Md. Tabrej Alam *alias* Roshan had come to Rangpo from Gangtok. Both the Appellants had thereafter taken the victim to Siliguri. Md. Tabrej Alam had actively taken part in taking the victim to Siliguri. Thereafter, Md. Tabrej Alam *alias* Roshan had along with Md. Ibraj Alam tried to book a lodge near Chota Masjid but they had failed to do so as both of them did not have identity card. The Appellants thereafter took the victim to Pala's lodge where they booked a room and kept the victim for a while. Thereafter, both the Appellants took the victim and returned to Singtam in a vehicle from where Md. Tabrej Alam alias Roshan and Md. Ibraj Alam separated. While Md. Tabrej Alam alias Roshan continued in the said vehicle towards Gangtok and Md. Ibraj Alam got off from the vehicle along with the victim at Singtam. The deposition of the victim confirms Md. Tabrej Alam's *alias* Roshan active participation in the act of taking the victim from Rangpo to Siliguri and back to Singtam. There could have been no other reason for Md. Tabrej Alam *alias* Roshan to do what he did save joining Md. Ibraj Alam's plan to commit the offence making it clear that there was meeting of minds of the Appellants. Merely because there is no direct evidence of the initial conspiracy to commit the offence it would be wrong to let go Md. Tabrej Alam *alias* Roshan in spite of the reliable, cogent and truthful evidence of the victim which clearly brings out his active participation in the crime and therefore proves the common intention. Conspiracy most always is hatched in secrecy and it is seldom that one finds direct evidence to prove it. Such intention can only be inferred from the circumstances

appearing from the proved facts of the case. In the present case the direct evidence of the victim and the corroborative evidence of the other prosecution witnesses coupled with the unflinching identification of Md. Tabrej Alam *alias* Roshan by the victim both during the Test Identification Parade and in Court leave no room for doubt about his complicity in the crime. Not only can the common intention of the Appellant be inferred but the active participation in the commission of a crime by both the Appellants has also been proved. The prosecution has been able to prove all the ingredients of each of the offences alleged against the Appellants.

28. The learned Sessions Judge after analyzing the evidence and the law would hold:

> *"**29**. Needless to say, on a conjoint reading of the evidence of PWs 2 & 1 it becomes absolutely clear that the two accused persons, in furtherance of a common intention, took/kidnapped PW2 (minor) out of the lawful keeping of his parents without their consent. The fact that the accused No.2 joined the accused No.1 at Rangpo and then they took PW2 further upto Siliguri, and later again brought him back to Singtam (Sikkim), makes it absolutely clear that he shared a common intention with the accused No.1. He is thus guilty to the same extent as the accused No.1. The case of Kala Raja & Anr., Petitioners v. State of Assam, Respondent 1983 Cri. L.J(NOC) 81(Gau) can be referred to in this Context."*

29. This Court has no hesitation in upholding the judgment and order on sentence both dated 19.04.2017 passed by the Learned Sessions Judge. Accordingly both the Appeals are dismissed. The judgment and order on sentence dated 19.04.2017 passed in Sessions Trial Case No. 02 of 2016 are upheld. The Appellants are in judicial custody. They shall continue there to serve out the remaining sentences.

SLR (2018) SIKKIM 930

(Before Hon'ble the Acting Chief Justice)

W.P. (C) No. 35 of 2017

Mrs. Suman Rai ….. **PETITIONER**

Versus

State of Sikkim and Others ….. **RESPONDENTS**

For the Petitioner: Mr. Zangpo Sherpa and Ms. Mon Maya Subba, Advocates.

For Respondent 1 and 2: Mr. Karma Thinlay, Senior Government Advocate with Mr. Thinlay Dorjee Bhutia, Government Advocate, Mrs. Pollin Rai, Assistant Government Advocate and Ms. Neera Thapa (Legal Retainer, HC, HS & FWD).

For Respondents 3, 5 to 14 and 16 to 18: Dr. (Mrs.) Doma T. Bhutia, Advocate.

Date of decision: 26th July 2018

A. Sikkim Government Establishment Rules, 1974 – Rule 8 (d) – *Inter se* seniority – 'Merit' as per the Cambridge English Dictionary would be "the advantages something has compared to something else" while the 'date of joining' obviously is the date on which a person would join duty – Merely because a person who is placed lower in the merit list joins duty promptly on issuance of appointment letter would not entitle that person placement at a higher position than what he/she was placed on selection on merit – Date of joining cannot be reckoned for computing seniority – *Inter se* seniority cannot be meddled with once determined.

(Paras 11, 14 and 17)s

B. Regulation of Seniority – The argument that no Rules were available to guide the Respondents on the question of seniority deserves no consideration and cannot be countenanced in view of the Regulation of Seniority Rules 1980 and the Establishment Rules 1974 – Undoubtedly, the aforestated Rules ought to have guided the Respondent on determination of seniority even in the absence of the Nursing Service Rules which came to be enacted only in 1997 and applied in *proprio vigore* with regard to the *inter se* seniority of the persons selected.

(Para 15)

C. Sikkim State Nursing Service Rules, 1997 – Respondent 7 and 18 have been redesignated as "Sister-in-Charge" of different Wards not promoted – As per the Concise Oxford English Dictionary, Twelfth Edition, Oxford University Press, the meaning of "redesignate" would be "give (someone or something) a different official name, description or title" while, the meaning of "promotion" would be "the action of raising someone to a higher position or rank" – Redesignation is surely not equivalent to promoting a person and there ought not to be any confusion on the nomenclature employed.

(Paras 20 and 21)

Petition allowed.

Chronological list of cases cited:

1. Competent Authority v. Barangore Jute Factory and Others, (2005) 13 SCC 477.

2. State of Kerala and Others v. K. Prasad and Another, (2007) 7 SCC 140.

3. P. Mohan Reddy v. E.A.A. Charles and Others, (2001) 4 SCC 433.

4. Chairman Puri Gramya Bank and Another v. Ananda Chandra Das and Others, (1994) 6 SCC 301.

5 Suresh Chandra Jha v. State of Bihar and Others, (2007) 1 SCC 405.

6. Rajasthan State Industrial Development and Investment Corporation v. Subhash Sindhi Cooperative Housing Society, Jaipur and Others,

(2013) 5 SCC 427.

7. R. M. Ramual v. State of Himachal Pradesh and Others, (1989) 1 SCC 285.

8. Bimlesh Tanwar v. State of Haryana and Others, (2003) 5 SCC 604.

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

10. Reserve Bank of India v. N. C. Paliwal and Others, (1976) 4 SCC 838.

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

12. Anil Kumar Vitthal Shete and Others v. State of Maharashtra and Another, (2006) 12 SCC 148.

JUDGMENT

Meenakshi Madan Rai, ACJ

1. The apple of discord between the parties herein is the alleged downgrading in the seniority of the Petitioner in her service, in which, on appointment she was placed at Serial No.3 vide Office Order No.896/M./H&FW dated 21-05-1996. Consequently, in the consolidated list indicating appointment of Nurses made from 1979 to 1996 vide communication No.277/H.&F.W. dated 19-11-1996, she found place at Serial No.68 while continuing to remain at Serial No.3 of the 1996 batch. However, vide Notification No.13/H&F.W. dated 09-09-2002, unbeknownst to her she was relegated to Serial No.75 in the consolidated list and to Serial No.17 of the batch of 1996, without notice to her of such action. Thus, claiming violation of her fundamental rights as guaranteed under Articles 14, 15, 16 and 21 of the Constitution of India, the Petitioner is before this Court seeking redressal, *inter alia*, as follows;

(a) an order directing the Respondents to comply with the communication dated 19-11-1996 along with seniority list and to act strictly in accordance with the said Office Order in maintaining the seniority;

(b) an order directing the Respondents to set aside the communications dated 22-09-2016 and 11-11-2016, along

with provisional seniority list and Notification bearing No.13/ H&F.W., dated 09-09-2002 of the Respondent No.1;

(c) After perusal of the records, causes shown if any and upon hearing the parties to make the Rule Absolute and/or pass any other order/orders/ directions as deemed fit and proper for the ends of justice;

(d) Direct the Respondents No.1 and 2 to pass necessary orders for publishing a fresh seniority list as per Rules by maintaining the *inter se* seniority of the 1996 batch according to the merit list.

2. For clarity, we may briefly advert to the facts of the case as per the Petitioner. Vide Office Memorandum bearing Memo No. 533/M/H&FW/M, dated 15-05-1996, the Petitioner was offered appointment to the post of General Nursing and Midwifery (for short "GNM"), by the Respondent No.1, as a direct recruit in the scale of pay of Rs.1410-30-1560/40-1800/ 50-2300, per month. Pursuant thereto on 21-05-1996 an Office Order bearing No.896/M./H&FW came to be issued by the Respondent No.1 appointing the Petitioner with sixteen others as Staff Nurses. The name of the Petitioner was placed at Serial No.3 in the seniority list in the said batch of appointments. On 25-05-1996 the Petitioner reported for duty at the District Hospital, Namchi, duly filing her joining report. Later, on 19-11-1996, letter No.277/H.&FW. was issued by the Respondent No.1 to the Petitioner along with a consolidated seniority list of Staff Nurses appointed from 1979 to 1996, placing the Petitioner at Serial No.68. The communication sought acceptance or objection of the seniority within fifteen days from the date of issuance of the letter failing which it would be presumed that the seniority therein was accepted and no future requests for alteration/addition or modification would be entertained. This seniority list came to be accepted by all the seventeen new employees who had joined service as Staff Nurses. In the year 2016, however, the Petitioner along with others came to learn that a new seniority list of Staff Nurses was to be prepared with no notice to them. The Petitioner on 12-09-2016 made a representation to the Respondent No.1 along with another Applicant, Sancha Maya Rai, seeking maintenance of their seniority in terms of the list of 1996. In response thereto, the Respondent No.1 vide letter dated 22-09-2016 informed her that the *inter se* seniority list appended with the letter,

had been notified vide Notification No.13/H&F.W. on 09-09-2002 which was to be adhered to. That, while the Petitioner had been placed at Serial No.3 at the time of appointment in 1996, in the consolidated seniority list she had found place at Serial No.68, but in the list of 2002 she was relegated to Serial No.75. It is her contention that the alleged seniority list is not proper, neither is it as per Rules. Following the aforestated response of the Respondent No.1 dated 22-09-2016, the Petitioner again preferred a representation on 26-09-2016 to the Respondent No.1 reiterating her request for maintenance of her seniority. However, on 11-11-2016, a letter came to be issued by the Respondent No.1 to the Chief Medical Officers of the four District Hospitals and the Director-cum-Medical Superintendent, STNM Hospital, informing therein that the Department was in the process of notifying *inter se* seniority list of Staff Nurses under the Sikkim Subordinate Nursing Service. The Officers were requested to circulate the enclosed provisional seniority list amongst the concerned Nurses to enable submission of their respective claims/objections, if any, in writing within fifteen days from the date of issuance of the letter. In the said list, for the 1996 appointments the Petitioner found herself listed at Serial No.16 (Respondent No.4 having resigned in the interim) instead of Serial No.3 as earlier, while those who had been placed below her now found place above her. Hence, she objected to the Provisional seniority list of 2016, vide communication dated 21-11-2016 to the Respondent No.1, in addition to which she preferred a representation before the Honble Chief Minister of Sikkim who requested the Respondent No.2 to consider her case. She also filed an application under the Right to Information Act, 2005 to the State Public Information Officer (SPIO) of the Respondent No.1 on 02-05-2017 who, *inter alia*, informed of her that the concerned File could not be located in the Department the matter being twenty-one years old. Aggrieved, the Petitioner on 10-06-2017 sent a legal notice to the Respondent No.1 to which the Respondent No.1 expressed inability to correct the seniority list as notified on 09-09-2002. Hence, the instant Petition seeking the aforestated reliefs.

3. Respondent No.1 and Respondent No.2 filed a joint Counter-Affidavit. While denying and disputing the claims of the Petitioner, *inter alia*, averred therein that the seniority list which was circulated vide Memo No.277/H.&F.W. dated 19-11-1996 was erroneous as the date of appointment of the Petitioner was wrongly recorded as "23-05-1996" instead of "21-05-1996". A fresh seniority list was thus prepared and notified on 09-09-2002 duly maintaining the *inter se* seniority with effect

from the date of joining of duty by the appointees and circulated to them and the respective Chief Medical Officers of all the Districts. That, the said seniority list has been accepted for the last fifteen years based on which a series of promotions and redesignations have been effected besides assigning duty roster and higher responsibilities in the Hospital, to which the Petitioner till date had not objected. It was also averred that the seniority list of 1996 was not notified while the seniority list as per Notification of 2002 was circulated to all concerned. Admitting to issuance of letter dated 11-11-2016 it was pointed out that this letter has since been rescinded, as the Notification of 2002 pertaining to seniority was already in existence. That, as the grounds set out by the Petitioner are not sustainable in the eyes of law besides which the Petitioner has approached this Court belatedly, the Petition is liable to be dismissed outright.

4. Respondents No.3, 5 to 14 and 16 to 18 too filed a common Counter-Affidavit denying that the Office Order dated 21-05-1996 was ever a merit list. Seeking a dismissal of the Petition, it was averred that no written test or viva voce was conducted during such appointment which infact was made on account of a large number of vacancies of Staff Nurses at that point in time. Hence a common appointment order was issued by the Respondents No.1 and 2 for all the Staff Nurses including the Petitioner based on those who had a Certificate of Nursing Course. The list was prepared District-wise in order to ascertain the number of staff belonging to various Districts to facilitate transfers to the concerned District Hospitals. That, the said Respondents joined their duties 2-3 days prior to the Petitioner who joined only on 25-05-1996, and it is a settled principle of law that the initial date of joining is the criteria for basing *inter se* seniority. In the event that the date of joining is identical then the age of the person would be taken into consideration, placing the older person at a higher rank in seniority. That, the Sikkim State Nursing Service Rules, 1997 (hereinafter "Nursing Service Rules"), categorically lays down that the *inter se* seniority of the members of the service shall be determined in accordance with the Sikkim State Services (Regulation of Seniority) Rules, 1980 (hereinafter "Regulation of Seniority Rules"). That, under the Regulation of Seniority Rules it is provided that the seniority of persons who are appointed to the service by a method other than by selection or by examination shall be determined *ad hoc* by the State Government by a special order. No such special order was issued nor was the seniority list notified in a Government Gazette or Circular. That, infact due to several errors appearing in the list of

1996 necessary rectifications were made by preparation of the list in 2002. Following the *inter se* seniority list of 2002 the Attendance Register of the Nurses are maintained as per the Wards attended to by them. The Respondents are thus in the Special Neonatal Care Unit (SNCU) and the Dialysis Unit, indicative of their seniority. That, infact a Screening Test of all Staff Nurses was done by the State-Respondents based on the *inter se* seniority list of 2002 whereupon Office Order dated 14-11-2016 was issued which remained unassailed by the Petitioner thereby waiving her right to challenge the *inter se* seniority list of 2002. A number of promotions of the batch of 1996 have been effected based on the *inter se* seniority list of 2002, hence, the Petition is liable to be dismissed also on the grounds of estoppel, waiver and acquiescence.

5. In Rejoinder, the Petitioner would draw the attention of this Court to Rule 8(a) of the Sikkim Government Establishment Rules, 1974 (hereinafter "Establishment Rules") and aver that in consideration of the said Rules the Petitioner having been selected as Staff Nurse by direct recruitment would be placed in the *inter se* seniority on the basis of the selection list. Assistance was also taken of Rule 4(d) of the Regulation of Seniority Rules. That, infact the Petitioner had applied for the post of Staff Nurse after it was advertised by the Respondent No.1 as evident from their RTI response, followed by an interview of applicants, marks awarded by the Selection Committee and their names arranged in accordance with the marks obtained by them. To buttress this point, reliance was placed on a letter dated 23-02-1995 issued by the Respondent No.1 calling one Sanchamaya Rai for an interview, on her application for appointment as GNM. Thus, the seniority so settled cannot be withdrawn without operation of a valid law and a mere fortuitous chance of reporting for duty earlier would not alter the ranking given by the Selection Board, hence the prayers in the Writ Petition be granted.

6. Canvassing his arguments on behalf of the Petitioner, Learned Counsel while drawing attention to the Notifications of 1996 and 2002 referred to hereinabove, would contend that the Respondents had acted arbitrarily and contrary to law by placing the Petitioner below her actual position in the seniority list. That the Respondents are required to strictly adhere to the provisions of the Establishment Rules, Regulation of Seniority Rules and Nursing Service Rules. Infact, the Establishment Rules clearly lays

down at Rule 8(d) that once the *inter se* seniority of a Government Servant in one grade is determined, it shall not be disturbed unless and until he is either promoted to the next higher post or is reduced in rank under the provisions of the procedure for disciplinary action. That, the Petitioner joined duty at Namchi Hospital within the time limits prescribed by the Authority and as there was no gross delay her *inter se* seniority cannot be affected. The Petitioner had never been informed by the Respondent No.1 that seniority would be on the basis of the date of joining and they cannot now take the said plea when merit was the criteria considered for placing the Petitioner at Serial No.3 of the list of 1996. It was urged that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone and every word of the statute has to be given its due meaning. Support was garnered from the ratio in ***Competent Authority*** vs. ***Barangore Jute Factory and Others***[1]. While contending that the Rules ought to be strictly complied with by the concerned Department, attention of this Court was drawn to the decision in ***State of Kerala and Others*** vs. ***K. Prasad and Another***[2]. While relying on ***P. Mohan Reddy*** vs. ***E.A.A. Charles and Others***[3] it was canvassed that the Petitioner has the right to her seniority being determined in accordance with the Rules which existed when she entered service. That the question of re-determination of the seniority in the cadre did not arise as there was no amendment to the Rules pertaining to seniority. Assailing the contention of the Respondent No.1 that seniority was based on the date of joining, strength was drawn from ***Chairman Puri Gramya Bank and Another*** vs. ***Ananda Chandra Das and Others***[4] and ***Suresh Chandra Jha*** vs. ***State of Bihar and Others***[5]. Drawing succour from ***Rajasthan State Industrial Development and Investment Corporation*** vs. ***Subhash Sindhi Cooperative Housing Society, Jaipur and Others***[6] it was argued that Notification of 2002 which had no legal sanction cannot override the Rules pertaining to seniority which are already in place. While fending of the argument of the Respondents that the Petitioner has approached the Court belatedly and was therefore not entitled to the reliefs, the attention of this Court was invited to ***R. M. Ramual*** vs. ***State of Himachal Pradesh and Others***[7]. That, the Petitioner was in ignorance of

[1] (2005) 13 SCC 477
[2] (2007) 7 SCC 140
[3] (2001) 4 SCC 433
[4] (1994) 6 SCC 301
[5] (2007) 1 SCC 405
[6] (2013) 5 SCC 427
[7] (1989) 1 SCC 285

the seniority list of 2002 as it was not notified in the Government Gazette and only the letter dated 11-11-2016 brought this fact to the notice of the Petitioner. It was further contended that the response dated 29-05-2017 of the ASPIO of the Respondent No.1 would clearly indicate that the promotion of Staff Nurses of the 1996 batch has not been effected although it is proposed to be, based on the seniority list of 09-09-2002, which reveals that the averment of the Respondents No.3, 5 to 14 and 16 to 18 that promotions have taken place is misleading. Hence, the prayers in the Writ Petition be granted.

7. Countering the arguments of Learned Counsel for the Petitioner, Learned Senior Government Advocate would contend that 17 candidates were appointed in the year 1996 as against 43 vacant posts of GNM that year thereby implying that the appointments were made without any interview or Selection Test, the qualification of the candidates being the sole consideration. Merely because the name of the Petitioner appeared at Serial No.3 it could not be interpreted as her *inter se* seniority. Moreover, seniority would be reckoned from the date of joining and evidently the Petitioner joined service only on 25-05-1996 as against others who admittedly joined prior to her in time. Besides, should the date of joining be the same then the date of birth and thereby the age of the candidate would be the factor for consideration while fixing seniority. That, infact in the year 1996 there were no Rules to follow for guidance on seniority and the list was prepared at random, apart from which seniority is not a fundamental right, but merely a civil right. Support on these aspects was drawn from ***Bimlesh Tanwar*** vs. ***State of Haryana and Others***[8]. Forwarding the argument that the Petition was filed belatedly rendering the Petitioner guilty of laches, attention was drawn to ***P. S. Sadasivaswamy*** vs. ***State of Tamil Nadu***[9]. That, in the instant case despite knowledge of the re-fixation of *inter se* seniority in 2002 the Petitioner has approached this Court only in the year 2017, fifteen years after such exercise. While arguing that the Court can only enquire into whether the Rule laid down by the State is arbitrary and irrational leading to inequality of opportunity amongst employees belonging to the same class, reliance was placed on ***Reserve Bank of India*** vs. ***N. C. Paliwal and Others***[10]. It was urged that in view of the grounds put forth, the Petition be dismissed.

[8] (2003) 5 SCC 604
[9] (1975) 1 SCC 152
[10] (1976) 4 SCC 838

8. Learned Counsel for the Respondents No.3, 5 to 14 and 16 to 18, while reiterating the averments made in her Counter-Affidavit would refute the stance of the Petitioner strenuously and contend that the Petition is liable to be dismissed, firstly on account of the delay and laches, towards this end reliance was placed on ***Vijay Kumar Kaul and Others*** vs. ***Union of India and Others***[11]. That the Petitioner cannot claim ignorance of the Notification of 2002 being undeniably aware that several Nurses of the same batch, some of whom were working with her, have been redesignated and consequently given higher responsibilities on the basis of the said Notification. That the averments made by the Respondents be given due consideration and the Petition be dismissed.

9. Submissions made at the bar were heard *in extenso* and given anxious consideration. The pleadings and all documents appended thereto have been carefully perused. What falls for consideration before this Court is,

(i) Whether the seniority of the Petitioner is to be determined by the Office Order No.896/M./H&FW dated 21-05-1996 followed by letter bearing No.277/H.&F.W. dated 19-11-1996, or would it be determined by Notification No.13/H&F.W. dated 09-09-2002.

(ii) Whether the Petition is liable to be dismissed on account of delay and laches.

10. Addressing the first question, a perusal of the Office Order bearing No.896/M./H&FW, dated 21-05-1996 (Annexure P-2), appointing the Petitioner as Staff Nurse with sixteen others, places her name at Serial No.3 of the list of appointed candidates. Indubitably the Petitioner joined on 25-05-1996 as against some others who joined prior in time. Nevertheless, this Office Order was followed by a letter to the Petitioner bearing No.277/H&F.W., dated 19-11-1996, which reads, *inter alia*, as follows;

> "..
>
> I am forwarding herewith the seniority list with relevant details for your perusal and acceptance thereof.

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[11] (2012) 7 SCC 610

> Your acceptance or objection of any should be submitted within 15 days from the date of issue of this letter else it will be presumed that you have accepted your seniority maintained by the Department and no future request for alteration/ addition, modification of the same will be entertained.
>
> ………………………………………………………….”

The seniority list was appended to the letter addressed to the Petitioner, for perusal and acceptance and included the names of Staff Nurses appointed from 06-04-1979 to 18-08-1996. In the batch of 1996 alone, of the said list, the Petitioner's name found place at Serial No.3 whereas in the overall rank in seniority she was listed at Serial No.68. The objection of the Petitioner was to be submitted within fifteen days, if no such objection was forthcoming it would be presumed that the seniority listed therein had been accepted. It is no one s case that there was any objection from any quarter within the given period of fifteen days, hence it would not be erroneous to assume that the *inter se* seniority was decided in terms of the list appended to the letter. At this juncture, it would be worthwhile considering whether the argument of the Respondents that the date of joining would be the basis for computing seniority can be countenanced. It would be advantageous to extract Rule 8 of the Establishment Rules which provides as follows;

> "8. **Seniority.-**
>
> ***(a) Direct recruits.-***
>
> (i) While making selection for direct recruitment, the authority concerned while making recommendations shall arrange the names of the selected candidates in the order of merit assigned to them by the authority. If all the candidates join duty or training courses, as the case may be, within the time limits prescribed, inter-se seniority will be fixed in the same order in which their names are placed at the time of selection. Extension of the period of training or probation in

any individual case by the Government shall not affect the inter-se seniority.

………………………………………………………………

(ii) ………………………………………

(b) ………………………………………

(c) ………………………………………

(d) Once the inter-se seniority of a Government Servant in one grade is determined, it shall not be disturbed unless and until he is either promoted to the next higher post or is reduced in rank under the provision of the procedure for disciplinary action.”

[emphasis supplied]

11. The aforestated Rule at 8(a)(i) clearly lays down that the names of the selected candidates shall be in the order of merit assigned to them by the Authority. The Rule also provides that if all the candidates joined duty within the time limit prescribed the *inter se* seniority will be fixed in the same order in which their names are placed at the time of selection. On examining Annexure P1 which is a Memorandum bearing Memo No.533/M/H&FW/M dated 15-05-1996 and Office Order No.896/M./H&FW dated 21-05-1996 the documents nowhere prescribe the time limit by which date the Petitioner or her colleagues were to join duty. The order of appointment having been issued on 21-05-1996 and the Petitioner having joined duty on 25-05-1996 appears to have been considered as reasonable time since the Authorities raised no objection. Rule 8(d) of the same Rules provides that the *inter se* seniority so arranged shall not be disturbed unless the concerned person is promoted or reduced in rank. What needs to be pointed out here is that none of the seventeen appointees of 1996 objected to the name of the Petitioner being placed at Serial No.3 in terms of Office Order dated 21-05-1996 and communication dated 19-11-1996. Pausing here for a minute, it would be appropriate to distinguish between “merit” and “date of joining”. Merit as per the Cambridge English Dictionary would be “*the advantages something has compared to something else*” while the date of joining obviously is the date on which a person would join duty.

Merely because a person who is placed lower in the merit list joins duty promptly on issuance of appointment letter would not entitle that person placement at a higher position than what he/she was placed on selection on merit. Although it is the stance of the State-Respondents that seventeen candidates were appointed as against a vacancy of forty-three qualification being the sole consideration, no document to substantiate this contention finds place in the records. The Petitioner for her part has submitted a letter issued to one Sancha Maya Rai in 1995 calling her for an interview for the Post of GNM. Although this is indeed a tenuous argument, but it raises a reasonable probability that an interview could similarly have been held for the 1996 batch.

12. In ***Chairman Puri Gramya Bank*** (*supra*) the Hon ble Supreme Court held that;

> "**12.** ……………….. It is settled law that if more than one are selected, the seniority is as per ranking of the direct recruits subject to the adjustment of the candidates selected on applying the rule of reservation and the roster. By mere fortuitous chance of reporting to duty earlier would not alter the ranking given by the Selection Board and the arranged one as per roster. The High Court is, therefore, wholly wrong in its conclusion that the seniority shall be determined on the basis of the joining reports given by the candidates selected for appointment by direct recruitment and length of service on its basis. The view, therefore, is wrong. ……………………………………."
>
> [emphasis supplied]

13. In ***Suresh Chandra Jha*** (*supra*) the Honble Supreme Court while considering whether seniority ought to be based on merit or according to the date of joining held that;

> "**6.** There is no dispute that the appellant was ranked higher to Respondent 8. There is also no dispute that in the appointment letter the appellant was given six weeks' time to join. Merely because

Respondent 8 joined earlier that did not in any way affect the merit placement."

[emphasis supplied]

14. We may now beneficially turn to Rule 4(d) and 4(f) of the Regulation of Seniority Rules, which provides as follows;

"**4. Determination of seniority**.-The seniority of the members of the Service shall be determined separately in respect of each Service in the manner specified below,-

(a) ....

(b) ....

(c) ....

(d) The relative seniority inter-se of persons recruited by selection shall be determined on the basis of the order in which their names are arranged in the selection list prepared in consultation with the Commission:

Provided that where persons promoted initially on a temporary basis are subsequently appointed to the Service on a substantive basis in an order different from the order of merit indicated at the time of their temporary promotion, seniority shall follow the order of subsequent appointment and not the original order of merit.

....

(f) The seniority of persons who are appointed to the Service by a method other than by selection or by examination shall be determined ad-hoc by the State Government by a special order."

[emphasis supplied]

These Rules in addition to the Establishment Rules *supra*, elucidate the method of determining seniority. It was contended by Learned Counsel

for Respondents No.3, 5 to 14 and 16 to 18 that Rule 4(f) of Regulation of Seniority Rules *supra* was applicable herein, requiring a special order by the Government to determine seniority as the Petitioner was appointed neither by way of selection nor examination, but on possession of qualification. That as no special order issued her seniority could not have been determined in 1996. It would be apposite to reiterate here that the Respondents have not been able to establish absence of interview or selection test for appointment of the Petitioner. While considering the response given by the ASPIO of the Respondent No.1, to a question put by the Petitioner vide her letter dated 02-05-2017 as follows;

> "*7(i) What are the provision/Rules under which the Staff Nurses were appointed as per the O.O. NO.895/M/H&FW dated 21.05.1996?*"

The response dated 29-05-2017 of the ASPIO was as follows;

> "01. The basis of appointment is the rules prevalent <u>at the time and as per the advertisement notice issued.</u> The matter being of 21 years old (sic), the department is unable to locate file, hence, note sheets are unavailable."
>
> [emphasis supplied]

It goes without saying that the response being from the ASPIO of the Respondent No.1 given under an RTI Application of the Petitioner is deemed to be correct. Since the appointment was made in response to an advertisement, it can safely be assumed that some semblance of a selection process was complied with. This therefore sets to rest the speculation that the appointment was not on merit consequently Rule 4(f) of the Regulation of Seniority Rules could not be applicable.

The law enunciated in the above extracted ratio sets to rest the arguments of the Respondents on this aspect, inasmuch as the date of joining cannot be reckoned for computing seniority.

15. The argument advanced by Learned Senior Government Counsel urging that no Rules were available to guide the Respondents on the question of seniority deserves no consideration and cannot be countenanced

in view of the truth that stares one in the face in the form of the Regulation of Seniority Rules 1980 and the Establishment Rules 1974, while the appointments admittedly were of the year 1996. Undoubtedly the aforestated Rules ought to have guided the Respondent on determination of seniority even in the absence of the Nursing Service Rules which came to be enacted only in 1997 and applied in *proprio vigore* with regard to the *inter se* seniority of the persons selected.

16. In ***K. Prasad*** (*supra*) the Hon'ble Supreme Court while considering the sanctity of Rules would hold as follows;

> "**10.** .... In view of such comprehensive procedure laid down in the statute, an application for upgradation has necessarily to be made and considered strictly in a manner in consonance with the Rules. It needs little emphasis that the Rules are meant to be and have to be complied with and enforced scrupulously. Waiver or even relaxation of any rule, unless such power exists under the rules, is bound to provide scope for discrimination, arbitrariness and favouritism, which is totally opposed to the rule of law and our constitutional values. It goes without saying that even an executive order is required to be made strictly in consonance with the rules. Therefore, when an executive order is called in question, while exercising the power of judicial review the Court is required to see whether the Government has departed from such rules and if so, the action, of the Government is liable to be struck down."
>
> [emphasis supplied]

In terms of the aforesaid observation it is clear that the State-Respondents were required to abide by the mandate of law pertaining to seniority in terms of the Rules and principles of law extracted hereinabove and discussed.

17. In ***P. Mohan Reddy*** (*supra*) the Hon ble Supreme Court held that;

> **"17.** A conspectus of the aforesaid decisions of this Court would indicate that even though an employee cannot claim to have a vested right to have a particular position in any grade, but all the same he has the right of his seniority being determined in accordance with the Rules which remained in force at the time when he was borne in the cadre. ……………..."

We may look for succour to Rule 8(d) of the Establishment Rules which dealing with this facet which provides that *inter se* seniority cannot be meddled with once determined as already discussed and which is not being reiterated here to prevent prolixity.

18. In ***R. M. Ramual*** (*supra*) the Honble Supreme Court has held that;

> **"17.** ………………………….. It is true that the final seniority list was sent to the Central Government and presumably it was approved, but because a seniority list has been approved by the Central Government, it cannot be laid down as a rule of law that even though it has been illegally prepared in violation of the directions of the Central Government itself to the prejudice of the officer or officers concerned, it cannot be challenged. Normally, when a seniority list has been made final, it should not be allowed to be challenged. But when a seniority list is prepared ignoring all just principles and also the rules framed or directions given by appropriate authority, seriously affecting any officer, it is always liable to be examined and set aside by the court. We are, therefore, unable to accept the contention of the learned counsel for Respondent 4 that the seniority list having been made final after the approval of the Central Government cannot be challenged by the appellant."

[emphasis supplied]

The observation *supra* would urge the Authorities to ensure that seniority list is prepared keeping in view "just" principles.

19. In ***Rajasthan State Industrial Development and Investment Corporation*** (*supra*) the Honble Supreme Court held that;

> "**27.** Executive instructions which have no statutory force, cannot override the law. Therefore, any notice, circular, guidelines, etc. which run contrary to statutory laws cannot be enforced. [Vide *B.N. Nagarajan* v. *State of Mysore* [AIR 1966 SC 1942] , *Sant Ram Sharma* v. *State of Rajasthan* [AIR 1967 SC 1910] , *State of Karnataka* v. *Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753 : AIR 2006 SC 1806] and *Mahadeo Bhau Khilare (Mane)* v. *State of Maharashtra* [(2007) 5 SCC 524 : (2007) 2 SCC (L&S) 194].]"

While on this point, it is relevant to consider that in the first instance after the seniority list was maintained in terms of the letter dated 25-11-1996 there appears to be no amendment to the Rules nor was there any Circular pertaining to change in the seniority, besides which it needs no reiteration that executive instructions cannot override the law. The argument of the Respondents No.1 and 2 that the list of 1996 required rectification as the Petitioners date of appointment was recorded as "23-05-1996" instead of "21-05-1996" is rather fragile and incredulous. Inarguably a letter dated 11-11-2016 was issued by the Respondent No.1 informing the concerned officials of the intention of the Department to prepare an *inter se* seniority list of Staff Nurses in 2016. No such communication or intention of resettlement of seniority appears to have been issued in 2002.

20. That, having been said a meticulous scrutiny of the Nursing Service Rules, at Rule 13, clearly contemplates as follows;

> "13. The inter-se-seniority of the member of the service shall be determined in accordance with the Sikkim State Service (Regulation of Seniority) Rules, 1980."

This Rule needs no further clarification suffice it to state that the *inter se* seniority of the Nurses was to be determined in terms of the Regulation of Seniority Rules which has already been discussed.

21. It also becomes imperative to mull over the averment of the Respondents No.3, 5 to 14 and 16 to 18 which was as follows;

> "13. That the Screening Test of all the Staff Nurses was done by the State Respondents based on the Inter-Se-Seniority list of 2002, thereafter Office Order 14/11/2016 was issued. The said Screening Test was also neither challenge (sic) nor protested by the petitioner. Said fact the petitioner has waive her right (sic) to protest & challenge the inter-se-seniority list of 2002 and not knowing the seniority list of 2002 is incorrect."

No evidence exists of a screening test neither is it averred or argued by the Respondents No.1 and 2. The Office Order dated 14-11-2016 is bereft of allusion to any screening test. This averment thus appears to be a figment of the imagination of the answering Respondents, in the absence of substantiation by documentary evidence. Another averment of the Respondents No.3, 5 to 14 and 16 to 18 that draws the attention of this Court is that the seniority of the Respondents is evident from the fact that they are in charge of the SNCU and Dialysis Ward. On this count, Annexure P7 would reveal that even the Petitioner is posted at the SNCU/ NICU, would this therefore bring her at par with the Respondents despite their arguments to the contrary? That apart, the averments of the said Respondents clearly indicate that Respondents No.7 and 18, have been redesignated as "Sister-in-Charge" of different Wards not promoted. As per the Concise Oxford English Dictionary, Twelfth Edition, Oxford University Press, the meaning of '*redesignate*' would be "*give (someone or something) a different official name, description or title*" While, the meaning of '*promotion*' would be "*the action of raising someone to a*

higher position or rank". Redesignation is surely not equivalent to promoting a person and there ought not to be any confusion on the nomenclature employed.

22. The contention of the Respondents *supra*, that the Nurses of the 1996 batch have been promoted has to be taken with a pinch of salt, as a careful perusal of the documents on record would reveal that promotions have been given to Staff Nurses employed in the year 1981 up to 1994 which by no stretch of the imagination included the 1996 batch. It is pertinent to mention here that on 27-10-2017, this Court in I.A. No.02 of 2017 on a prayer of the intervenors being Staff Nurses of 1995, *inter alia*, ordered as follows;

> " 5. In view of the detailed submission reflected herein, it is evident that promotion with regard to the Intervenors/Applicants who were appointed in the year 1995 is not in contest and if steps are taken for their promotion, no prejudice will be caused to the Petitioner. Accordingly, the State-Respondents No.1 and 2, if so advised, may proceed with the promotional matter of the Intervenors/Applicants. The Order dated 14.7.2017, is modified accordingly"

Towards this, we may also rely on the response of the ASPIO dated 29-05-2017 to the query of the Petitioner which states as follows;

> " 08. The promotion of staff nurse (sic) has not been executed. However, the promotion of Staff Nurses is proposed to be based as per Seniority List published vide Notification No.13/H&FW; Dated 09.09.2002. (Copy enclosed at flag 'B')"
>
> **[emphasis supplied]**

The argument *supra* of the Respondents thus merits no consideration, being fallacious.

23. It is the specific argument of the Respondent No.1 that Notification of 2002 having been duly notified in the Department would have precedence over the 1996 Notification and the Petitioner cannot now claim ignorance. Having perused the Notification No.13/H&F.W. dated 09-09-2002, it emerges therein that a copy each of the Notification has been made over to "*All persons concerned in the enclosed list*" and to Authorities listed therein and, File and Guard File. What the Respondent No.1 has failed to establish is whether all concerned persons had ever received the said Notification. For that matter, Respondents No.3, 5 to 14 and 16 to 18 have also failed to substantiate by any documentary evidence or averment in that context that a copy of the Notification of 2002 was made over to them or received by them at any point in time. The process of Departmental Notification has not been elucidated by Learned Counsel for the Respondents No.1 and 2. Over and above the aforestated circumstances there is also no prior correspondence, Office Circular or Notice to the concerned persons informing them that *inter se* seniority was being restructured in the year 2002 as against the seniority existing in 1996, thereby depriving them an opportunity to put forth their stance. As already pointed out the rescinded letter of 11-11-2016 has offered such an opportunity when such a process was being considered in 2006. Hence, on the existence of such lacuna and the foregoing discussions, in my considered opinion, the Notification of 2002 cannot be said to have any precedence over the Notification of 1996.

24. While addressing the question of laches, reliance was placed by the Respondents No.3, 5 to 14 and 16 to 18, on ***Vijay Kumar Kaul*** (*supra*), which enumerates the proposition that a litigant who invokes the jurisdiction of a Court claiming seniority has to approach the Court at the earliest. In the matter at hand it emerges with clarity that the Petitioner learnt of resettlement of seniority only in 2016 which fact could not be countered by the Respondents. Respondents No.1 and 2 have issued Notification of 2002 unbeknownst to the Petitioner, they cannot therefore impute knowledge of their act to her. Since she learnt of the resettlement of seniority in 2016 which is supported by the letter

of 11-11-2016, which admittedly has been rescinded by the Respondents No.1 and 2, the conclusion thereof is that there has been no delay in the Petitioner invoking the jurisdiction of this Court. We may usefully recall the ratiocination in ***R. M. Ramual*** (*supra*) already extracted hereinabove observing, *inter alia*, that a seniority list illegally prepared to the prejudice of Officer or Officers is always liable to be examined and set aside by the Court.

25. In conclusion, assuming a restructuring of the seniority was necessitated on account of the error on the part of the Respondent No.1 as claimed, such change ought not to prejudice the Petitioner who was placed at Serial No.3 of the seniority in her batch prior to the change made by the Notification of 2002. Indeed the power that vests on the Respondents No.1 and 2 to fix *inter se* seniority is not being questioned, but such an exercise cannot be arbitrary or discriminatory and thereby offend the constitutional safeguards. In ***Anil Kumar Vitthal Shete and Others*** vs. ***State of Maharashtra and Another***[12] the Honble Supreme Court observed as follows;

> "**33.** From the above decisions, it is clear that it is always open to an employer to adopt a policy for fixing service conditions of his employees. Such policy, however, must be in consonance with the Constitution and should not be arbitrary, unreasonable or otherwise objectionable.
>
> ……………………………………………"

26. In the instant matter, the determination of seniority in terms of Notification No.13/H&F.W. dated 09-09-2002 in view of the foregoing detailed discussions is evidently unreasonable and arbitrary.

27. Consequently, Notification No.13/H&F.W. dated 09-09-2002 is set aside as also the communication dated 22-09-2016.

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[12] (2006) 12 SCC 148

28. The Respondents No.1 and 2 shall comply strictly with the seniority as laid out vide communication bearing No.277/H.&FW. dated 19-11-1996.

29. No order need issue for communication dated 11-11-2016 or the consequences that would have flown from it, in view of the correspondence having been rescinded by the Respondent No.2.

30. Writ Petition is allowed and stands disposed of accordingly.

31. No order as to costs.

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