THE
SIKKIM LAW REPORTS

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SUBJECT INDEX

Code of Criminal Procedure – S. 154 – Requirement of Disclosing a Cognizable Offence – Report first filed by P.W.7 would tantamount to one under S. 174 devoid as it was of disclosure of a cognizable offence. The second complaint lodged by P.W.7 after the autopsy was conducted discloses a cognizableoffence and indeed qualifies as an F.I.R under S. 154.
Garja Bir Rai* v. *State of Sikkim ***323-A***

Code of Criminal Procedure – S. 164 – When confessions are being recorded, the Magistrate is to exercise caution to ensure that the confession is voluntary. Although as evident from a reading of S. 164(2), the statute does not specify that time for reflection is to be given to the person making such confession but nevertheless by way of abundant precaution a minimum of 24 hours is granted to the accused for this purpose to ensure the voluntariness of his statement. Besides, before recording the confession of an accused he is to be informed that the Officer recording his statement is a Magistrate and that the statement given by him can be used as evidence against him. His voluntariness is of paramount importance as also his awareness that he is no longer in the custody of the police, neither is he bound by any statement, unless he does so of his own freewill. It is also settled law that the statement recorded under S. 164 can never be used as substantive evidence of truth of the facts but may only be used for contradiction or corroboration of the witness who made it – Not extending time for reflection to the victim who was a witness, before recording her statement, lends no prejudice to either the victim, the Prosecution or the Appellant.
Ashim Stanislaus Rai* v. *State of Sikkim ***296-B***

Code of Criminal Procedure – Ss. 174 and 175 – Power to Summon During Inquiry on Suicide – S. 175 provides that a Police Officer proceeding under S. 174, may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case. Every person so summoned shall be bound to attend and to answer truly all questions other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. If the facts do not disclose a cognizable offence to which S. 170 applies, such persons shall not be required by the police officer to attend a Magistrate's Court – The Section requires the Officer concerned to prepare a report, which without ambiguity requires investigation.
Garja Bir Rai* v. *State of Sikkim ***323-B***

Indian Evidence Act, 1872 – Circumstantial Evidence – The principle of circumstantial evidence is that the hypothesis of guilt must lead to the accused and none else by a chain of circumstances which are cogent, consistent and reliable.
Garja Bir Rai* v. *State of Sikkim ***323-C***

Indian Evidence Act, 1872 – Evidence – Requirement of Corroboration – There is a material difference between voluntarily indulging in sexual act and someone forcing themselves on the girls and having sexual intercourse. Whereas the POCSO Act, 2012 may make no difference and consent of minors would be no consent the reliability of the deposition would suffer when it is found that the girls in spite of having indulged in consensual sexual acts had sought to give it the colour of forceful sexual assault against the accused – Evidence of the girls is neither wholly reliable nor wholly unreliable. When the Court is faced with such situation it is essential that corroboration is necessarily sought for. In such circumstances, oral testimony of the girls alone would not be sufficient as it would be difficult to sift the grain from the chaff.
Krishna Pradhan* v. *State of Sikkim ***308-B***

Indian Evidence Act, 1872 – Interested Witnesses – Evidence – Evidence of an interested witnesses requires careful scrutiny, however if tested and found credible nothing debars reliance on it.
Garja Bir Rai* v. *State of Sikkim ***323-D***

Indian Evidence Act, 1872 – Victim's Testimony – Requirement of Corroboration – The evidence of a child witness is to be considered after taking all due precautions which are necessary to find out the truth and to ensure that her deposition is trustworthy – In the matter at hand, the evidence on record indicates that the victim did not divulge the unfortunate incident to any of her friends and slept over it that night. The next morning, on 31-05-2016, at around 06.30 a.m., at the first opportunity she informed P.W.3 of the incident. The action of the victim is understandable as in the first instance an incident which she could not fathom in its correct perspective had taken place, her body had been violated and instinctively sensing that it was a wrong act, which obviously rankled and traumatized her, she dealt with it by keeping it under wraps the night of the incident. The next morning, she confided the incident to the teacher who also had her living quarters in the school. On careful analysis of the victim's entire evidence the consistency therein is undeniable and is found to be cogent,

honest and truthful, consequently her testimony requires no further corroboration – It is only when the Court is ambivalent about the veracity of the victim's evidence that resort can be taken to corroborative evidence.
Ashim Stanislaus Rai* v. *State of Sikkim ***296-A***

Indian Evidence Act, 1872 – S. 73 – Had the prosecution proved the relevant entry in the hotel guest register, it was permissible for the learned Special Judge to compare the signature therein with the admitted signature of Krishna Pradhan on the charge – The Court under S. 73 of the Indian Evidence Act, 1872 is entitled to compare the disputed and admitted signature – If the prosecution had identified the relevant entry and exhibited the same the defence would have had occasion to dispute the entries. As this was not done the learned Special Judge could not have taken the entry therein as the "disputed"entry and compared the same at the time of writing judgment.
Krishna Pradhan* v. *State of Sikkim ***308-C***

Indian Evidence Act, 1872 – S. 74 – Public Documents – Birth certificate is a public document – As per S. 77 of the Indian Evidence Act certified copies of a public document may be produced in proof of its contents – Mere production of a birth certificate without even authenticating the same by proving it through its maker is however, not enough to prove the age of the victim. The age of the victim must be proved by leading clinching evidence. The cogency of the evidence led would ultimately help the Court in determining the age of the victim.
State of Sikkim* v. *Girjaman Rai @ Kami and Others ***266-C***

Motor Vehicles Act, 1988 – S. 173 (2) – Condonation of Delay – The grounds given for the delay are nothing short of pathetic since all that emerges therein besides the above anomalies is that the File went from Gangtok to Kolkata and back. The Appellant has exhibited a lackadaisical attitude while filing the Petition and dealt with it not only in a routine manner, but by harbouring the notion that the Courts are without doubt to adjudicate for justice dispensation and thereby perforce to condone the delay.
The Branch Manager, Reliance General Insurance Co. Ltd* v. *Jarun Maya Rai and Others ***258-A***

Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age – Date of birth is a question of fact which must be cogently proved by leading evidence. The allegation of sexual assault coupled with the proof of minority of the victim drags an

accused to the rigours of the POCSO Act, 2012 which mandates a reverse burden of proof – Absolutely vital to prove the minority of the victim. The "best evidence rule" must be necessarily followed while proving the contents of a birth certificate – Aim of the Court of facts is to come to a firm conclusion about the minority of the victim. Like all other facts in issue, determination of the age of the victim must necessarily be proved by cogent evidence needed in a criminal trial. The POCSO Act, 2012 does not diminish or dilute the Indian Evidence Act, 1872.
State of Sikkim* v. *Girjaman Rai @ Kami and Others ***266-A***

Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age – Bone Age Estimation Report – Relaibility – Medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence – Date of birth must be determined on the basis of material on record and on appreciation of evidence adduced by the parties – Under the POCSO Act, 2012 a reverse burden of proof is imposed upon an accused. The requirement of proof of age of the girl to establish her minority must be strictly complied with and cogently proved.
Krishna Pradhan* v. *State of Sikkim ***308-A***

Protection of Children from Sexual Offences Act, 2012 – Evidence – It is trite to reiterate that the Prosecution is required to prove its case beyond a reasonable doubt and cannot leave room for assumptions or doubts. If these exist then the benefit is to be extended to the accused. The Prosecution by way of cogent and unwavering evidence is required to establish that the Appellant had a culpable mind and *mens rea* when committing the Act.
Shiva Kala Subba* v. *State of Sikkim ***244-B***

Protection of Children from Sexual Offences Act, 2012 – Ss. 5 and 6 – Aggravated Penetrative Sexual Assault – Offence of sexual assault is committed when the parts of the body enumerated in the definition are touched by an accused with "sexual intent" – The Act becomes culpable when it is established that there was a sexual intent or *mens rea* for the accused to commit a sexual offence – Nothing emanates in the evidence of the victim or the other witnesses to establish the state of mind of the Appellant when the acts of physical violence were perpetrated by her on the victim and whether the acts were inflicted with sexual intent
Shiva Kala Subba* v. *State of Sikkim ***244-A***

Registration of Births and Deaths Act, 1969 – Birth Certificate – The birth certificate is a certificate issued under the 1969 Act. The Registrar of Births and Deaths appointed under the 1969 Act is required to enter information of the birth given to him either orally or otherwise in the register maintained. The informant who gives the information of the birth of a child is required to be provided free of charge an extract of the prescribed particulars under his hand from the register relating to such birth. The name of the informant is also to be recorded in the register maintained under the 1969 Act. Proved by its signatory i.e. the maker, the birth certificate would stand proved. The maker of the birth certificate would be able to depose about the contents of the birth certificate based on the information recorded in the register maintained under the 1969 Act. If the register is therefore, produced and proved it would prove the authenticity of what is recorded in the birth certificate. This would prove that the contents of the birth certificate are the extract of the contents of the register maintained under the 1969 Act. The contents of the register, however, are entered from the information provided by the informant as required under the 1969 Act. The truth about the contents of the information recorded in the register however, is yet another matter. Usually the informant would be the parents or either of them – The birth certificate issued under the 1969 Act is therefore an extract of the entries made in the register issued under Ss. 12 or 17 of the 1969 Act.

State of Sikkim* v. *Girjaman Rai @ Kami and Others ***266-B***

SLR (2019) SIKKIM 237

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

R.S.A No. 01 of 2016

Shri Furden Tshering Bhutia and Others ….. APPELLANTS

Versus

Smt. Payzee Bhutia (Sherpa) and Others ….. RESPONDENTS

For the Appellants: Mr. B. Sharma, Sr. Advocate with Mr. Bhola Nath Sharma, Advocate.

For Respondents 1-3: Mr. S. S. Hamal, Ms. Priyanka Chhetri, Mr. Mahesh Subba, Ms. Srijana Chettri and Ms. Prasanna Chettri, Advocates.

For Respondents 4-6: Mr. Karma Thinlay, Sr. Government Advocate with Mr. Thinlay Dorjee Bhutia, Government Advocate.

Date of decision: 7th May 2019

A. Code of Civil Procedure, 1908 – S. 89 – Mediation – It is said that mediation is as ancient as human civilization. It is not without any reason that this innovation survives and thrives even today. A dispute which had not been able to be fully resolved through the process of adversarial litigation in Court for 15 long years has been amicably settled through the efforts of the learned Counsels and the Mediator who has facilitated the parties to reach a common agreement – The Appellants as well as the private Respondents have realized that it is better to bury their differences and live peacefully than to litigate in this manner for such a prolonged period without any complete resolution.

(Paras 9 and 10)

Compromise Arrived.

JUDGMENT

Bhaskar Raj Pradhan, J

1. This litigation has a long chequered history of almost 15 years with several rounds before this Court itself.

2. Dissatisfied with the judgment and decree passed on 07.04.2016 in Title Appeal No. 03 of 2015 the present Regular Second Appeal was registered before this Court and on completion of the pleadings matter taken up for hearing on 27.02.2019.

3. During the course of arguments, on a query raised by this Court regarding the possibility of an amicable settlement, the respective parties and the Counsels submitted that they were willing to explore the possibility to resolve the matter amicably.

4. On 20.03.2019 Mr. U.P. Sharma, learned Advocate and a trained Mediator was appointed to mediate between the parties in dispute. Barely a month thereafter the Sikkim State Legal Services Authority vide communication bearing reference No.18/SLSA/02/MC dated 27.04.2019 to the Registry of this Court forwarded the Deed of Compromise stating that the matter has been amicably settled. The Compromise Deed is dated 25.04.2019 and it is signed at Gangtok, East Sikkim.

5. The five Appellants are personally present in Court. The Appellant No.5 and 6 are minors and are represented by their mother who is Appellant No. 4. She is also personally present in Court. The three private Respondents are represented by the Respondent No. 2 who states that the other two Respondents have agreed on the Compromise Deed. The Compromise Deed has been signed by all the parties before this Court in the Regular Second Appeal. The learned Counsels representing the State-Respondents submit that the Compromise Deed has also been signed by the State. The Compromise Deed is taken on record and marked as (X). The Compromise Deed reads as under:

"COMPROMISE DEED

This Compromise Deed made on this the 25th day of April, 2019 at Gangtok, East Sikkim

BETWEEN

1. *Shri Furden Tshering Bhutia, s/o Late Karma Tshering Pintso Bhutia @ Sepchung Bhutia*

2. *Shri Karma Sonam Bhutia @ Karma Tshering Bhutia, s/o late Karma Tshering Pintso Bhutia @ Sepchung Bhutia*

3. *Shri Norbu Sonam Bhutia @ Norbu Tshering Bhutia, s/o Late Karma Tshering Pintso Bhutia @ Sepchung Bhutia*

4. *Mrs. Dawa Doma Bhutia, w/o Late Sandu Bhutia @ Sandup Bhutia*

5. *Miss Hissey Palmu Bhutia (minor), d/o Late Sandu Bhutia @ Sandup Bhutia Represented through her mother Dawa Doma Bhutia*

6. *Master Kalden Dorjee Bhutia (minor), s/o Late Sandu Bhutia @ Sandup Bhutia @ Sandup Bhutia Represented through her mother Dawa Doma Bhutia*

7. *Shri Dadul Bhutia, s/o Late Karma Tshering Pintso Bhutia, @ Sepchung Bhutia.*

All residents of Bermiok Tokal, P.O. Bermoik, P.S. Temi, South Sikkim (hereinafter referred to as the FIRST PARTY and which expression shall mean and include their legal heirs, successors, successors-in-interest, executor, administrators, legal representative, attorney and assigns) of the first part.

AND

1. *Smt. Payzee Bhutia (Sherpa), w/o passing Sherpa, r/o Mungrung Busty, P.O. & P.S. Namchi, South Sikkim*

2. *Smt. Diki Palmoo Bhutia, w/o Dr. Thinley Nidup Bhutia, r/o Bermoik Thangsing Block P.O. Bermoik, P.S. Temi, South Sikkim*

3. *Dr. Thinley Nidup Bhutia, s/o Shri Pala Tshering Bhutia, r/o Lower Pelling, P.O. & P.S. Pelling, West Sikkim.*

(hereinafter referred to as the SECOND PARTY and which expression shall mean and include their legal heirs, successors, successors-in-interest, executors, administrators legal representatives, attorney and assigned of the second part.

AND

1. *The Secretary, Land Revenue Department, Government of Sikkim, Gangtok*

2. *District Collector, South District at Namchi, South Sikkim*

3. *Sub-Divisional Magistrate, Office of the District Collectorate, South Sikkim at Namchi.*

(hereinafter referred to as the THIRD PARTY of the third part.

WHEREAS the First Party had filed R.S.A. No. 01/2016 (Furden Tshering Bhutia & Ors. –vs- Payzee Bhutia & Ors) against the Second Party and Third Party before the Hon'ble High Court of Sikkim. With the consent of the parties the matter was referred to mediation at Gangtok where it was taken up as Mediation Case No. 08 of 2019.

AND WHEREAS during mediation the parties have agreed to settle their long pending disputes on certain terms and conditions and desires that for the record the

terms and conditions on which they have agreed to settle their disputes in writing.

NOW THIS COMPROMISE DEED WITNESSETH AS FOLLOWS:

1. *The landed property i.e. bearing plot no. 257, 258, 332, 333 & 334 measuring 2.892 hectares (approx) situated at Chalamthang more particularly described in the Schedule of T.S. No. 02 of 2014 pending before the court of the Ld. Civil Judge, South Sikkim at Namchi shall be mutated on the application of the First Party to the First Part in their joint names from the concern Revenue Office at their expenses for which the Second Party to the Second Part shall have no objection.*

2. *The possession of the aforesaid property described in Para-1 of this Compromise Deed is handed over today i.e. 25.04.2019 to the First Party to the First Part by the Second Party of the Second Part in token thereof the parties have put their respective seal and signatures.*

3. *The First Party of the First Part shall withdraw Title Suit No. 02 of 2014 pending before the Court of Ld. Civil Judge, Namchi, South Sikkim.*

4. *A portion of property from the property i.e. plot no. 76, 77 and 78 (more particularly described in T.S. No. 07 of 2014) shall be handed over by the Second Party to the First Party with the boundaries as earlier agreed by them on the spot on 18.04.2019 after demarcation by the surveyor on the joint application of the parties.*

5. *The portion of properties (supra) so demarcated by the surveyor shall be demarcated in the joint names of the First Party for which the Second Party shall have no objection and the remaining portion of the properties of schedule of T.S. No. 07 of 2014 shall be peacefully enjoyed by the Second Party.*

In witness whereof the parties above named have put their respective signatures on the date, month and year as mentioned above.

FIRST PARTY	*SECOND PARTY*	*THIRD PARTY*
Sd/-	*Sd/-*	*Sd/-*
Sd/-	*Sd/-*	
Sd/-	*Sd/-*	
Sd/-	*Sd/-*	
Sd/-		
Dawa (on behalf of Appellant No. 5 & 6)		
Sd/-"		

6. The learned Counsels representing the Appellants and the private Respondents submits that clause 4 of the Compromise Deed requires a small clarification with regard to the extent of land mentioned therein. To ascertain the exact area comprising the portion of property from the property i.e. plot nos. 76, 77 and 78 (more particularly described in T.S. No. 07 of 2014) which is required to be handed over to the Appellants a copy of a map titled *"showing the map of Diki Palmo Bhutia of Thangsing Block, South Sikkim"* under the signature of the VLO, Bermiok Tokal, South Sikkim has been handed over to the Court by the Appellants. The map has been duly examined by the Respondent No.2 along with her Counsel in Court and she states that it is correct. The said map is also taken on record and marked as (Y).

7. The parties to the present Regular Second Appeal and their respective Counsels state that all issues pending between the Appellants and the private Respondents have been amicably settled.

8. The learned Counsel for the State submits that when the parties approaches the authorities for mutation of the immovable properties in terms of the Compromise Deed it shall be done. The parties agree to approach the authorities to take such steps accordingly in right earnest.

9. It is said that mediation is as ancient as human civilization. It is not without any reason that this innovation survives and thrives even today. A dispute which had not been able to be fully resolved through the process of adversarial litigation in Court for 15 long years has been amicably settled through the efforts of the learned Counsels and the Mediator who has facilitated the parties to reach a common agreement.

10. The Appellants as well as the private Respondents have realized that it is better to bury their differences and live peacefully than to litigate in this manner for such a prolonged period without any complete resolution. This Court records its appreciation of the yeomen service rendered by the learned Mediator. This Court also records its appreciation of the ernest efforts made by the learned Counsels representing not only the parties in dispute but also the State-Respondents. Quite clearly, this has been possible only because the learned Counsels have considered themselves the guardians of their client's interest.

11. In view of the Compromise Deed the Appellants shall withdraw Title Suit No 02 of 2014 pending before the Court of the learned Civil Judge, South Sikkim at Namchi. The present Regular Second Appeal No. 01 of 2016 is disposed of in terms of the Compromise Deed (X) and the map (Y) which shall be read as part of the Compromise Deed. Nothing further remains to be considered and decided. Let a decree be drawn in terms of the Compromise Deed (X) and the map (Y) explaining clause 4 of the Compromise Deed.

12. The parties shall bear their own costs.

SLR (2019) SIKKIM 244

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. A. No. 12 of 2017

Shiva Kala Subba ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

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

For the Respondent: Mr. Thinlay Dorjee Bhutia, Addl. Public Prosecutor.

Date of decision: 8th May 2019

A. Protection of Children from Sexual Offences Act, 2012 – Ss. 5 and 6 – Aggravated Penetrative Sexual Assault – Offence of sexual assault is committed when the parts of the body enumerated in the definition are touched by an accused with "sexual intent" – The Act becomes culpable when it is established that there was a sexual intent or *mens rea* for the accused to commit a sexual offence – Nothing emanates in the evidence of the victim or the other witnesses to establish the state of mind of the Appellant when the acts of physical violence were perpetrated by her on the victim and whether the acts were inflicted with sexual intent

(Paras 8 and 14)

B. Protection of Children from Sexual Offences Act, 2012 – Evidence – It is trite to reiterate that the Prosecution is required to prove its case beyond a reasonable doubt and cannot leave room for assumptions or doubts. If these exist then the benefit is to be extended to the accused. The Prosecution by way of cogent and unwavering evidence is required to establish that the Appellant had a culpable mind and *mens rea* when committing the Act.

(Para 16)

Appeal partially allowed.

JUDGMENT

Judgment of the Court was delivered by ***Meenakshi Madan Rai, J***

1. The Court of the learned Special Judge, Protection of Children from Sexual Offences Act, 2012 (hereinafter the "POCSO Act"), West Sikkim at Gyalshing, by the impugned Judgment dated 24.02.2017, convicted the Appellant of the offences under Section 5(m), Section 5(n) of the POCSO Act and Section 323 of the Indian Penal Code, 1860 (hereinafter the 'IPC'). Consequent thereto the Appellant was sentenced as follows;

> "…….....……
> 6. Therefore, I am of opinion that the ends of justice would be well served in this case if the convict is sentenced to undergo 15 years of rigorous imprisonment and to pay a fine of Rs.10,000/- under Section 6 of POCSO Act, 2012. In the event of default on payment of fine, convict shall undergo SI for a term of 1 year.
>
> For the offence committed under Section 323 IPC, 1860, the convict is sentenced to undergo SI for a term of 1 year.
>
> Both the sentences shall run concurrently. …"

2. Assailing the finding of the learned trial Court, learned Counsel for the Appellant while inviting the attention of this Court to the First Information Report, Exhibit 1, dated 31.07.2015, contended that the document contains no imputation of sexual assault by the Appellant against the victim. This aspect has been ignored by the Prosecution in totality. In fact it brings to light the facet that her step father had previously sexually assaulted her. That, the First Information Report (Document 'X'), said to be lodged by the Protection Officer of the Child Welfare Commission would reiterate the allegation against the victims step father, to the effect that he sexually assaulted her a few months back at Tadong, Gangtok. This statement also finds credence in the Statement of the victim under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter "Cr.P.C.") which contains no allegation of sexual assault by the Appellant. The medical

examination of the victim confirmed the fact of sexual assault, however the Investigating Officer (hereinafter 'I.O.') of the case while conducting the investigation, relied only upon Exhibit 1, received on 31.07.2015 said to be made by the victim s School Teacher to the detriment of the Appellant. That, the Appellant was arrested during the course of investigation while the victims step father despite being the perpetrator of an attempt to sexually assault her was left scot free. That, the injuries which are revealed in the Medical Report of the victim Exhibit 3A are indicative of old healed scar marks in the genital area, thereby corroborating the victims allegation that her step father had sexually assaulted her. That, Exhibit 4A Medical Report prepared by the Gynaecologist after conducting medical examination on the victim also reveals that the victim had a history of sexual abuse by her step father a few months back. That, despite such specific allegation, no steps were taken against the said step father and the emphasis of the investigation has been only on the Appellant. That, P.W.4 a Teacher in the victims School had stated that the victim had told her and some other Teachers that her step father had attempted to sexually assault her, while the Appellant tortured her daily. That P.W.5, the Doctor (Medical Officer) who examined the victim had stated that, the victim was produced at the Primary Health Centre with an alleged history of having been "physically and mentally assaulted" by the Appellant, devoid of any allegation of sexual assault. Hence, sexual assault or culpable mental state for such assault by the Appellant is ruled out. That, the I.O. in his evidence lends support to the statement contained in Exhibit 1 that the victims step father had attempted to sexually assault her. It was also alleged that the learned trial Court has failed to exercise care and caution while considering the inconsistent statements of the witnesses and the Statement of the victim. That, it is now settled law that as a rule of practical wisdom the evidence of child witnesses must be considered along with adequate corroboration but variations occur in the statement of the victim under Section 164 Cr.P.C. Statement and in her evidence before the learned trial Court. That, the said circumstances as also the arguments *supra* require that the benefit of doubt be extended to the Appellant. The evidence of the witnesses being beset with anomalies, the impugned Judgment and Order on Sentence of the learned trial Court ought to be set aside.

3. Resisting the assertions of learned Counsel for the Appellant, the learned Additional Public Prosecutor would contend that in the first instance. Document X sought to be relied on by the Appellant was in fact not an Exhibit before the learned trial Court and deserves no consideration by this

Court. That, it is the victims case that the Appellant used to hit her on her hands, legs, back and her head sometimes with heavy objects and also bite her on her legs and hands apart from inserting soap in her genital. That, the Section 164 Cr.P.C. Statement of the victim duly corroborates the statement given by her before the learned trial Court. To clear the air on the sexual assault allegedly committed by the victims step father, learned Public Prosecutor submitted that the step father had indeed been arrested on suspicion of the offence but was discharged by the Police due to lack of materials. That, from the Section 164 Cr.P.C. Statement of the victim, it appears that she had implicated her step father out of fear of the Appellant, moreover the victim has stated therein that the Appellant threatened to kill her if she refused to extend sexual favours to her step father. That, the evidence of P.W.5 who examined the victim reveals that the injuries found on the person of the victim was detected to have been inflicted within a span of less than twenty four hours to seventy two hours, the victim has admittedly been living with the Appellant from the month of November 2014, in such a circumstance the question of doubting the victims step father in the offence are far-fetched and a mere allegation made by the Appellant to shift the blame on her step father. That, the evidence of P.W.6, the Gynaecologist who examined the victim clearly indicates that when he examined the victim, she told him that her aunt had pushed soap in her private area and on his examining the child he found injuries as described in Exhibit 4A, his Medical Report. P.W.6 also found evidence of recent sexual abuse as well as physical abuse pointing to the guilt of the Appellant. Accordingly, no reason emerges to interfere in the impugned Judgment and Order on Sentence.

4. We have carefully heard the rival contentions placed by Learned Counsel *in extenso* and given it due consideration. We have also meticulously perused all evidence and documents on record as also the impugned Judgment.

5. For clarity it would be beneficial to briefly traverse the facts of the case. The Ravangla Police Station, South Sikkim on 31.07.2015, at 20:00 Hrs, received a written complaint, Exhibit 1, from a Teacher in the School of the victim informing therein that the victim, aged about six years, was physically and sexually assaulted by her aunt, the Appellant. The Teacher learnt of this after noticing some visible marks and bites on the body of the victim child and as her behavior also appeared to have undergone a change.

On enquiry by the Teacher as to the reason for the marks, the victim informed her that her guardian, the Appellant, tortured her physically everyday. The child also informed her that her step father had attempted to sexually assault her on a previous occasion. Consequently Ravangla Police Station Case was registered against the Appellant and the step father of the victim, and investigation commenced. The Appellant was arrested on the same day while the victim was forwarded for medical examination. Investigation revealed that the minor victim had earlier been living with her other siblings, mother and step father at Tadong Bazaar, Gangtok. In the month of November, 2015 she was taken by her maternal uncle to South Sikkim for education. However, during her stay there, she was subjected to physical torture by the Appellant, her aunt, wife of her maternal uncle, while her step father had sexually assaulted her at Tadong. After her medical examination, she was handed over to the Child Welfare Commission where she reiterated that her step father had sexually assaulted her a few months back at Tadong. A second FIR against the said step father came to be lodged at the Sadar Police Station in ignorance of the case already registered at Ravangla Police Station. Charge Sheet was submitted against the Appellant on completion of investigation under Section 6 of the POCSO Act read with Section 325 of the IPC and Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000, however no case could be made out against the step father of the victim. The learned trial Court, on consideration of materials placed before it proceeded to frame charge against the Appellant under Section 5(m) and Section 5(n) of the POCSO Act punishable under Section 6 of the POCSO Act and under Section 323 of the IPC, 1860. The Appellant entered a plea of "not guilty" to the charges, pursuant to which the Prosecution examined nine witnesses to establish its case against the Appellant. On due consideration of the evidence on record, the trial culminated in the impugned Judgment of conviction and sentence *supra*.

6. Whether the Prosecution was able to establish a case under Section 5(m) and Section 5(n) of the POCSO Act and whether the offence committed by the Appellant contain the ingredients of Section 325 IPC in view of the evidence on record or would the offence be only under Section 323 IPC? These are the questions this Court needs to consider.

7. While addressing the first question framed hereinabove, we may turn to the definition of sexual assault as laid down in Section 7 of the POCSO Act, 2012 which reads as follows;

> "**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."
>
> **(Emphasis supplied)**

8. A careful perusal of the above definition elucidates that an offence of sexual assault is committed when the parts of the body enumerated in the definition are touched by an accused with "sexual intent." In other words, the Act becomes culpable when it is established that there was a sexual intent or *mens rea* for the accused to commit a sexual offence. In this context, we may carefully examine the evidence of the Prosecution witnesses.

9. On noticing an apparent transformation in the behavior of the victim, injuries and bite marks on her body, P.W.4 a Teacher of the victims School along with other Teachers enquired as to the cause of the injuries. They were duly informed by the victim that the Appellant had been subjecting her to physical torture daily. The victim also disclosed that her step father had "*attempted*" to sexually assault her on a previous occasion. On such discovery, P.W.4 informed P.W.1, the Panchayat of the area on 30.07.2015. The following day, P.W.1 went to check on the minor victim at her School where she found the Sub Divisional Magistrate, Yangang and some lady Police personnel already present. The injuries described by P.W.4 were also verified and found on the person of the victim, by P.W.1, who further detected injuries on the victims private part. The victim informed them that the Appellant had inflicted those injuries. Exhibit 1 thus came to be filed on 31.07.2015. The fact of physical assault by the Appellant was substantiated by the evidence of P.W.2 who used to be the Appellants neighbor living adjacent to their room, she testified that she often heard the minor victim crying. She had witnessed the Appellant on one occasion lifting the minor victim and flinging her towards the side of the terrace, upon which the victim sustained head injuries. As per this witness, on enquiry by the Sub Divisional Magistrate, Yangang and Police personnel she told them that the victim was subjected to cruelty by the Appellant. The victim, P.W.3 has categorically deposed that she used to live with her aunt who always used to hit her on

her hands, legs, back and head. According to her, on some occasions she used to hit her with a spoon and also with the wire/charger of rice cooker, besides which she used to hang her on the wall upside down, put soap in her genital and insert her fingers therein. The Appellant also used to bite her legs and hands. After the Teachers noticed the injuries on her body she had told them what the Appellant had subjected her to. Her evidence is silent on the alleged attempt at sexual assault on her by her step father. The evidence of P.W.1, P.W.2 and P.W.4 correlate with each other and are consistent of the fact of physical assault by the Appellant on the victim. The evidence of the said witnesses withstood the rigours of cross-examination. It is thus evident that the Appellant tormented the victim with physical assault in various forms on different parts of her body.

10. In this thread, we may relevantly consider the evidence of P.W.5, the Doctor who examined the victim which is as follows;

> "... In connection with this case, on 31.07.2015, at around 1:05 p.m, the minor victim was produced before me at the PHC with an alleged history of having been physically and mentally assaulted by her aunt Shiva Kala Subba at the latters residence. On her examination, I found the following injuries on her person:-
>
> 1. There was sparse hair and two areas of graze(sustained in less than 24 to 48 hours) on the left parietal region;
>
> 2. There were areas of bruise and graze on the superior region of the right ear pinna with tenderness(sustained in less than 72 hours);
>
> 3. There were multiple areas of bruises and graze(sustained in less than 72 hours) on the left ear pinna with tenderness;
>
> 4. There were multiple areas of graze(sustained within 72 hours) on the right cheek and the right angle of mouth;
>
> 5. There were multiple areas of graze(sustained within 48 hours) on the left cheek;

6. There were multiple areas of bruise on the right upper limb, especially on the posterior aspect of her forearm(sustained within 48 hours);

7. There were multiple areas of bruise on the left upper limb(arm and forearm)(sustained within 72 hours).

8. There was external trauma on the nail of the left ring finger, lateral aspect (sustained within 48 hours). There was area of graze on the dorsal aspect of the left index finger;

9. There was area of ulceration on the dorsal aspect of the right hand (sustained within 72 hours) with multiple areas of healed scar marks and bruises on both lower limbs;

10. The sole of the right foot showed an area of laceration with bite marks(sustained within 72 hours/3 cm x 5 mm x 2 mm);

11. There was area of bruise (10 x 13 cms) and contusion(less than 72 hours) on the right flank region and multiple healed scar marks over the back.

On examination of her genital region, I found that she was bleeding from her vaginal region and there were multiple areas of healed scar marks around the vaginal region. On passing of the probe, hymen was found to be destroyed and there was active bleeding with surrounding areas of erythema and swelling. Exhibit-3 is the medical report of the minor victim prepared by me and bearing my signature as Exhibit-3(a). …"

11. P.W.6, the Medical Specialist (Gynaecology and Obstetrics), STNM Hospital, in his evidence would *inter alia* state as follows;

"… In connection with this case, the minor victim was produced before me on 01.08.2015 evening for her medical examination. The alleged

> history was that she had been subjected to repeated sexual abuse by her aunt *(maiju)*. In fact, she was in psychological trauma and told me that she was tortured in the form of biting, hitting with hammer by her aunt. Her aunt had also pushed soap in her private part. Further, *as per her,* she had also been sexually abused by her stepfather. On her examination, I found injury/abrasion over her perineum which was red in colour. Tear was present in posterior fourchette. The vaginal area was tender and was bleeding on touch. The other injuries on her were already reflected by the concerned Medical Officer who had examined her before she was produced before me. As she was having severe pain I could not examine her hymen. I found evidence of recent sexual abuse as well as physical abuse. …"

In his cross-examination, it emerged as follows;

> "… It is not a fact that she did not reveal to me about the sexual assault on her by her aunt. …"

According to this Doctor (P.W.6), he found evidence of recent sexual abuse as well as physical abuse. On a perusal of Exhibit 4A, the Medical Report prepared by P.W.6 when the victim was produced before him, he has recorded as follows;

> "… A girl child brought from … for examination with alleged history of repeated abuse by her aunty (maiju). As per child She was repeatedly abused by her aunty (maiju). She was given torture in the from *(sic)* of biting, hitting with hammer. **She was also abused by pushing soap in private part.** She also give *(sic)* history of sexual abuse by her step father … few month *(sic)* back at Tadong. ..."
>
> **(Emphasis supplied)**

12. The evidence of P.W.5 and P.W.6 clearly establish that there were injuries on the genitals of the victim. According to P.W.6, the vaginal area

was tender and was bleeding on touch. As she was having severe pain he could not examine her hymen but he found evidence of recent sexual abuse as well as physical abuse. A careful analysis of the evidence of both Doctors reveal that P.W.5 has not opined as to how the injuries could have been caused on the various parts of the victims body including her genital region. According to her, the victim was brought with a history of having been "physically and mentally" assaulted by her aunt. There is no allegation of sexual assault recorded by her on Exhibit 3A, her Report. This witness examined the child on 31.07.2015 at around 1.05 p.m. and enumerated the injuries found on the victim. P.W.6 examined the victim on 01.08.2015, no time has been recorded on Exhibit 4A, the Medical Report prepared by him. As per P.W.6 the history of the child is that she was repeatedly abused by her "*maiju*" and tortured by hitting with hammer, biting and pushing soap in her private part. The history on Exhibit 4A does not mention "sexual abuse." However, before the learned trial Court P.W.6 would go on to state as follows;

> "… The alleged history was that she had been subjected to repeated sexual abuse by her aunt (maiju). …"

Herein is a discrepancy in the evidence of P.W.6. When the victim was brought to him in the first instance his report is silent on sexual assault but his statement before the Court appear exacerbated on this issue as he adds that the child had an alleged history of sexual abuse, thereby diminishing the veracity of this witness.

13. There is no reason given by P.W.6 as to why he concluded that because the victim was bleeding from the hymen that it was due to sexual assault and no other cause, as the victim evidently said nothing about sexual assault nor does investigation establish sexual intent. This statement of P.W.6 is being mulled over in view of the fact that a sexual offence necessarily requires "intent" but the Prosecution has failed by any evidence whatsoever to establish that the Appellant had sexual intent when she inserted soap into the genital of the victim. **Black's Law Dictionary, Tenth Edition, at page 930,** defines "intent" as under;

> "1. The state of mind accompanying an act, esp. a forbidden act. While motive is the inducement to do

> some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists, motive becomes immaterial. Cf. MOTIVE; SCIENTER.
>
> "The persistence of the word „intent in complex social problems where conscious intent is either irrelevant or indeterminable probably retards legal progress. The cloudy ethical atmosphere that hovers about this term tends to make [analysis] difficult." Edward Stevens Robinson, Law and the Lawyers 230 (1935).
>
> "The phrase 'with intent to,' or its equivalents, may mean any one of at least four different things: - (1) That the intent referred to must be the sole or exclusive intent; (2) that it is sufficient if it is one of several concurrent intents; (3) that it must be the chief or dominant intent, any others being subordinate or incidental; (4) that it must be a determining intent, that is to say, an intent in the absence of which the act would not have been done, the remaining purposes being insufficient motives by themselves. It is a question of construction which of those meanings is the true one in the particular case." John Salmond, Jurisprudence 383-84 (Glanville L. Williams ed., 10th ed. 1947)."

14. Bearing the above definition in mind, it is apposite to note that nothing emanates in the evidence of the victim or the other witnesses to establish the state of mind of the Appellant when the acts of physical violence were perpetrated by her on the victim and whether the acts were inflicted with sexual intent.

15. As per P.W.6 there was a tear in her fourchette which according to **Modi's Medical Jurisprudence and Toxicology, 24th Edition, in Chapter 31–Sexual Offences, at Page 668**, is indicative of use of violence. Nevertheless, despite such an injury was P.W.6 competent to proclaim that the injuries were due to sexual assault? On these lines, it

would lend succour to refer to page **752 of Modi's Medical Jurisprudence and Toxicology, 25th Edition, Chapter 32–Sexual Offences** which states as follows;

> "Rape is a crime and not a medical diagnosis to be made by the medical officer treating the victim. Therefore, the issue of whether rape has occurred or not is a legal conclusion, not a medical one. It is a charge made by the investigating officer on a complaint by the victim. The only statement that can be made by the medical officer is whether there is evidence of recent sexual activity and about injuries noticed in and around the private parts or bite marks noticed in any part of the body. His or her duty extends principally to provide adequate healthcare and comfort to the victim and secondarily to assist the prosecution with appropriate medical evidence."

16. On the anvil of the commentary *supra* it appears to us that although severe injuries obtained in the genitals of the victim evidently as soap was inserted by the Appellant therein as also her finger but would this necessarily tantamount to sexual assault. In our considered opinion, this would have to be answered in the negative as the prosecution has nowhere addressed this facet of the offence as discussed *supra*. It is indeed trite to reiterate that the Prosecution is required to prove its case beyond a reasonable doubt and cannot leave room for assumptions or doubts. If these exist then the benefit is to be extended to the accused. The Prosecution by way of cogent and unwavering evidence is required to establish that the Appellant had a culpable mind and *mens rea* when she committed the Act. The consistent stand of the Prosecution is that the victim was subjected to physical torture, in the light of this evidence insertion of the Appellant s finger and soap into the genital of the victim appears to be a method of meting out the pinnacle of physical torture on the victim. It is axiomatic that in the absence of proof of any sexual intent, assumptions cannot be drawn by this Court in this context.

17. So far as commission of sexual assault by the step father of the victim is concerned, the injuries on the genital of the victim are stated to have been inflicted within 48 to 72 hours of the medical examination of the

victim by P.W.5. No evidence is furnished to prove that the victim had any interaction with her step father during the said period of time. Neither is there evidence to establish an attempt at sexual assault by him on any prior date/day. The arguments of learned Counsel for the Appellant are not tenable in this context as it is evidently an effort to foist the entire case on a person against whom investigation resulted in naught.

18. Now, while answering the second question, Section 320 of the IPC enumerates the kinds of hurt which are designated as grievous hurt. The penalty for causing grievous hurt is at Section 325 of the IPC which provides as follows;

> **"325. Punishment for voluntarily causing grievous hurt. –** Whoever, except in the case provided for by Sec. 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

19. The injuries listed in the Medical Reports of the victim Exhibit 3 A and Exhibit 4A do not fall within the parameters as described in Section 320 of the IPC. Even if this Court were to take advantage of the latitude in *"Eighthly"* of Section 320 IPC which provides that any hurt which endangers life is also grievous hurt but we hasten to clarify that it is qualified with the words *"which causes the sufferer to be during the space of twenty days in severe bodily pain or unable to follow his ordinary pursuits."* No medical evidence is forthcoming on this point. Hence, as the injuries on the victim cannot be defined as grievous, we find that the injuries noted by P.W.5 and P.W.6 can only be categorized as "simple injuries" as defined under Section 323 of the IPC, despite the physical injuries which are sufficient to make a normal person cringe.

20. The learned trial Court had framed charge under Section 5(m) and Section 5(n) of the POCSO Act which reads as follows;

> "**5. Aggravated penetrative sexual assault.-**.....
> .....

> (m) whoever commits penetrative sexual assault on a child below twelve years; or
>
> (n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care of having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; ....."

21. Since the prosecution has failed to establish sexual intent in the acts of the Appellant against the victim, the conviction and sentence handed out to the Appellant under Section 5(m) and Section 5(n) of the POCSO Act are set aside.

22. However, no error emanates in the conviction of the Appellant under Section 323 of the IPC, which is accordingly upheld.

23. The enormity of the inhuman and barbaric acts perpetrated by the Appellant on the unsuspecting and innocent victim, who was brought to reside with the Appellant on the promise of educating her, appalls us. A psychiatric evaluation of the Appellant becomes imperative. Let steps be taken by the Jail authorities.

24. Appeal allowed to the extent above.

25. The impugned Judgment and Order on Sentence stand modified as discussed *supra*.

26. Copy of this Judgment be sent to the learned trial Court, for information.

27. Lower Court records be remitted forthwith.

SLR (2019) SIKKIM 258
(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

I.A. No. 01 of 2018 in MAC App. No. 05 of 2018

The Branch Manager,
Reliance General Insurance Co. Ltd. ….. APPELLANT

Versus

Jarun Maya Rai and Others ….. RESPONDENTS

For the Appellant: Mr. Manish Kumar Jain, Advocate.

For Respondent No.1: Ms. Yanzee Pinasha, Advocate.

For Respondent No.2: Mr. Ajay Rathi, Advocate (Legal Aid).

For Respondents 3-4: Ms. Panila Theengh and Ms. Tashi Doma Bhutia, Advocates.

Date of decision: 8th May 2019

A. Motor Vehicles Act, 1988 – S. 173 (2) – Condonation of Delay – The grounds given for the delay are nothing short of pathetic since all that emerges therein besides the above anomalies is that the File went from Gangtok to Kolkata and back. The Appellant has exhibited a lackadaisical attitude while filing the Petition and dealt with it not only in a routine manner, but by harbouring the notion that the Courts are without doubt to adjudicate for justice dispensation and thereby perforce to condone the delay.

(Para 10)

Petition and Appeal dismissed.

Case cited:

1. Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and Others, (2013) 12 SCC 649.

JUDGMENT

Meenakshi Madan Rai, J

1. The Petitioner/Appellant-Insurance Company, seeks condonation of 107 days delay in filing the Appeal, which assails the Judgment and Award of the Learned Motor Accidents Claims Tribunal, South Sikkim, at Namchi (hereinafter, Claims Tribunal), in MACT Case No.01 of 2016 (*Branch Manager, Reliance Insurance Co. Ltd.* vs. *Smt. Jarun Maya Rai and Others*) and MACT Case No.11 of 2014 (*Deki Lepcha* vs. *Bir Bahadur Rai and Others*). The Petition is purported to be under Section 173(1) of the Motor Vehicles Act, 1988 (hereinafter, MV Act), read with Section 5 of the Limitation Act, 1963 (hereinafter, Limitation Act).

2. The grounds averred in the Petition for delay which was filed on 24-05-2018 are as follows;

> "……
>
> 1. That this day, the petitioner/Appellant has filed an Appeal challenging the judgment and Award passed by the Learned Member, Motor Accident Claim Tribunal, South Sikkim at Namchi, in MACT case No.01 of 2016 (Branch Manager Reliance General Insurance Co. Ltd versus Smt. Jarun Maya Rai and others) along with the impugned judgment of MACT Case no.11 of 2014 (Deki Lepcha versus Bir Bahadur Rai and Others).
>
> 2. That the judgment in the aforesaid case was pronounced by the Ld. Claim Tribunal (sic) on **11/9/2017** as such the appeal challenging the said judgment ought to have been filed by the petitioner appellant on or before the **11/12/2017**. The appeal was filed on the said date and there was no delay initially in filling (sic) the appeal before this Hon'ble Court.

3. That on the said date the said memo could not be registered due to certain defects which were cleared and re-filed before this Hon'ble Court on **01/02/2018**. The delay in curing the defects was due to the sending the entire file again to its regional office at Kolkatta, taking legal opinion and sending the same for filling (sic) before this Hon'ble Court.

4. That on the said date there were again defects stating that the memo of appeal have to filed along with the petition of condonation of delay petition, hence this petition has been filed today.

5. That the application for certified copies of the judgment was made on **16/12/2013** and the same was obtained on **28/12/2013** when the information was given by its investigator. Thereafter, the entire file was sent to the Kolkatta for seeking it legal opinion in the instant matter (sic).

6. That thereafter the advocate informed the company about the said facts and finally the Appellant company had taken decision to file the appeal along with the petition of condonation of delay. There has been a delay of 107 days in filling (sic) the instant appeal before the Hon'ble High Court. There has been delay in filling (sic) the appeal but same was on account of circumstances beyond the control of parties mentioned herein above.

7. That this petition praying for condonation of delay of 107 days has been filed bonafide for the ends of justice.

8. That the accompanying memo of appeal may be read as part and parcel of this petition and the appellant may be allowed to refer and rely upon the same during the time of hearing of the petition.

9. That the appellant state that the memo of appeal has been filed on account challenging the false and fabricated insurance policy which has not been issued by the appellant company and the Learned Member Tribunal have wrongly fastened the liability upon the Appellant.

……."

It was thus prayed that the delay be condoned.

3. While making his verbal submissions before this Court, Learned Counsel for the Appellant admitted to some errors in the averments made in the said Petition, viz., the dates pertaining to application for certified copy of the Judgment having been made on **16-12-2013** and obtained on **28-12-2013**, whereas challenge was to the Judgment in **MACT Case No. 11 of 2014, dated 30-05-2015**. It was further urged that the errors may be ignored by the Court which are inadvertent. That, this Court may kindly consider the pith and substance of the Petition inasmuch as 107 days delay has been explained in the averments and that the delay be condoned in the larger interest of justice.

4. Learned Counsel for the Respondent No.1 objected to the Application for delay and contended that a Review Application had been filed before the Learned Claims Tribunal on 19-03-2016 against the impugned Judgment dated 30-05-2015, of which the Order was pronounced on 11-09-2017. Thus, a period of 262 days had lapsed in the interim which has not been addressed by the Appellant in his Petition. Consequently, the delay has not been computed correctly, besides which no provision for review emanates in the MV Act and the Petition deserves a dismissal.

5. Objecting to the Petition, Learned Counsel for the Respondent No.2 for his part contended that the period of limitation started to run from 30-05-2015, the date of pronouncement of the impugned Judgment and Award in MACT Case No.11 of 2014, hence the delay has been wrongly calculated as the Appeal before this Court was filed only on 24-05-2018. That, no right accrues under Section 173 of the MV Act to file a Review Petition, which was however resorted to by the Appellant before the Learned Claims Tribunal culminating in the Order rejection by the Tribunal, dated 11-09-2017. That, the Petition has been drafted with no attention to detail, hence if the averments were to be considered, the application seeking a copy of the impugned Judgment has been made before its pronouncement, which is indeed congruous. For the reason that the Petition details no sufficient grounds for the delay, has been filed carelessly with no attention to the averments made therein, the Petition ought to be dismissed.

6. Learned Counsel for the Respondents No.3 and 4 also objected to the Petition *inter alia* submitting that the Petition neither satisfies nor falls within the ambit of Section 173(1) of the MV Act read with Section 5 of the Limitation Act. Hence, the Application is not maintainable.

7. Careful consideration has been afforded to the rival contentions of Learned Counsel for the parties and records before this Court perused meticulously.

8. Having considered the entire materials placed before me and the submissions of Learned Counsel for the parties, I deem it essential to narrate the matter with clarity herein. The Appellant is assailing the Judgment dated 30-05-2015 in MACT Case No.11 of 2014 (*Deki Lepcha and Others* vs. *Bir Bahadur Rai and Others*) of the Learned Motor Accidents Claims Tribunal, South Sikkim, at Namchi (Learned Claims Tribunal). Evidently, this matter had been filed before the Learned Claims Tribunal and Judgment as already stated pronounced on 30-05-2015. Against this Judgment and Award, the Appellant-Insurance Company preferred a Review Petition before the same Learned Claims Tribunal being MACT (Review) Case No.01 of 2016. The Order of the Learned Claims Tribunal came to be pronounced on 11-09-2017 rejecting the Review Petition. It thus transpires that the Appellant now assails both the Judgment *supra* and Review Petition *supra*. Neither the averments made by the Petitioner nor

the verbal submission of Learned Counsel for the Petitioner have articulated these circumstances with clarity.

9. Following this is the anomaly that arises in Paragraph 5 of the averments in the Petition wherein the Appellant has stated that he had made an application for certified copy of the Judgment on **16-12-2013** which was obtained on **28-12-2013** when information was given by its Investigator. It is indeed appalling that such a blatant error obtains in the averments and it is incomprehensible as to how certified copies of the impugned Judgment could be sought for in December, 2013, when the impugned Judgment was pronounced only on 30-05-2015. What information the Investigator has given, who the Investigator averred to in the said paragraph was, also remains a mystery and which copy was obtained on 28-12-2013 compounds the already mysterious circumstances. The Appellant has also while seeking condonation of 107 days failed to explain the date from which he has computed the period of limitation.

10. The grounds given for the delay are nothing short of pathetic since all that emerges therein besides the above anomalies is that the File went from Gangtok to Kolkata and back. The Appellant has exhibited a lackadaisical attitude while filing the Petition and dealt with it not only in a routine manner, but by harbouring the notion that the Courts are without doubt to adjudicate for justice dispensation and thereby perforce to condone the delay.

11. In this context, we may now refer to the observations of the Hon'ble Supreme Court in ***Esha Bhattacharjee*** vs. ***Managing Committee of Raghunathpur Nafar Academy and Others***[1] while referring to various authorities on condonation of delay has summarised guiding principles for condonation or otherwise *inter alia* as follows;

> **"22.** To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:
>
> **22.1.** (*a*) An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the

[1] (2013) 12 SCC 649

courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

22.2. (*b*) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

22.3. (*c*) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

22.4. (*d*) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchallant manner requires to be curbed, of course, within legal parameters.**"**

12. These principles are to be the guiding light for the Courts while considering delay Petitions in addition to the other points laid down in the Judgment. The conduct and confidence that the Appellant exudes reflects the belief that the Court has no other option but to condone the delay as the *lis* is to be adjudicated on merits, this attitude is indeed misplaced. The Petition has been filed with nary a care to detail nor was any light thrown to explain the delay, therefore resulting in failure to enumerate sufficient grounds. Besides, as pointed out by Learned Counsel for the Respondents No.3 and 4, the Appellant has invoked the incorrect provision of law for condonation of delay, inasmuch as Section 173(1) of the MV Act lays down that 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. It is infact the second proviso to Section 173 of the MV Act which is the relevant provision which is to be invoked and the High Court may entertain the Appeal after the expiry of ninety days, if it is satisfied that the Appellant was prevented by sufficient cause from preferring the Appeal in time. No such grounds have been put forth as obtains from the discussions which have ensued hereinabove.

13. Hence, in conclusion, in view of the totality of the facts and circumstances, the Petition for condonation of delay deserves no consideration and is accordingly dismissed as also the Appeal.

SLR (2019) SIKKIM 266

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. A. No. 36 of 2018

State of Sikkim ….. APPELLANT

Versus

Girjaman Rai @ Kami and Others ….. RESPONDENTS

For the Appellant: Mr. Karma Thinlay and Mr. Thupden Youngda, Additional Public Prosecutors with Mr. S. K. Chettri, Assistant Public Prosecutor.

For the Respondents: Manish Kumar Jain, Advocate.

Date of decision: 9th May 2019

A. Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age – Date of birth is a question of fact which must be cogently proved by leading evidence. The allegation of sexual assault coupled with the proof of minority of the victim drags an accused to the rigours of the POCSO Act, 2012 which mandates a reverse burden of proof – Absolutely vital to prove the minority of the victim. The "best evidence rule" must be necessarily followed while proving the contents of a birth certificate – Aim of the Court of facts is to come to a firm conclusion about the minority of the victim. Like all other facts in issue, determination of the age of the victim must necessarily be proved by cogent evidence needed in a criminal trial. The POCSO Act, 2012 does not diminish or dilute the Indian Evidence Act, 1872.

(Paras 15 and 22)

B. Registration of Births and Deaths Act, 1969 – Birth Certificate – The birth certificate is a certificate issued under the 1969 Act. The Registrar of Births and Deaths appointed under the 1969 Act is

required to enter information of the birth given to him either orally or otherwise in the register maintained. The informant who gives the information of the birth of a child is required to be provided free of charge an extract of the prescribed particulars under his hand from the register relating to such birth. The name of the informant is also to be recorded in the register maintained under the 1969 Act. Proved by its signatory i.e. the maker, the birth certificate would stand proved. The maker of the birth certificate would be able to depose about the contents of the birth certificate based on the information recorded in the register maintained under the 1969 Act. If the register is therefore, produced and proved it would prove the authenticity of what is recorded in the birth certificate. This would prove that the contents of the birth certificate are the extract of the contents of the register maintained under the 1969 Act. The contents of the register, however, are entered from the information provided by the informant as required under the 1969 Act. The truth about the contents of the information recorded in the register however, is yet another matter. Usually the informant would be the parents or either of them – The birth certificate issued under the 1969 Act is therefore an extract of the entries made in the register issued under Ss. 12 or 17 of the 1969 Act.

(Para 23)

C. Indian Evidence Act, 1872 – S. 74 – Public Documents – Birth certificate is a public document – As per S. 77 of the Indian Evidence Act certified copies of a public document may be produced in proof of its contents – Mere production of a birth certificate without even authenticating the same by proving it through its maker is however, not enough to prove the age of the victim. The age of the victim must be proved by leading clinching evidence. The cogency of the evidence led would ultimately help the Court in determining the age of the victim.

(Paras 26 and 27)

Appeal dismissed.

Chronological list of cases cited:

1. Acharaparambath Pradeepan v. State of Kerala, (2006) 13 SCC 643.
2. Murugan *alias* Sattu v. State of Tamil Nadu, (2011) 6 SCC 111.
3. Madamanchi Ramappa v. Muthaluru Bojjappa, AIR 1963 SC 1633.

4. Sancha Hang Limboo v. State of Sikkim, SLR (2018) Sikkim 1.

5. Mahadeo v. State of Maharashtra, (2013) 14 SCC 637.

6. Chandrappa v. State of Karnataka, (2007) 4 SCC 415.

7. Sampat Babso Kale and Another v. State of Maharashtra, 2019 SCC OnLine SC 498.

8. Mangala Mishra @ Dawa Tamang @ Jack v. State of Sikkim, 2018 SCC OnLine Sikk 215.

9. Madan Mohan Singh v. Rajni Kant, (2010) 9 SCC 209.

10. Lakhi Ram Takbi v. State of Sikkim, Crl. Appeal No. 15 of 2017.

11. Om Prakash Berlia v. Unit Trust of India, AIR 1983 Bombay 1.

JUDGMENT

Judgment of the Court was delivered by ***Bhaskar Raj Pradhan, J***

1. The present Appeal by the State raises two important issues relating to a criminal prosecution under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012). The first issue raised is regarding the quality of the victim's testimony. The second is regarding the quality of proof required to determine the age of a victim.

2. The State is aggrieved by the acquittal of the Respondents in a Sessions Trial Case against them. The first and the second Respondents were indicted for commission of gang penetrative sexual assault and penetrative sexual assault thereby making the victim (P.W.1) pregnant both amounting to aggravated penetrative sexual assaults under Section 5(g)/ 5(j)(ii) as well as for committing penetrative sexual assault under Section 3(a) of the (POCSO Act, 2012). In addition they also faced indictments for rape, criminal intimidation and wrongful confinement under Section 376-D/ 506/342 read with Section 34 of the Indian Penal Code, 1860 (IPC, 1860). The third Respondent was charged for committing aggravated penetrative sexual assault under Section 5(g) and for committing penetrative sexual assault as defined in Section 3(b) of the POCSO Act, 2012. In addition the third Respondent was also indicted for abetting the commission of rape, criminal intimidation and wrongful confinement under Section 109/ 376-D/506/342 read with Section 34 of the IPC, 1860.

3. Mr. Karma Thinlay Namgyal, learned Additional Public Prosecutor for the State-Appellant, during the hearing, with regard to the first issue, submitted that the testimony of a victim of sexual offence is vital and unless there are compelling reasons which necessitated looking for corroboration, the Court should act on the testimony of the victim of the sexual assault alone to convict the Respondent. He relied upon the judgment of the Supreme Court in re: ***Acharaparambath Pradeepan v. State of Kerala***[1] and contended that a child witness undisputedly is competent to testify if he understands the question put to him and gives rational answers. With reference to the second issue he submitted that the learned Special Judge ought to have considered the birth certificate of the victim produced and exhibited by the prosecution to establish the minority of the victim. He hinged his case upon the judgment of the Supreme Court in re: ***Murugan alias Sattu v. State of Tamil Nadu***[2] and submitted that the prosecution could have relied upon the birth certificate to ascertain the age of the victim. Relying upon the judgment of the Supreme Court in re: ***Madamanchi Ramappa v. Muthaluru Bojjappa***[3] he further submitted that further proof of public document is not necessary.

4. *Per contra* Mr. Manish Kumar Jain, learned Advocate for the Respondents submitted that the impugned judgment dated 27.02.2018 was a reasoned judgment of acquittal based on scientific evidence confirming the innocence of the Respondents and thus call for no interference. He also submitted that the prosecution had failed to prove the minority of the victim as well. He relied upon the judgment of the Division Bench of this Court in re: ***Sancha Hang Limboo v. State of Sikkim***[4] and contended that admissibility of a document is one thing, while proof of its contents is an altogether different aspect.

5. We have been taken through the evidence produced during the trial. We have examined the same in great detail.

6. The prosecution case, briefly, was that the victim born to casual labourers on 10.02.2000 hailed from a poor scheduled caste family. The family lived in very poor economic condition. They did not even have television at home. Therefore, the victim used to frequently visit the second

[1] (2006) 13 SCC 643
[2] (2011) 6 SCC 111
[3] AIR 1963 SC 1633
[4] SLR (2018) Sikkim 1

and third Respondent's house to watch television. Four/five months before the receipt of the First Information Report (FIR) (exhibit-8) the victim had gone to their house to watch television. While doing so the second Respondent arrived home. Later the first Respondent also arrived there. He was quite drunk. After dinner the third Respondent persuaded the victim to come and sleep in the next room. The second and third Respondents made the victim lie down on the mattress and removed her clothes. Thereafter, the third Respondent inserted her finger into her vagina and asked the first Respondent to rape her. The second Respondent also touched and fondled her breast but did not rape her. The victim did not cry as the Respondents warned her not to shout for help. After the incident the victim came to her house and slept. She did not disclose about the incident to anyone as she was scared after being threatened by the Respondents. On 10.01.2016 the victim had gone to the house of P.W.6 who saw the swollen abdomen of the victim. The victim told P.W.6 about the incident and how the three Respondents had committed sexual assault on her. The next day i.e. 11.01.2016 a urine test was conducted on the victim. The test confirmed her pregnancy and the fact that the pregnancy was due to the sexual assault on her. On 12.01.2016 the P.W.6 informed about it to the father (P.W.7) of the victim who lodged the FIR on 13.01.2016.

7. The learned Special Judge would come to the conclusion that prosecution had failed to establish the offence against the Respondents and therefore the benefit of doubt must go in their favour.

8. The learned Special Judge disbelieved the testimony of the victim on the basis of the DNA profiling and analysis done of the blood sample of the victim, her child and the first Respondent. The learned Special Judge noticed that prosecution had fixed the responsibility of the victim's pregnancy on the first Respondent as it was alleged that the victim had become pregnant due to the rape committed by him. The learned Special Judge recorded that the DNA profiling and analysis had come to a firm conclusion that the victim was in fact the biological mother of the infant. However, the first Respondent was not the biological father opined the said report.

9. The learned Special Judge also held that under the POCSO Act, 2012 it is necessary for the prosecution to prove that the victim was a minor at the time of the incident. The prosecution had produced the birth certificate of the victim. The learned Special Judge came to the conclusion

that neither the victim nor the father of the victim had deposed about her date of birth. In fact the father of the victim had categorically stated that he did not remember the date of birth of the victim. The learned Special Judge also noticed that the date of birth in the birth certificate was recorded as 10.02.2000 but the said birth certificate was procured only on 02.04.2009. The Registrar of Birth and Deaths was not examined to prove the birth certificate and that the mandate of the law laid down by the Supreme Court in ***Mahadeo v. State of Maharashtra***[5] had not been followed by the prosecution as the certificate of birth from the school first attendant or the matriculation certificate had also not been produced. The learned Special Judge thus concluded that the prosecution had also failed to prove the birth certificate. In view of the anomaly appearing in the birth certificate itself the learned Special Judge opined that it would be unsafe to rely upon it and conclude that the date of birth of the victim was 10.02.2000 as the birth certificate was not admissible in evidence. It was held that no presumption as to the proof of the contents of the birth certificate could be drawn as laid down under Section 79 of the Indian Evidence Act, 1872.

10. The learned Special Judge examined whether the sole testimony of the victim could be relied upon to secure the conviction of the second and the third Respondents as well. The victim had implicated them for aiding, abetting and committing sexual assault on her. The learned Special Judge held that if a person comes to the Court with *"half cooked truth"* and does not reveal the correct facts and circumstances it would be highly unsafe for the Court to rely on such a testimony and punish the said Respondents for serious offences under the POCSO Act, 2012. It was held that in such circumstance it was necessary to look for corroboration. The learned Special Judge examined the evidence of the father and the mother (P.W.3) of the victim and held that the parents had not supported the case of the prosecution and they had failed to prove that the victim was sexually assaulted.

11. In re: ***Chandrappa v. State of Karnataka***[6] the Supreme Court reviewed the law on the power of the Appellate Court in reversing a finding of acquittal and laid down the following guiding principles:

> ***"42.*** *From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:*

[5] (2013) 14 SCC 637
[6] (2007) 4 SCC 415

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

> *(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.***"**

12. The Supreme Court has consistently followed the principles laid down in ***Chandrappa (supra).*** In re: ***Sampat Babso Kale and Another v. State of Maharashtra***[7] following the said principles the Supreme Court, once again, held :

> ***"7****. With regard to the powers of an appellate court in an appeal against acquittal, the law is well established that the presumption of innocence which is attached to every accused person gets strengthened when such an accused is acquitted by the trial court and the High Court should not lightly interfere with the decision of the trial court which has recorded the evidence and observed the demeanour of witnesses. .....***"**

13. The prosecution alleges that the victim was a child and therefore the offences alleged were tried under the POCSO Act, 2012 as well. As rightly held by the learned Special Judge in a case punishable under the POCSO Act, 2012 it is necessary for the prosecution to prove that the victim was a minor below the age of 18 years at the time of the incident.

14. In re: ***Ramappa (supra)*** relied upon by the learned Counsel for the State the Supreme Court held that the admissibility of evidence is no doubt point of law, but once it is shown that the evidence on which courts of fact have acted was admissible and relevant, it is not open to a party feeling aggrieved by the findings recorded by the courts of fact to contend before the High Court in second appeal that the said evidence is not sufficient to justify the findings of fact in question. The Supreme Court further held that it has been always recognised that the sufficiency or adequacy of evidence to support a finding of fact is a matter for decision of the court of facts and cannot be agitated in second appeal. In the said case the certified copy of

[7] 2019 SCC OnLine SC 498

Changes Register had been exhibited during the trial without any objection raised to mode of proof either in Trial Court or in Appellate Court. It was in this context that the Supreme Court held that the High Court was in error in rejecting such document on the ground that it had not been proved.

15. Date of birth is a question of fact which must be cogently proved by leading evidence. The allegation of sexual assault coupled with the proof of minority of the victim drags an accused to the rigours of the POCSO Act, 2012 which mandates a reverse burden of proof. Therefore, it is absolutely vital to prove the minority of the victim. The *"best evidence rule"* must be necessarily followed while proving the contents of a birth certificate.

16. On this aspect regarding determination of the age of a victim in prosecutions under the POCSO Act, 2012 it is important to consider three judgments rendered by the Division Bench of this Court.

17. This Court in re: ***Mangala Mishra @ Dawa Tamang @ Jack v. State of Sikkim***[8] examined whether the prosecution was able to establish that the victim was a child, as defined under Section 2(d) of the POCSO Act, 2012. This Court examined the said birth certificate and held that it had not been established in terms of the required legal parameters. Section 35 of the Indian Evidence Act, 1872 was examined and it was held that the entries mentioned in the said section must be established by necessary evidence. This Court held that it was essential to show that a document was prepared by the public servant in discharge of his official duty. This Court also examined Section 74 of the Indian Evidence Act, 1872 and the judgment of the Supreme Court in re: ***Madan Mohan Singh v. Rajni Kant***[9] which in turn examined various pronouncements of the Supreme Court and culled out the parameters for consideration as follows:

> *(i) A document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case.*
>
> *(ii) In several cases the Supreme Court had held that even if the entry was made in any official record by the official concerned in*

[8] 2018 SCC OnLine Sikk 215
[9] (2010) 9 SCC 209

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 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.

(iii) Similarly in several other cases the Supreme Court had also held that 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.

(iv) 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.

(v) 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.

(vi) *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 Section 50, 51, 59, 60 and 61, etc. of the Evidence Act by examining a person having special means of knowledge, authenticity of date, time, etc. mentioned therein.*

18. In re: ***Mangala Misra (supra)*** it was seen that the evidence produced by the prosecution was contradictory and no register of the Chief Registrar of Births and Deaths was furnished to substantiate the entries made in the birth certificate. It was also noticed that no witness was examined to prove the entries therein. Hence, this Court concluded that the prosecution had failed to establish that the victim was a child and rejected the purported birth certificate as proof of age.

19. In re: ***Sancha Hang Limboo (supra)*** this Court clarified that the birth certificate may be admissible under Section 35 of the Indian Evidence Act, 1872, but the Court is not barred from taking evidence to test the authenticity of the entries made therein. This Court held that admissibility of a document is one thing, while proof of its contents is an altogether different aspect. This Court also held that a birth certificate is a public document falling under Section 74 of the Indian Evidence Act, 1872. It was noticed that objection as to the admissibility and mode of proof of document was not taken at the trial before it was received in evidence and marked as exhibit. Thus it was held that the birth certificate cannot be questioned at the appellate stage.

20. In re: ***Lakhi Ram Takbi v. State of Sikkim***[10] this Court held that the seizure of the birth certificate had been established and that it fulfilled the requirements of both Section 35 and Section 74 of the Indian Evidence Act, 1872. It was held that since no doubt was raised about the authenticity of

[10] Crl. Appeal No. 15 of 2017

the original birth certificate by way of examination of witnesses before the learned Trial Court this question could not be brought up before the Appellate Court since it was admitted without formal proof. In the said case the Headmaster of the School attended by the victim was examined as a prosecution witness who produced the original register maintained and exhibited the certified copy thereof. This Court noticed that the defence had failed to cross-examine regarding proof of entries therein and therefore, it was held that the certificate issued by the Headmaster which indicated the date of birth of the victim also was not demolished. Considering the evidences produced including the birth certificate, copy of the entries contained in the school register and the evidence of the Headmaster of the school this Court held that the prosecution had proved the victim's minority.

21. In re: ***Murugan (supra)*** the Supreme Court examined various documents i.e. the FIR, certificate of birth issued under Section 17 of the Registration of Births and Deaths Act, 1969 (the 1969 Act), the date of birth certificate issued by the Headmaster of the school as well as the evidence of the Radiologist and the test report opining that the victim's age was about 18 years. The Supreme Court also examined the oral evidences of various witnesses including the mother who had deposed about the date of birth being 14 years of age and the Headmistress of the school proving the certificate issued by the school. It was noticed that the birth certificate issued by the Municipality did not contain the name of the child. It was in this background that the Supreme Court held that documents made *ante litem motam* can be relied upon safely, when such documents are admissible under Section 35 of the Indian Evidence Act, 1872. It was noticed that although the registration was made one month after the birth the names of the parents and address were correctly mentioned and thus there was no reason to doubt the veracity of the said certificate. The Supreme Court also noticed that the school certificate had been issued by the Headmaster on the basis of the entry made in the school register which corroborates the contents of the certificate of birth issued by the Municipality. It was noticed that both those entries in the school register as well as in the Municipality had come much before the criminal prosecution started and those entries stood fully supported and corroborated by the evidence of the mother of the victim who had been cross-examined at length.

22. The common determinative factor which runs in the judgments examined *supra* is the consideration of the evidence produced to determine

the age of the victim. The aim of the Court of facts is to come to a firm conclusion about the minority of the victim. Like all other facts in issue the determination of the age of the victim must necessarily be proved by cogent evidence needed in a criminal trial. The POCSO Act, 2012 does not diminish or dilute the Indian Evidence Act, 1872.

23. The birth certificate is a certificate issued under the 1969 Act. The Registrar of Births & Deaths appointed under the 1969 Act is required to enter information of the birth given to him either orally or otherwise in the register maintained. The informant who gives the information of the birth of a child is required to be provided free of charge an extract of the prescribed particulars under his hand from the register relating to such birth. The name of the informant is also to be recorded in the register maintained under the 1969 Act. Proved by its signatory i.e. the maker, the birth certificate would stand proved. The maker of the birth certificate would be able to depose about the contents of the birth certificate based on the information recorded in the register maintained under the 1969 Act. If the register is therefore, produced and proved it would prove the authenticity of what is recorded in the birth certificate. This would prove that the contents of the birth certificate are the extract of the contents of the register maintained under the 1969 Act. The contents of the register, however, are entered from the information provided by the informant as required under the 1969 Act. The truth about the contents of the information recorded in the register however, is yet another matter. Usually the informant would be the parents or either of them. Section 8 of the 1969 Act provides for the duty of the persons specified therein to give or cause to be given, either orally or in writing, according to the best of their knowledge and belief, information to the Registrar of the several particulars required to be entered in the forms prescribed in respect of births. Section 10 of the 1969 Act imposes a duty upon certain persons to notify births. The person specified therein would have special knowledge about the birth of the child. The birth certificate issued under the 1969 Act is therefore an extract of the entries made in the register issued under Section 12 or 17 of the 1969 Act.

24. The birth of a child would be known to the parents and therefore the evidence of the parents has been accepted as best evidence if it is supported by unimpeachable documents. Unfortunately in the present case the parents of the victim did not depose about the date of birth of the victim. Neither did the victim. The prosecution has not proved the birth

certificate through its maker i.e. the Registrar of Births & Deaths as well. It was not even exhibited and proved by the parents of the victim.

25. There were two seizure witnesses of the birth certificate. P.W.2 and P.W.4 deposed that the birth certificate was seized on 14.01.2016 from the possession of the father of the victim. In cross-examination they admitted they did not know the date of birth of the alleged victim. The seizure memo (exhibit-4) which evidenced the seizure was proved by Mahendra Pradhan (P.W.16), the Station House Officer (SHO) of the Gyalshing Police Station, who had initially taken up the investigation of the case as well as P.W.2 and P.W.4. The father of the victim and the two seizure witnesses (P.W.2 and P.W.4) only proved the seizure of the birth certificate of the victim from the father but not the contents thereof.

26. The birth certificate is a public document and as per Section 77 of the Indian Evidence Act, 1872 certified copies of a public document may be produced in proof of its contents. In re: ***Om Prakash Berlia v. Unit Trust of India***[11] the Bombay High Court held that although secondary evidence is admissible of a public document by way of it certified copy, the party who produced it is not relieved of his obligations to prove the execution of document just as if the original has been produced, unless the case was covered by Section 90 of the Indian Evidence Act, 1872 or the legislature had otherwise expressly excepted it under the provisions of Indian Evidence Act, 1872. It was also held that a certified copy of a public document can be admitted as secondary evidence to prove only what the document states. The Bombay High Court thus held that the truth of what the document states must be separately established.

27. Mere production of a birth certificate without even authenticating the same by proving it through its maker is however, not enough to prove the age of the victim. The age of the victim must be proved by leading clinching evidence. The cogency of the evidence led would ultimately help the Court in determining the age of the victim.

28. The victim did not depose about her age or her date of birth during her examination. In cross-examination she admitted that she did not know her date of birth. The victim's parents did not depose about the victim's age or her date of birth. The father of the victim identified the birth certificate

[11] AIR 1983 Bombay 1

after he was declared hostile. However, during cross-examination by the defence the father of the victim stated that he did not know the date of birth of the victim. There is no evidence of either the parents or the victim herself about her age. The cross-examination of the prosecution witnesses by the defence does not reflect that they had not raised any doubt about the age of the victim.

29. The Learned Special Judge found it unsafe to rely upon the birth certificate to come to a finding that the date of birth of the victim is 10.02.2000 since the parents as well as the victim did not know the victims age or her date of birth. The finding of the learned Special Judge that the prosecution had failed to prove the contents of the birth certificate cannot be faulted.

30. The FIR was lodged by the father of the victim. It was lodged on 13.01.2016 several months after the date of the incident as asserted by the prosecution. It alleged that the first and second Respondents lured and raped the victim few months ago. The formal FIR (exhibit-9) was registered and investigation taken up on the basis of said allegation which made out commission of cognizable offences. However, the victim's father during his deposition admitted that he did not know who lodged the FIR and that he was not aware of its contents. He also admitted that the contents of the written FIR and the formal FIR were not read over and explained to him. He deposed that he merely affixed his signature thereon as asked by one Kharanand Sharma and that he did not know if that person had any enmity with the Respondents. K. N. Sharma (P.W.12), *per contra*, deposed that he had ultimately scribed the report about the alleged sexual assault on the victim by the first and second Respondents although he had declined to do so on his first request. The evidence of the father and K. N. Sharma (P.W.12) are not consistent regarding the lodging of the FIR and the surrounding circumstances. The hesitance of the father to stand by the FIR purportedly lodged by him regarding the alleged heinous crime committed against his own daughter must be noticed and renders the information suspect.

31. The allegation against the Respondents made by the victim was heinous but slightly different from the allegation made in the FIR. The FIR had alleged that both the first and the second respondent had lured and raped the victim. According to the victim's testimony the second respondent

had not raped her. The allegation in her testimony was that the third Respondent called the victim to her house to watch television, grabbed one of her legs and asked the second Respondent to grab the other after which she inserted her finger inside the victim's vagina. The victim deposed that the third Respondent, thereafter, asked the first Respondent to rape the victim and the first Respondent raped her in front of the other two Respondents. The victim did not depose about the date, month or year when the alleged rape took place.

32. The victim did not disclose about commission of any sexual intercourse, rape or otherwise by any other person. The prosecution was certain it was only the first Respondent who had raped the victim on that particular day due to which the victim had become pregnant and ultimately delivered the infant. Apparently, the victim also did not tell anyone about the heinous act. The parents were completely unaware about it. They even learnt about the victim's pregnancy few months later. The mother of the victim deposed that she came to learn about the victim's pregnancy just two three months prior to the delivery of the victim's child. She did not depose that even then the victim had confided to her about the heinous act of rape and sexual assault allegedly committed on her. The victim's mother merely accused that they were responsible for her daughter's pregnancy. The father of the victim also did not depose about the victim disclosing to him or to his wife about the alleged incident. He merely deposed learning about the victim's pregnancy from P.W.6 and the pregnancy test conducted on her. In fact the prosecution had declared the victim's father hostile and cross-examined him. On such cross-examination the victim's father admitted having stated to the police that P.W.6 had informed him about the second and third Respondents having grabbed the victim and instigating the first Respondent to rape her. However, on being cross-examined by the defence the victim's father admitted that the victim did not inform him about the alleged incident and that he had heard about it from P.W.6. He also admitted that P.W.6 had only told him about the victim's pregnancy and nothing about the involvement of the Respondents in the alleged heinous act. However, P.W.6 did not mention that the victim had told her about the incident as alleged. P.W.6 deposed that the victim, on finding out about her pregnancy after the test, told her that the first Respondent was responsible for her pregnancy. On the other hand the victim stated that she had only informed P.W.6 about her pregnancy and nothing else. The evidence of the father, P.W.6 and the victim on this aspect also does not inspire confidence needed in a criminal prosecution.

33. The pregnancy of the victim is sought to be proved by the evidence of Dr. Tukki D. Bhutia (P.W.5) the Gynaecologist posted at District Hospital, Gyalshing. She deposed that the investigation of the victim's urine sample resulted in testing positive for pregnancy. P.W.15 deposed that the victim was staying in the short stay home where she was the in-charge and on 26.04.2016 she had delivered a girl child at the District Hospital, Namchi. However, in cross-examination she admitted that she did not have any document to show either that the victim was staying at her short stay home or that she had delivered a girl child at District Hospital, Namchi. The victim testified that she had recently delivered a female child at District Hospital, Namchi. However, the victim's mother strangely admitted during her cross-examination that she did not know that the victim was pregnant and had delivered a child. The victim's father too, strangely again, also admitted that he was not aware that his daughter was actually pregnant and had given birth to a daughter.

34. Bishal Rai (P.W.17) the then SDPO, Gyalshing, and the final Investigating Officer testified that the victim had delivered a baby girl on 26.04.2016. He also stated that to ascertain the paternity of the new born baby, the blood sample of the victim, her child and the first Respondent were collected by him and sent for DNA analysis. He however, did not exhibit the blood sample authentication forms purportedly taking blood samples of the victim, her baby and the first Respondent. Dr. Soma Roy (P.W.18), Scientist-B at CFSL, Kolkatta testified that she had received one sealed cloth parcel containing blood sample for DNA profiling to prove paternity on 18.07.2016. Dr. Soma Roy (P.W.18) exhibited the said blood sample authentication forms of the victim, her child and the first Respondent. The witnesses to the said blood sample authentication forms were however, not examined. Therefore, the factum of the blood samples having been taken from the victim, her child and the first Respondent stands not proved.

35. It is the case of the prosecution that DNA profiling was done on the blood samples of the victim, her child and the first Respondent. Dr. Soma Roy examined the blood samples sent to her for forensic examination. The expert opinion is detailed. It cogently records the result of examination of the blood samples, the observations of the expert and the conclusions. On the basis of the test conducted by Dr. Soma Roy she concluded that the first Respondent was not the biological father of the baby although she was the daughter of the victim.

36. In the absence of clear evidence to connect the taking of the blood samples from the victim, her baby and the first Respondent it is difficult to connect the result of the forensic examination to the present prosecution. However, the prosecution is bound by the evidence it leads. More so when it renders the defence probable. It is the prosecution case that the blood samples examined by the expert were of the victim, her baby and the first Respondent. Dr. Soma Roy's conclusion that the first Respondent was not the biological father of the child born from the victim completely demolishes the substratum of the prosecution case. The prosecution as well as the victim had categorically and clearly insisted that it was the first Respondent and the first Respondent alone who had committed rape on her. Neither the victim nor the Investigating Officer disclosed about any other person having had sexual intercourse with the victim around the time. If the evidence of Dr. Soma Roy is to be believed then the father of the child born to the victim was someone else other than the first Respondent. The victim admitted that during the same year the alleged incident had occurred she had stayed at Ranipool as a maid. She also admitted that a person not related to them used to come to their house and stay. The victim's mother testified that the victim had been given as a maid to a lady in Ranipool and that she had returned one or one and half months before they learnt about the pregnancy. The defence version that the father of the child could be someone else has been made probable by the prosecution evidence.

37. The prosecution has led no evidence to establish the intention of the three Respondents to commit such a heinous act. This gathers significance in the peculiar circumstances of the present prosecution since the victim's mother admitted that the victim used to often go to the house of the second and third Respondents to watch television, eat food and also sleep there. She admitted that the victim was treated like their own sister by the second and third Respondents and that the victim had never complained to her about any ill-treatment by them. In cross-examination the victim also admitted of sharing very good relationship with the second and third Respondents and that she would often go to their house to watch television and stay overnight. The victim did not attribute any reason for the said Respondents to commit such a heinous act. In such circumstances, it would be extremely difficult to hold them guilty based on the sole testimony of the victim and as rightly held by the learned Special Judge, corroboration must be sought for. However, corroboration was wanting.

38. The allegation against the second Respondent by the victim was only of holding the victim's leg on the instruction of his wife, the third Respondent, who had held the other while she inserted her finger into the victim's vagina. The allegation therefore, was of one singular incident which involved all the three Respondents. In such circumstances, when the allegation against the first Respondent fails, it would be a travesty of justice to rely upon the same sole testimony of the victim to saddle the second Respondent for commission of gang penetrative sexual assault for making the victim pregnant as a consequence of sexual assault; for penetrative sexual assault as well as for rape. Similarly the charge against the third Respondent for commission of aggravated penetrative sexual assault; for commission of penetrative sexual assault; for abetting the commission of rape on the victim punishable; and for wrongful confinement must also fail. In so far as the charge of criminal intimidation against the Respondents is concerned the victim has not even made an allegation to the said effect. The said charge against all the Respondents also cannot stand.

39. The presumption of innocence now fortified by the Respondents acquittal has not been dislodged by the prosecution. The victim's testimony remains doubtful, the prosecution version incomplete. The absolute truth has not been placed before the Court. The father of the victim's new born child remains unidentified. A delicate balance is required to be maintained between the presumption that a victim would not ordinarily lie and a presumption of innocence of the accused. The prosecution's failure to investigate further and tell the Court about the father of the victim's child is a major inconsistency and lacunae which shakes the very foundation of their case. The victim's version required corroboration in the present case. However, the evidence led by the prosecution failed to corroborate the testimony of the victim. In fact the expert opinion contradicted the testimony of the victim and rendered it improbable. Therefore, following the principles laid down in ***Chandrappa (supra)*** and ***Sampat Babso Kale (supra)*** we without any hesitance hold that the judgment of acquittal passed by the learned Special Judge does not merit any interference.

40. The appeal preferred by the State is dismissed.

SLR (2019) SIKKIM 285

(Before Hon'ble the Chief Justice)

CRP No. 06 of 2018

Shri Chingtop Bhutia ….. REVISIONIST

Versus

Shri Ran Bahadur Chettri and Others ….. RESPONDENTS

For the Revisionist: Mr. Jorgay Namka, Mr. Karma Sonam Lhendup, Ms. Panila Theengh and Ms. Tashi Doma Sherpa, Advocates.

For Respondent 1-2: –

For Respondent No. 3: Mr. Thinlay Dorjee Bhutia, Government Advocate.

Date of decision: 10th May 2019

A. Code of Civil Procedure, 1908 – Order VII Rule 11 – Rejection of Plaint – It is clear that where the plaint does not disclose a cause of action, the relief claimed is undervalued, and not corrected within the time allowed by the Court, insufficiently stamped and not rectified within the time given by the Court, barred by any law, failed to enclose the required copies and failed to comply with the provisions of R. 9, the Court shall reject the plaint – In such situation the Court has no other option except to reject the plaint. The power of the Court under O. VII R. 11 of the Code can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial – Relevant facts which need to be looked into for deciding an application under O. VII, R. 11, C.P.C. are the averments in the plaint.

(Para 9)

B. Code of Civil Procedure, 1908 – Order VII Rule 11 – Rejection of Plaint – While deciding an application under O. VII R. 11,

the Court is required to go through the plaint. The plaint must contain material facts. When the plaint does not disclose material facts giving rise to a cause of action, the application moved under O. VII R. 11 deserves to be allowed – Clearly provides that where the plaint does not disclose a cause of action, the same *shall* be rejected.

(Para 14)

Petition allowed.

Chronological list of cases cited:

1. Saleem Bhai v. State of Maharashtra and Others, (2003) 1 SCC 557.
2. A.B.C. Laminart (P) Ltd. v. A.P. Agencies, Salem, (1989) 2 SCC 163.
3. Fatehji & Company and Another v. L.M. Nagpal and Others, AIR 2015 SC 2301,
4. Hardesh Ores Pvt. Ltd. v. M/s Hede and Co., 2007 AIR SCW 3456.
5. Church of North India v. Lavajibhai Ratanjibhai and Others, (2005) 10 SCC 760.
6. Prem Lala Nahata and Another v. Chandi Prasad Sikaria, AIR 2007 SC 1247.

JUDGMENT

Vijay Kumar Bist, CJ

This revision has been preferred by the revisionist under Section 115 of the Code of Civil Procedure, 1908 (for short, "C.P.C.") against the order dated 09.07.2018 passed by the Civil Judge, Yangang Sub-Division, South Sikkim at Yangang, by which an application filed by the revisionist under Order VII Rule 11, C.P.C. has been rejected.

2. In this matter, notice was issued to the respondents on 21.08.2018. The case was listed on 24.09.2018. Registry submitted its report stating that respondents no. 1 and 2 had been duly served. Respondent no. 2 appeared in person before the Court on that day, but none appeared for respondent no. 1. The Court again directed to serve notice upon respondent no. 1

through the Process Server of the Civil Court, South Sikkim. In compliance to the said order, learned District & Sessions Judge, South Sikkim sent a communication to this Court informing that the notice was duly served upon the respondent no. 1. The revision was heard and admitted and was listed for final hearing on 19.11.2018. Inspite of service of notice, none appeared for respondents no. 1 and 2. The matter was fixed for ex-parte hearing and was heard ex-parte.

3. Respondent no. 1/plaintiff instituted a Title Suit No. 01 of 2018 for declaration, confirmation and recovery of possession, mandatory injunction and other consequential reliefs along with an application under Order XXXIX, Rules 1 and 2 C.P.C. The revisionist/defendant no. 1 filed written statement raising preliminary objections and gave para-wise reply. The revisionist/defendant no. 1 also filed an application under Order VII, Rule 11, C.P.C. for rejection of the plaint. In his application, the revisionist/ defendant no. 1 stated that earlier in the year 2015 the plaintiff/respondent no. 1 had filed a Title Suit No. 05 of 2015 seeking declaration, confirmation and recovery of possession, mandatory injunction and other consequential reliefs along with an application under Section XXXIX, Rules 1 and 2, C.P.C. before the District Judge, South Sikkim at Namchi, and valued his suit at Rs.12,20,000/-. He also stated that the plaintiff/ respondent no. 1 had deliberately concealed this fact and on that ground the application filed under Order VII, Rule 11, C.P.C. needed to be allowed and the case of the plaintiff/respondent no. 1 to be dismissed. It is also stated that as per the plaintiff's own admission, pleadings and the documents filed by him, the cause of action arose in the year 2013, and thus, the case of plaintiff is directly hit by the provisions of Order VII, Rule 11, C.P.C. and the title suit filed by him is hopelessly barred by law of limitation. It is also stated that as per the plaintiff's own admission and pleadings, the suit is undervalued.

4. The plaintiff in his reply stated that the earlier suit filed by him was withdrawn on the ground of technical errors and the Court was pleased to allow the withdrawal with liberty to file a fresh. As far as cause of action is concerned, the plaintiff admitted the fact that the cause of action arose in the year 2013 but denied that the suit is hit by provisions of Order VII, Rule 11, C.P.C. Regarding valuation of the suit, the plaintiff stated that even in the event that the suit is found to be undervalued, the same cannot be dismissed rather the plaintiff is required to be given a chance to rectify the valuation of the suit and pay the requisite court fees.

5. Learned Civil Judge after hearing the parties, rejected the application filed by the revisionist/defendant no. 1 under Order VII, Rule 11, C.P.C. in the following manner : -

> "Heard and considered.
>
> A perusal of the petition, documents and after hearing the Ld. Counsel for the defendant No.1, it is seen that the defendant No. 1 has sought for rejection of the plaint on two grounds. The first being that it does not reveal any cause of action. This issue has been correctly addressed by the Ld. Counsel for the plaintiff wherein he has relied upon the judgment of the Hon'ble Supreme Court in **AIR 2007 SC 1247** in which the Hon'ble Supreme Court held that a plaint cannot be rejected because it does not reveal any cause of action. With respect to the second ground of the suit being barred by limitation, it has been held by the Hon'ble Courts of this country in the plethora of cases that the question of limitation involved a mixed question of facts and law and therefore, to decide this this Court is required to go through the merits of the case.
>
> Thus for the above reasons the petition of the defendant No. 1 stands rejected."

6. The contention of learned counsel for the revisionist/ defendant no. 1 is that not only the pleadings made on oath by the plaintiff in his two suits i.e. Title Suit No. 05 of 2015 and Title Suit No. 01 of 2018, are similar but the reliefs sought therein are also the same. It is stated by him that the plaintiff for the purpose of court fees and pecuniary jurisdiction had valued his earlier suit i.e. Title Suit No. 05 of 2015 at Rs.12,20,000/- and thereafter he for the same schedule land and reliefs sought, for the purpose of court fees and pecuniary jurisdiction has valued his second suit, i.e. Title Suit No. 01 of 2018 at Rs.500/- on 23.04.2018, without any supporting pleadings. Thus, the court fee valued by him is insufficient. It is also contended by the learned counsel for the revisionist/ defendant no. 1 that as per the plaintiff's own admission, pleadings and documents filed by him, the cause of action arose in the year 2013, which are directly hit by the

provisions of Order VII, Rule 11, C.P.C., hence the Title Suit filed by the plaintiff is barred by limitation.

7. I have considered the submissions of learned counsel for the revisionist/ defendant no. 1.

8. Order VII, Rule 11, C.P.C. deals about the rejection of plaint. The same is reproduced below: -

> "**11. Rejection of plaint -** The plaint shall be rejected in the following cases:-
>
> (a) where it does not disclose a cause of action;
>
> (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
>
> (c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
>
> (d) where the suit appears from the statement in the plaint to be barred by any law;
>
> (e) where it is not filed in duplicate;
>
> (f) where the plaintiff fails to comply with the provisions of rule 9:
>
> Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an

> exceptional nature for correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

9. From the bare reading of Order VII, Rule 11, C.P.C., it is clear that where the plaint does not disclose a cause of action, the relief claimed is undervalued, and not corrected within the time allowed by the Court, insufficiently stamped and not rectified within the time given by the Court, barred by any law, failed to enclose the required copies and failed to comply with the provisions of Rule 9, the Court shall reject the plaint. It is, thus, clear that in such situation the Court has no other option except to reject the plaint. The power of the Court under Order VII Rule 11 of the Code can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial, as held by the Hon'ble Supreme Court in the matter of *Saleem Bhai* v. *State of Maharashtra and others :* (2003) 1 SCC 557. The relevant facts which need to be looked into for deciding an application under Order VII, Rule 11, C.P.C. are the averments in the plaint.

10. In *A.B.C. Laminart (P) Ltd.* v. *A.P. Agencies*, Salem, (1989) 2 SCC 163, the Hon'ble Supreme Court explained the meaning of "cause of action" in the following manner:

> "*12*. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything

which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

11. In *Fatehji & Company & another v. L.M. Nagpal and others* : AIR 2015 SC 2301, the Hon'ble Supreme Court considered the case relating to Order VII, Rule 11, C.P.C. Few paragraphs of the judgment are reproduced below: -

"**4.** Defendants 1 to 3 filed an application under Order VII Rule 11, CPC on 10.10.1996 seeking for rejection of the plaint as barred by the law of limitation. The trial court after hearing both sides by a speaking order held that the suit is patently barred by the law of limitation and allowed the application by rejecting the plaint. The plaintiffs preferred appeal in RFA No. 350 of 1997 and the High Court by the impugned judgment allowed the appeal by setting aside the order of the Trial Court and restored the suit to file. Aggrieved by the same the defendants have preferred the present appeal. For the sake of convenience, the parties are hereinafter referred to as they were arrayed in this suit.

x x x

8. Yet another circumstance was pointed out to prove the laches on the part of the plaintiffs. The sons of the second defendant filed a suit in July 1985 against defendants 2, 3 and the plaintiffs seeking for declaration that the present suit property is their ancestral joint family property and the sale made by the defendants in favour of the plaintiffs be declared as null and void. The plaintiffs herein contested the said suit and it came to be dismissed on 5.4.1989. The suit for specific performance was not filed within three years from the said date also.

9. The plaintiffs averred in the plaint that the last and final cause of action accrued and arose to them after August, 1991 when the defendants succeeded in hiding themselves and started avoiding the plaintiffs and the cause of action being recurring and continuous one, they filed the suit on 29.4.1994. As already seen the original cause of action became available to the plaintiffs on 2.12.1973, the date fixed for the performance of the contract and thereafter the same stood extended till 1.2.1977 as requested by the defendants. Though the plaintiffs claimed that oral extension of time was given, no particulars as to when and how long, were not mentioned in the plaint. On the other hand even after knowing the dishonest intention of the sons of the second defendant with regard to the suit property in the year 1985, the plaintiffs did not file the suit immediately. The suit having been filed in the year 1994 is barred by limitation under Article 54 of the Limitation Act.

10. We are of the view that the High Court committed manifest error in reversing the well-considered order of the trial court rejecting the plaint as barred by the law of limitation and the impugned judgment is liable to be set aside. In the result, the appeal is allowed and the impugned judgment of the High Court is set aside and the order of the trial court is restored. No costs."

12. In *Hardesh Ores Pvt. Ltd. v. M/s Hede and Co. :* 2007 AIR SCW 3456, the Hon'ble Supreme Court held as under: -

"**21.** The language of Order VII, Rule 11, CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr. Nariman did not dispute that "law" within the meaning of clause (*d*) of Order VII, Rule 11 must include the law of limitation as well. It

is well settled that whether a plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is whether the averments made in the plaint, if taken to be correct in their entirety, a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether clause (*d*) of Rule 11 of Order VII is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. As observed earlier, the language of clause (*d*) is quite clear but if any authority is required, one may usefully refer to the judgments of this Court in *Liverpool & London S.P. & I Assn. Ltd.* v. *M.V. Sea Success I and another :* (2004) 9 SCC 512 and *Popat and Kotecha Property* v. *State Bank of India Staff Association :* (2005) 7 SCC 510.

x x x

34. We are, therefore, satisfied that the Trial Court as well as the High Court were justified in holding that the plaint deserved to be rejected under Order VII, Rule 11, CPC since the suit appeared from the statements in the plaint to be barred by the law of limitation. We, therefore, find no merit in these appeals and the same are accordingly dismissed. No order as to costs."

13. In *Church of North India v. Lavajibhai Ratanjibhai and others :* (2005) 10 SCC 760, the Hon'ble Apex Court held as under: -

> **"39.** A plea of bar to jurisdiction of a civil court must be considered having regard to the contentions raised in the plaint. For the said purpose, averments disclosing cause of action and the reliefs sought for therein must be considered in their entirety. The court may not be justified in determining the question, one way or the other, only having regard to the reliefs claimed dehors the factual averments made in the plaint. The rules of pleadings postulate that a plaint must contain material facts. When the plaint read as a whole does not disclose material facts giving rise to a cause of action which can be entertained by a civil court, it may be rejected in terms of Order 7 Rule 11 of the Code of Civil Procedure".

14. While deciding the application under Order VII, Rule 11, C.P.C., the Court is required to go through the plaint. The plaint must contain material facts. When the plaint does not disclose material facts giving rise to a cause of action, the application moved under Order VII, Rule 11, C.P.C. deserves to be allowed. In the present case, it appears that the learned Civil Judge did not go through the contents of the plaint and rejected the application filed under Order VII, Rule 11, C.P.C. by simply referring a judgment of the Hon'ble Supreme Court in *Prem Lala Nahata & Anr. Vs. Chandi Prasad Sikaria* : AIR 2007 SC 1247. It appears that the learned Civil Judge understood the judgment of Hon'ble Apex Court that the plaint cannot be rejected even if the same does not reveal any cause of action. In fact, legal position is not like this. The facts of the case in the matter of *Prem Lala Nahata* (supra) were entirely different. In that case, suit was filed by the appellants for recovery of sum allegedly due to them. In that matter respondent had also filed two suits for recovery of sum allegedly due from the appellants. The said two suits were pending in the Civil Court. The appellants moved on the original side of the Calcutta High Court seeking withdrawal of two money suits to be tried with another suit on the plea that common questions of fact and law arise in the suits and it would be in the interests of justice to try and dispose of the three suits together. The High Court took the view that it would be appropriate in the interest of justice to transfer the two suits pending in the Civil Court to the original side of the High Court for being tried and disposed of along with the suit pending in

the High Court. In this background the Hon'ble Supreme Court observed that an objection of misjoinder of plaintiffs or misjoinder of causes of action, is a procedural objection and it is not a bar to the entertaining of the suit or the trial and final disposal of the suit. The Supreme Court further observed that it is open to the Court to proceed with the suit notwithstanding the defect of misjoinder of parties or misjoinder of causes of action. But facts in the present case are different. The learned Civil Judge without going through the facts mentioned in the plaint simply held that the plaint cannot be rejected because it does not reveal any cause of action. This finding of the learned Civil Judge is not correct. Order VII, Rule 11, C.P.C. clearly provides that where the plaint does not disclose a cause of action, the same **shall** be rejected.

15. I have gone through the plaint filed by the respondent no. 1/plaintiff. Pleadings do not support the reliefs. Lack cause of action. Even if the facts mentioned in the plaint are taken to be correct in their totality, in my view, the same are not sufficient to decree the suit.

16. On the question of limitation also the learned Civil Judge simply observed that the Hon'ble Courts of this country in plethora of cases held that the question of limitation involved a mixed question of facts and law and therefore, to decide this, the Court is required to go through the merits of the case. The learned Civil Judge failed to appreciate that according to the plaintiff himself the cause of action arose in the year 2013. In paragraph 33 of the plaint, the plaintiff has stated that the cause of action arose in the year 2013. Suit in question has been instituted in the year 2018. The suit is barred by limitation and as such is hit by provisions of Order VII, Rule 11 of C.P.C.

17. In view of the above discussion, the Revision Petition is allowed. Order dated 09.07.2018 passed by the learned Civil Judge, Yangyang Sub-Division, South Sikkim at Yangang in Title Suit Case No. 01 of 2018 (*Shri Ran Bahadur Chettri vs. Shri Chintup Bhutia & Ors.*) is set aside. The application moved by revisionist/ defendant no. 1 under Order VII, Rule 11, C.P.C. is allowed. Plaint filed by the plaintiff is rejected.

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SLR (2019) SIKKIM 296

(Before Hon'ble the Chief Justice and
Hon'ble Mrs. Justice Meenakshi Madan Rai)

Crl. A. No. 03 of 2018

Ashim Stanislaus Rai ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. K. T. Tamang, Advocate (Legal Aid).

For the Respondent: Mr. Thinlay Dorjee, Additional Public Prosecutor with Mr. S. K. Chettri, Assistant Public Prosecutor.

Date of decision: 10th May 2019

A. Indian Evidence Act, 1872 – Victim's Testimony – Requirement of Corroboration – The evidence of a child witness is to be considered after taking all due precautions which are necessary to find out the truth and to ensure that her deposition is trustworthy – In the matter at hand, the evidence on record indicates that the victim did not divulge the unfortunate incident to any of her friends and slept over it that night. The next morning, on 31-05-2016, at around 06.30 a.m., at the first opportunity she informed P.W.3 of the incident. The action of the victim is understandable as in the first instance an incident which she could not fathom in its correct perspective had taken place, her body had been violated and instinctively sensing that it was a wrong act, which obviously rankled and traumatized her, she dealt with it by keeping it under wraps the night of the incident. The next morning, she confided the incident to the teacher who also had her living quarters in the school. On careful analysis of the victim's entire evidence the consistency therein is undeniable and is found to be cogent, honest and truthful, consequently her testimony requires no further corroboration – It is only when the Court is ambivalent about the veracity of the victim's evidence that resort can be taken to corroborative evidence.

(Paras 10 and 11)

B. Code of Criminal Procedure – S. 164 – When confessions are being recorded, the Magistrate is to exercise caution to ensure that the confession is voluntary. Although as evident from a reading of S. 164(2), the statute does not specify that time for reflection is to be given to the person making such confession but nevertheless by way of abundant precaution a minimum of 24 hours is granted to the accused for this purpose to ensure the voluntariness of his statement. Besides, before recording the confession of an accused he is to be informed that the Officer recording his statement is a Magistrate and that the statement given by him can be used as evidence against him. His voluntariness is of paramount importance as also his awareness that he is no longer in the custody of the police, neither is he bound by any statement, unless he does so of his own freewill. It is also settled law that the statement recorded under S. 164 can never be used as substantive evidence of truth of the facts but may only be used for contradiction or corroboration of the witness who made it – Not extending time for reflection to the victim who was a witness, before recording her statement, lends no prejudice to either the victim, the Prosecution or the Appellant.

(Paras 12 and 13)

Appeal dismissed.

Chronological list of cases cited:

1. State of Himachal Pradesh v. Sanjay Kumar *alias* Sunny, (2017) 2 SCC 51.
2. Abbas Ahmad Choudhary v. State of Assam, (2010) 12 SCC 115.
3. Panchhi and Others v. State of U.P., (1998) 7 SCC 177.
4. State of U.P. v. Ashok Dixit and Another, (2000) 3 SCC 70.
5. State of Punjab v. Gurmit Singh and Others, (1996) 2 SCC 384.

JUDGMENT

Judgment of the Court was delivered by ***Meenakshi Madan Rai, J***

1. The present Appeal is preferred against the impugned Judgment and Order on Sentence, dated 22-09-2017, of the Learned Special Judge (POCSO), North Sikkim, at Mangan, in Sessions Trial (POCSO) Case

No.01 of 2017. The Appellant, vide the Judgment was convicted under Section 354B, Section 376(2)(i), Section 376(2)(f) of the Indian Penal Code, 1860 (hereinafter, IPC) and Section 5(m)/6 and 5(f)/6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, (POCSO Act, 2012).

2. The impugned sentence is as follows;

(i) For the offence under Section 376(2)(f) of the IPC and Section 5(f) of the POCSO Act, 2012, the convict was sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.30,000/- (Rupees thirty thousand) only;

(ii) For the offence under Section 5(m) of the POCSO Act, 2012, the convict was sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.30,000/- (Rupees thirty thousand) only;

(iii) For the offence under Section 376(2)(i) of the IPC, he was sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.30,000/- (Rupees thirty thousand) only; and

(iv) For the offence under Section 354B of the IPC, he was sentenced to undergo simple imprisonment for a period of three years and to pay a fine of Rs.25,000/- (Rupees twenty five thousand) only.

The sentences were ordered to run concurrently and all the sentences of fine bore a default clause of imprisonment. The fine, if recovered, was to be paid as compensation to the victim, in addition to a sum of Rs.1,00,000/- (Rupees one lakh) only, to be paid to her out of the Victims Compensation Fund [*sic*, The Sikkim Compensation to Victims Dependents (Amendment) Schemes, 2013].

3. The facts are briefly being adverted to for clarity in the matter. On 04-06-2016, a written First Information Report (FIR), Exhibit 3, came to be lodged at the Mangan Police Station, North Sikkim, by P.W.2, the father

of the minor victim, P.W.1, stating that, the Appellant a teacher in the victim's school had sexually assaulted the minor, aged about 9 years, on 03-06-2016, at around 11.30 a.m. or 12.30 p.m. Acting upon the Complaint, the Mangan Police Station on the same date registered Mangan P.S. Case under Sections 376/511 of the IPC read with Sections 4 and 8 of the POCSO Act, 2012, against the Appellant and endorsed it for investigation. Investigation revealed that the victim had been admitted to the residential school in the year 2012 and was in Class II at the relevant time. On 30-05-2016, around 2050 hours, when the victim along with other hostel students was studying in the hall, the Appellant called her and another student of Class II to the adjacent Boys' dormitory. After admonishing the boy for having teased the victim the Appellant dismissed him to the study hall, but held the victim back in the dimly lit room. He locked the door to the room and told her to lie down in the bunk bed in the room and thereupon sexually assaulted her by way of fondling and licking her vagina, kissing her mouth and cheeks. When he attempted to commit penetrative sexual assault by inserting his genital into hers, the victim resisted by biting one of his hands. He threatened to beat her should she reveal the incident to anyone indicating that he would use his belt for the purpose. In the meanwhile, another student knocked on the door of the room which afforded an opportunity to the victim to escape. She did not report the incident to anyone immediately, i.e., on 30-05-2016, but on 31-05-2016 she informed her teacher, P.W.3 who in turn narrated it to P.W.6, P.W.7, P.W.8, P.W.10, the other teachers of the school. The Principal of the school, P.W.5, was out of station on 31-05-2016 and on her arrival the same evening, she was apprised of the matter by P.W.6 upon which she confirmed of it from the victim. As the Appellant was out of station on 01-06-2016, on his return that evening, P.W.5, the Principal, confronted him about the incident to which he admitted in the presence of Members of the School Children Committee, constituted by P.W.5. The Appellant executed a document admitting his guilt and signed on it which was duly countersigned by the five teachers, pursuant to which, he resigned from service. On completion of investigation, Charge-Sheet came to be filed against the Appellant under Section 4, 8 and 10 of the POCSO Act, 2012.

4. The Learned Special Judge (POCSO) Act, 2012, after considering the materials on record, framed Charge against the Appellant under Sections

5 (m), 5 (f), 9(m), 9(f) of the POCSO Act, 2012 and Sections 376(2)(i), 376(2)(f), 354 and 354B of the IPC. On a plea of "not guilty" by the Appellant, sixteen witnesses were examined by the Prosecution, including the I.O. of the case. The Appellant thereafter was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, Cr.P.C.) to enable him to explain the incriminating circumstances appearing against him and his responses recorded. On closure thereof, the final arguments of the parties were heard. The Learned Trial Court on consideration of the entire evidence on record pronounced the impugned Judgment of conviction, but found no materials to convict the Appellant under Section 9(m), 9(f) of the POCSO Act, 2012 and Section 354 of the IPC. Following the impugned Judgment of Conviction, the impugned Order on sentence was pronounced as stated *supra*. Discontented thereof, the instant Appeal has arisen.

5. Learned Counsel for the Appellant would contend before this Court that the Section 164 Cr.P.C. statement of the victim came to be recorded on 09-06-2016 with no time for reflection afforded to the victim prior to such recording thereby causing prejudice to the Appellant. The evidence of P.W.9, another student of the school as well as of P.W.11 do not support the Prosecution case. According to P.W.9, he saw the minor victim with the Appellant but she appeared to be neither nervous nor uneasy. P.W.11 deposed that the Appellant had called the minor victim and P.W.12 to the Boys' dormitory and after sometime the minor victim, P.W.12 and the Appellant exited the room together and they all seemed normal, thereby falsifying the Prosecution story. As per P.W.11 the door to the Boys' room was open when the victim, P.W.12 and the Appellant were inside. This is in contradiction to the evidence of the victim who has stated that when she went inside the room where the Appellant had called her, he had caught hold of her, taken off her clothes and committed sexual assault. That, the evidence of the victim appears improbable as P.W.9 has specifically stated that when he had gone to hand over the Appellant's mobile phone the victim was in the room talking to the Appellant. That, when he knocked on the door to the said room the door was wide open. Also it is his specific evidence that he did not see anything unusual when he entered the room. Drawing strength from the ratio in ***State of Himachal Pradesh*** vs. ***Sanjay Kumar alias Sunny***[1], it was urged that the evidence of the victim cannot

[1] (2017) 2 SCC 51

be treated as gospel truth and ought to be evaluated with circumspection. That, infact the Learned Trial Court ought to have garnered corroborative evidence of the adult witnesses to test the veracity of the victim's evidence. That, although the victim's evidence insinuates penetrative assault yet the medical evidence shows nothing to support the said allegation, thereby raising a serious doubt on the Prosecution story. That, the offence has been wrongly foisted on the Appellant as he was a strict teacher. In support of his contentions, Learned Counsel placed reliance on ***Abbas Ahmad Choudhary*** vs. ***State of Assam***[2], ***Panchhi and Others*** vs. ***State of U.P.***[3] and ***State of U.P.*** vs. ***Ashok Dixit and Another***[4]. Hence, in the light of the anomalies in the witnesses' evidence, the Appeal be allowed and the impugned Judgment and Sentence be set aside.

6. Countering the arguments of Learned Counsel for the Appellant, Learned Additional Public Prosecutor submitted that the victim has specifically detailed the nature of the sexual assault committed on her by the Appellant, this finds due corroboration in her Section 164 Cr.P.C. statement. The Medical Report, Exhibit 26, of the Appellant reveals that there was a bite mark with reddish discolouration on the right side of the thumb of the Appellant, which is corroborative of the victim's Section 164 Cr.P.C. statement, where, she has stated that she had resisted the assault of the Appellant by biting one of his hands. That, the evidence of the victim before the Court as well as in her Section 164 Cr.P.C. statement is consistent, besides which, the POCSO Act 2012 provides that if the Appellant is prosecuted for committing or attempting to commit any offence under Section 3, 5, 7 and 9 of the POCSO Act, 2012, the Special Court shall presume that such person had committed the act unless the contrary is proved. The evidence of P.W.2 is duly corroborated by the teachers in her school being P.Ws 3, 6, 7 and 8 as they had been informed of the incident by the minor victim and no inconsistencies arise in their evidence. In the given circumstances, no reason emanates to set aside the impugned Judgment and Sentence of the Learned Trial Court.

7. We have heard the rival assertions of the Learned Counsel at length. Careful perusal of the documents and impugned Judgment and Order on Sentence have also been made.

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[2] (2010) 12 SCC 115
[3] (1998) 7 SCC 177
[4] (2000) 3 SCC 70

8. Was the conclusion of the Learned Trial Court in convicting the Appellant correct? This falls for consideration of this Court. We may carefully walk through and scrutinise the evidence of the Prosecution witnesses in order to gauge this. P.W.1, the victim, is categorical in her statement that the Appellant had sexually assaulted her by narrating graphic details of the incident in her evidence. That, the Appellant had after committing the act told her not to tell anyone of the incident and threatened her of physical assault. The chain of events as narrated by the victim is reiterated and substantiated by P.Ws 3, 5, 6, 7, 8, 10 in their evidence. According to P.W.3, on 31-05-2016, at around 06.30 a.m., the victim told her that she wanted to say something to her and proceeded to divulge that the Appellant had sexually assaulted her and described the various acts of sexual assault perpetrated on her by the Appellant. P.W.3 informed P.W.10 about it while P.W.7 and P.W.8 were privy to their conversation, thereafter P.W.3 informed P.W.6. The evidence of P.W.3 is duly corroborated by the evidence of P.Ws 6, 7, 8 and 10. P.W.5, the Principal, for her part stated that she was informed of the incident by P.W.6 on 31-05-2016, when she returned from Kalimpong, where she had gone for some work the same morning. P.W.5 then reported the incident to the parents of the victim on 03-06-2016, who reached the school on 04-06-2016 as duly affirmed by P.W.2, the father of the victim. It further transpires that on 04-06-2016 the FIR Exhibit 3, came to be lodged before the Mangan P.S by P.W.2. There is no contest about the age of the victim in the instant matter and indubitably she was about eight years old when the incident occurred. P.W.13, the Doctor who medically examined the Appellant and the victim found no injury on the person of the victim, which is not an erroneous finding as there is no allegation by the victim of use of violence by the Appellant. Her statement *inter alia* was to the effect that when she entered the room, he caught hold of her, took off the clothes below her waist and thereafter started licking her genitals. There is no question of insertion of finger or any other object in her genital. While examining the Appellant, P.W.13 found a bite mark and reddish discolouration on his right thumb. This could not be demolished under cross-examination. The injury on the hand of the victim is consistent with the statement of the victim under Section 164 of the Cr.P.C. that she had bitten his hand in order to escape from the situation when the Appellant attempted to insert his genital into hers. Although another plea was raised by the Appellant that a false allegation had been foisted on him as he was a

strict teacher, in our considered opinion, this would scarcely be a motive for a child to spin a yarn against him for a depraved and horrific act. It is only an attempt on the part of the Appellant to introduce a red herring.

9. While addressing the question of delayed lodging of the FIR, the delay has been sufficiently explained by P.W.5. According to her, it was the first time such an incident had occurred in the school leading to shock and confusion about steps to be initiated. It was only after much deliberations amongst themselves, i.e., the teachers, that the parents of the minor victim were informed on 03-06-2016, added to which the difficulty in contacting the parents of the victim due to their mobile phones being switched off exacerbated the delay. The Supreme Court in ***State of Punjab*** vs. ***Gurmit Singh and Others***[5] has observed that %

> **"8.** ..... The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. ....."

The above observation covers the reality of situations in such offences. In the instant matter, the delay from the date of incident to the date of lodging of the FIR has been explicitly clarified in the evidence of P.W.5.

10. Dealing with the question of corroborative evidence, having placed reliance on ***Panchhi*** (*supra*) and ***Ashok Dixit*** (*supra*) Learned Counsel for the Appellant would emphasise that the evidence of the victim ought to be evaluated carefully as she could be prone to tutoring. This Court is conscious and aware that the evidence of a child witness is to be considered after taking all due precautions which are necessary to find out the truth and to ensure that her deposition is trustworthy. In the matter at hand, the evidence on record indicates that the victim did not divulge the

[5] (1996) 2 SCC 384

unfortunate incident to any of her friends and slept over it that night. The next morning, on 31-05-2016, at around 06.30 a.m., at the first opportunity she got she informed P.W.3 of the incident. The action of the victim is understandable as in the first instance an incident which she could not fathom in its correct perspective had taken place, her body had been violated and instinctively sensing that it was a wrong act, which obviously rankled and traumatized her, she dealt with it by keeping it under wraps the night of the incident. The next morning, she confided the incident to the teacher who also had her living quarters in the school. On careful analysis of the victim's entire evidence the consistency therein is undeniable and is found to be cogent, honest and truthful, consequently her testimony requires no further corroboration. While dealing with a somewhat similar issue the Supreme Court in ***Sanjay Kumar*** (*supra*) held as follows;

> **"31.** After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. 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 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. 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 (See *Bhupinder Sharma* v. *State of H.P.* [(2003) 8 SCC 551 : 2004 SCC (Cri) 31]). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove.**"**
>
> **[emphasise supplied]**

11. Thus, it is only when the Court is ambivalent about the veracity of the victim's evidence that resort can be taken to corroborative evidence. This Court harbours no such doubts. As already pointed out the question of the child having been tutored is completely out of the question as firstly she is living in a hostel, it is not the Prosecution case that she divulged the incident to her friends who could have influenced her and neither was she under the influence of any other adult to create a story to foist the offence on the Appellant nor was there any underhanded motive to do so.

12. While considering the provisions of Section 164 of the Cr.P.C. the provision deals with recording of confessions and statements. Section 164(2) requires that the Magistrate shall, before recording any "confession", explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has the reason to believe that it is being made voluntarily. The provision lucidly lays down that when confessions are being recorded the Magistrate is to exercise caution to ensure that the confession is voluntary. Although as evident from a reading of Section 164(2) the statute does not

specify that time for reflection is to be given to the person making such confession but nevertheless by way of abundant precaution a minimum of 24 hours is granted to the accused for this purpose to ensure the voluntariness of his statement. Besides, before recording the confession of an accused he is to be informed that the Officer recording his statement is a Magistrate and that the statement given by him can be used as evidence against him. His voluntariness is of paramount importance as also his awareness that he is no longer in the custody of the police, neither is he bound by any statement, unless he does so of his own freewill. It is also settled law that the statement recorded under Section 164 of the Cr.P.C. can never be used as substantive evidence of truth of the facts but may only be used for contradiction or corroboration of the witness who made it.

13. In the same thread, we may now look at Section 164(5) of the Cr.P.C. which requires that any statement, other than a confession, made under Sub-Section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted for circumstances of the case and the Magistrate shall have power to administer oath to the person whose statement is so recorded. Hence not extending time for reflection to the victim who was a witness, before recording her statement, lends no prejudice to either the victim, the Prosecution or the Appellant. Moreover, the cross-examination of the witness reveals that she was never confronted with her Section 164 Cr.P.C. statement to contradict what she had stated therein before the Learned Trial Court.

14. Having carefully and cautiously evaluated the entire evidence on record, examined the veracity of the evidence of the victim and the corroborative evidence as emerges of the other Prosecution witnesses, there is no reason to interfere with the findings of the Learned Trial Court and the impugned Judgment and the Sentence of imprisonment imposed vide the Order on Sentence as also the fine payable and the default stipulation. However, with regard to the compensation of Rs.1,00,000/- (Rupees one lakh) only, ordered to be paid to the victim, it is relevant to notice that the FIR was lodged on 04-06-2016, the trial concluded with the impugned Judgment and Order on Sentence, both dated 29-09-2017. Prior to pronouncement of the impugned Judgment an amendment came to be made

to The Sikkim Compensation to Victims Dependents (Amendment) Schemes, 2013, as The Sikkim Compensation to Victims or his Dependents (Amendment) Schemes, 2016. This was notified on 18-11-2016, by the Home Department, Government of Sikkim. It was published in the Sikkim Government Gazette, No.451, dated 25-11-2016. The Notification provided that the said Scheme would come into force at once, thereby meaning that on 18-11-2016 the Scheme was enforced. Vide the said Scheme a sum of Rs.3,00,000/- (Rupees three lakhs) only, is to be granted as compensation to victims of rape. Since the impugned Judgment is later in time than the amended Scheme *supra*, it would be in the fairness of things to enhance the compensation to the victim to Rs.3,00,000/- (Rupees three lakhs) only, as against Rs.1,00,000/- (Rupees one lakh) only, granted by the Learned Special Court. The compensation is modified to the extent *supra*.

15. Appeal disposed of accordingly.

16. No order as to costs.

17. Copy of this Judgment be sent to the Learned Trial Court.

18. Records of the Learned Trial Court be remitted forthwith.

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SLR (2019) SIKKIM 308

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. A. No. 31 of 2016

Krishna Pradhan ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

For the Appellant: Mrs. Gita Bista, Advocate (Legal Aid).

For the Respondent: Ms. Pollin Rai, Assistant Public Prosecutor.

With

Crl. A. No. 07 of 2017

State of Sikkim ….. APPELLANT

Versus

Kiren Chettri and Another ….. RESPONDENTS

For the Appellant: Ms. Pollin Rai, Assistant Public Prosecutor.

For Respondent No.1: Mr. Tashi Norbu Basi, Advocate (Legal Aid).

For Respondent No.2: Mrs. Zola Megi, Advocate.

Date of decision: 27th May 2019

A. Protection of Children from Sexual Offences Act, 2012 – Determination of the Victim's Age – Bone Age Estimation Report – Relaibility – Medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence – Date of birth must be determined on the basis of

material on record and on appreciation of evidence adduced by the parties – Under the POCSO Act, 2012 a reverse burden of proof is imposed upon an accused. The requirement of proof of age of the girl to establish her minority must be strictly complied with and cogently proved.

(Paras 12, 13 and 14)

B. Indian Evidence Act, 1872 – Evidence – Requirement of Corroboration – There is a material difference between voluntarily indulging in sexual act and someone forcing themselves on the girls and having sexual intercourse. Whereas the POCSO Act, 2012 may make no difference and consent of minors would be no consent the reliability of the deposition would suffer when it is found that the girls in spite of having indulged in consensual sexual acts had sought to give it the colour of forceful sexual assault against the accused – Evidence of the girls is neither wholly reliable nor wholly unreliable. When the Court is faced with such situation it is essential that corroboration is necessarily sought for. In such circumstances, oral testimony of the girls alone would not be sufficient as it would be difficult to sift the grain from the chaff.

(Para 28)

C. Indian Evidence Act, 1872 – S. 73 – Had the prosecution proved the relevant entry in the hotel guest register, it was permissible for the learned Special Judge to compare the signature therein with the admitted signature of Krishna Pradhan on the charge – The Court under S. 73 of the Indian Evidence Act, 1872 is entitled to compare the disputed and admitted signature – If the prosecution had identified the relevant entry and exhibited the same the defence would have had occasion to dispute the entries. As this was not done the learned Special Judge could not have taken the entry therein as the "disputed"entry and compared the same at the time of writing judgment.

(Para 31)

Appeal No. 31 of 2016 allowed

Appeal No. 07 of 2017 dismissed.

Case cited:

1. Jaya Mala v. Government of J&K, (1982) 2 SCC 538.

JUDGMENT

Judgment of the Court was delivered by ***Bhaskar Raj Pradhan, J***

1. The father (P.W.1) of two young girls lodged a written report on 25.07.2013 at the Ranipool police station. It alleged that his two daughters; the elder girl (P.W.2) aged 16 years and the younger girl (P.W.3) aged 12 years, who had gone to Singtam Bazaar on 21.07.2013 at 9.00 a.m. had not returned home. He requested for help to search them. Pursuant thereto P.S. Case No.29/2013 got registered on 25.07.2013 and the case endorsed for investigation.

2. It is the prosecution case that the two girls were traced out at Rangpo Bazaar by one of their relatives and brought to Ranipool Police Station. The girls stated to the police that they had been enticed by unknown persons, wrongfully confined in hotels at Singtam Bazaar and subjected to sexual intercourse. The police registered a case and took it up for investigation.

3. We shall examine two Criminal Appeals in this common judgment as both relate to events that transpired with the two girls during the period they left Singtam and till they ultimately returned after a few days. We are conscious that Criminal Appeal No.07 of 2017 has been preferred by the State and therefore, it is against the judgment of acquittal. We must bear in mind that the presumption of innocence in favour of Kiren Chettri and Laxuman Gurung has been fortified by their acquittal. Under such circumstances, if two reasonable conclusions are possible on the basis of evidence on record, we should not disturb the finding of acquittal.

4. The Investigating Officer filed a charge-sheet dated 29.10.2013 against three accused persons, Krishna Pradhan (the Appellant in Criminal Appeal No. 31 of 2016), Kiren Chettri and Laxuman Gurung (Respondent Nos. 1 and 2 in Criminal Appeal No. 07 of 2017) under Section 343, 363, 376 read with Section 34 IPC, 1860 and under Section 3 of the POCSO Act, 2012.

5. On 23.09.2014 the learned Special Judge framed charges against all the three accused persons.

6. The learned Special Judge convicted Krishna Pradhan under Section 4 of the POCSO Act, 2012 but acquitted him for the offence under Section 363/34 IPC, 1860. Kiren Chettri and Laxuman Gurung were acquitted from all charges. The judgment of conviction dated 29.08.2016 is assailed by Krishna Pradhan in Criminal Appeal No. 31 of 2016. The acquittal of Kiren Chettri and Laxuman Gurung are challenged by the State in Criminal Appeal No.07 of 2017. Krishna Pradhan's acquittal for alleged offence under Section 363/34 IPC, 1860 is not challenged.

Minority of the two girls:

7. The learned Special Judge on the basis of the evidence produced found that both the girls were below 18 years as on July, 2013 and hence a child within the meaning of Section 2(1)(d) of the POCSO Act, 2012.

8. The primary attack by the learned defence Counsels was on the failure of the prosecution to establish the minority of the two girls. The learned Special Judge has relied upon the attested copies of the birth certificates (exhibit-7 and exhibit-8) of the two girls and the medical evidence of Dr. Keshav Giri, (P.W.20) the Radiologist of STNM Hospital to hold that the girls were minors. The learned Special Judge held that the seizure of both the birth certificates have been confirmed by Bishnu Kumar Rai (P.W.4) and Puran Rai (P.W.5). He also took into account the deposition of the father (P.W.1) and held that it would be safe to conclude that the girls were below 18 years as on July, 2013.

9. The consistent and cogent evidence of the father (P.W.1) would have been the best evidence if it was supported by unimpeachable documents. The father (P.W.1) testified on 03.03.2014 that the girls aged 14 and 17 were his daughters. He did not however, identify their birth certificates but merely stated that the police had seized them from his residence. In cross-examination he admitted that he was not present when the birth certificates of his daughters were seized by the police. The father (P.W.1) was the one who lodged the FIR (exhibit-1) and he exhibited the same in Court stating that it was scribed by a fellow villager on his instructions. The FIR lodged on 25.07.2013 under the signature of the father (P.W.1) states that his two daughters aged 16 years and 12 years had gone missing. There was discrepancy in the age of the girls in the FIR and the deposition of the father (P.W.1) and it was necessary for the

learned Special Judge to seek for unimpeachable document to establish their minority. This was needed because the father (P.W.1) gave two different ages for the girls and was, therefore, uncertain about their age. Neither did the prosecution explain the discrepancy in their evidence nor did the defence confront the father about the age of the girl as given by the father in the FIR (exhibit-1) and his deposition. The defence also did not deny the testimony of the father that the girls were aged 14 and 17 years. However, the discrepancy in the age is evident from the FIR and the deposition of the father which we cannot ignore. The elder girl (P.W.2) while deposing before Court on 04.03.2014 stated that she was 19 years then and that she was 17 years old in the year 2013. There is a difference of one year between the FIR and evidence of the elder girl (P.W.2) about her age. There is a similar difference of one year in the age of the elder girl (P.W.2) as given by her in her deposition and by her father recorded the same month. The elder girl (P.W.2) also stated that her date of birth is 25.11.1996. The attested birth certificate of the elder girl (P.W.2) however, records that her date of birth was 25.12.1996.

10. The younger girl (P.W.3) deposed on 09.03.2015 and stated that she was presently 15 years old. The age of the younger girl (P.W.3) given by the father (P.W.1) in the FIR and his deposition is consistent. The younger girl (P.W.3) however, stated that she did not know the date and month of her birth and whether her father (P.W.1) changed her year of birth to reduce her age in the birth certificate.

11. The two other evidences available therefore, are the attested copies of the birth certificates and the ossification test. The birth certificates were not identified by the father (P.W.1), the elder girl (P.W.2) or the younger girl (P.W.3). The learned Special Judge relied upon two seizure witnesses to confirm the seizure. Bishnu Kumar Rai (P.W.4) exhibited the birth certificates of the girls. However, Bishnu Kumar Rai (P.W.4) admitted in cross-examination that when he reached the police station the birth certificates were already on the table. He had stated in his examination that some police personnel from Ranipool Police Station had visited the residence of the girls and seized the birth certificates. Puran Rai (P.W.5), contrary to what Bishnu Kumar Rai (P.W.4) had stated in his examination-in-chief, deposed that the police had called him to the Ranipool Police Station to witness the seizure of the birth certificates of the two girls. In cross-examination, Puran Rai (P.W.5) deposed that apart from himself and the

police there was no one else when the seizure of the birth certificates was made. The learned defence Counsel contested before us that attested copies of the said birth certificates which are marked as (exhibit-6 and exhibit-7) were not admissible. Bishnu Kumar Rai (P.W.4) exhibited the original birth certificates. This is clear from the fact that the defence Counsel had not protest against the exhibition of the said birth certificates. Further in the office note on the right margin of order sheet dated 25.03.2015 there is an endorsement which records *"receive original birth certificates of my daughters (younger girl (P.W.3) and elder girl (P.W.2))-sd-"*. It seems that the original birth certificates had been handed over to the father (P.W.1) of the girls and in its place the attested photocopies marked as (exhibit-6 and exhibit-7). In fact the Investigating Officer (P.W.19) testified having seized the birth certificates from the residence of the girls. He also deposed that exhibit-7/1 and exhibit-8 are the compared copies of the birth certificate. The birth certificates have been exhibited by two seizure witnesses who had no idea about the contents thereof. Neither the Registrar of Births & Deaths nor the authority who attested the photo copies of the birth certificates have been examined. The Investigating Officer (P.W.19) has candidly admitted in cross-examination that he has not verified the age of the girls from the Births & Deaths Cell of the concerned hospital from where the birth certificates were issued. He has also admitted that he did not visit the school were the girls last attended to ascertain their date of birth. The Investigating Officer (P.W.19) admitted that the age of the girls had been recorded different before various authorities. We are therefore, of the view that no reliance can be placed on the contents of the birth certificates due to the vacillating evidence.

12. The only evidence left to determine the age of the girls therefore, are the bone age estimation reports (exhibit-37 and exhibit-38). The learned Special Judge has also relied upon the same. It is settled proposition, as of now, that the medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence. Both the bone age estimation reports prepared by Dr. Keshav Giri (P.W.20) and his evidence are cryptic and do not qualify as expert opinions. Even if one was to accept the bone age estimation report (exhibit-38) the fact that the Dr. Keshav Giri (P.W.20) had opined that the upper age of the elder girl (P.W.2) may have been 17 would attract the ratio of the judgment of the Supreme Court in re: ***Jaya Mala v. Govt. Of J & K***[1]

[1] (1982) 2 SCC 538

and the Court could take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. This would therefore, make the Court presume that the elder girl (P.W.2) was a major at the time of commission of the alleged offence. This would therefore, render the acquittal of Kiren Chettri and Laxuman Gurung unquestionable as bone age estimation report (exhibit-38) was evidence produced by the prosecution which they are bound by. The bone age estimation report (exhibit-37) also does not inspire confidence to saddle criminal liability on the basis of such cryptic report about the estimated age of the younger girl (P.W.3) too.

13. It has been repeatedly held by the Supreme Court that it is not feasible or desirable to lay down an abstract formula to determine the age of a person. Date of birth must be determined on the basis of material on record and on appreciation of evidence adduced by the parties. However it is mandatory for the prosecution to establish the minority of the victims by leading cogent and clinching evidence.

14. In the circumstances, we are of the firm view that the finding of the learned Special Judge that the birth certificates and the cryptic bone age estimation reports of the girls has proved their minority is legally untenable. Under the POCSO Act, 2012 a reverse burden of proof is imposed upon an accused. The requirement of proof of age of the girl to establish her minority must be strictly complied with and cogently proved.

15. The prosecution's failure to prove the minority of the girls by leading cogent evidence takes the case out of the rigours of the POCSO Act, 2012 as well as Section 363 IPC, 1860.

16. We now proceed to examine whether the prosecution has been able to establish the other ingredients of the offences charged against Kiren Chettri, Laxuman Gurung and Krishna Pradhan.

17. The identification of Kiren Chettri, Laxuman Gurung and Krishna Pradhan during Test Identification Parade was of no consequence as the girls had identified them at the police station itself after they were rounded up by the police. The police had rounded them up on the basis of the descriptions given by the girls. The girls thus, quite obviously, identified them in Court with absolute certainty. In the natural course of human conduct this

was but apparent. There is no discernible reason as to why they would be wrongly identified by the girls. The identification of Kiren Chettri, Laxuman Gurung and Krishna Pradhan by the girls is unquestionable even if we discard the Test Identification Parade.

Evidence against Kiren Chettri:

18. Kiren Chettri was charged for kidnapping the two minor girls from the lawful guardianship and committing an offence under Section 363 IPC, 1860 on the evening of 21.07.2013. He was also charged for committing penetrative sexual assault under Section 3 of the POCSO Act, 2012 on the elder girl (P.W.2) on the same night.

19. The elder girl (P.W.2) stated that the incident took place on the 23.06.2013. The younger girl (P.W.3) deposed that it happened on 22.06.2013. The FIR lodged by the father (P.W.1) is dated 25.07.2013 in which he stated that the girls had left home on 21.07.2013 and had not returned. The girls were examined by Dr. Paras Mani Karki (P.W.7) on 27.07.2013. Therefore, there is no certainty regarding the date of the commission of the alleged offence. The learned Special Judge found it impossible to convict Kiren Chettri due to the inconsistency in the evidence of the girls. The deposition of the girls suggests that they had got into the truck driven by Kiren Chettri on their own volition. Both the girls however, during their examination-in-chief insisted that Kiren Chettri did not stop the truck where they wanted to get off and instead proceeded towards Kalijhora, West Bengal in spite of their protest. However, during cross-examination the elder girl (P.W.2) admitted that Kiren Chettri stopped the truck when they waved for lift. She also admitted that he asked them where they were going, took them to Singtam where they desired to go and bought them food too. She also admitted that it was on their request that Kiren Chettri took them to Siliguri. The allegation against Kiren Chettri of taking or enticing the girls out of the keeping of their lawful guardianship without the consent of their father (P.W.1) which is the second ingredient of Section 363 IPC, 1860 cannot also stand.

20. The elder girl (P.W.2) has deposed that Kiren Chettri forced himself on her and had sexual intercourse and threatened to kill her if she did not relent after removing the younger girl (P.W.3) from the truck. She also alleged that he once again forced himself on her and had sexual intercourse

with her while the younger girl (P.W.3) slept in the truck the next night at Teesta after coming back from Siliguri. The elder girl deposed that Kiren Chettri had taken them to Siliguri on their request as they were afraid to return home. The elder girl (P.W.2) also deposed that on the third day after they left Teesta and reached 8th mile she sent her sister home to find out the situation there while she stayed back in the truck. The younger girl's (P.W.3) deposition about the elder girl (P.W.2) having sexual intercourse with Kiren Chettri is hearsay. The younger girl (P.W.3) however, admitted that Kiren Chettri did not force himself either on her or the elder girl (P.W.2) during the night they spent in the truck at Teesta. She also admitted that she did not witness Kiren Chettri sexually assaulting her sister. The allegation against Kiren Chettri of forcing himself on the elder girl (P.W.2) on two occasions and also threatening to kill her if she did not relent is palpably false. It would have been relevant to consider whether Kiren Chettri did have sexual intercourse with the elder girl (P.W.2) if her minority had been proved. The learned Special Judge found it would not be wise to take the evidence of the two girls as the absolute truth. The State has preferred the Appeal against a judgment of acquittal in favour of Kiren Chettri. Keeping in mind the parameters of the law while examining a case of acquittal we are of the view that the judgment of acquittal in favour of Kiren Chettri cannot be faulted.

Evidence against Laxuman Gurung and Krishna Pradhan:

21. Laxuman Gurung was charged for two offences. He was charged for the offence of kidnapping the two minor girls on 24.07.2013 along with Krishna Pradhan from the lawful guardianship of their father thereby committing offence under Section 363 read with Section 34 IPC, 1860. He was also charged for committing penetrative sexual assault under Section 3 of the POCSO Act, 2012 on 24.07.2013 at Hotel Carnation at Singtam on the elder girl (P.W.2). The learned Special Judge has acquitted Laxuman Gurung of all charges.

22. According to the girls they had gone to Singtam with Laxuman Gurung after travelling with Kiren Chetti for two days on their own volition. No case has been made out to fasten liability of kidnapping from lawful guardianship of the father (P.W.1) against Laxuman Gurung more so when the minority of the girls have not been proved either.

23. Two charges were framed against Krishna Pradhan. The first charge was under Section 363 read with Section 34 IPC, 1860 for kidnapping the two minor girls on 24.07.2014 from the lawful guardianship of their father along with Laxman Gurung. The second charge was for commission of penetrative sexual assault on the younger girl (P.W.3) under Section 3 of the POCSO Act, 2012. The State has not preferred any Appeal against the impugned judgment of acquittal in favour of Krishna Pradhan for the offence of kidnapping the girls from the lawful guardianship of their father (P.W.1) and thus we do not propose to examine the same.

24. We shall therefore examine the charges of penetrative sexual assaults on the elder girl (P.W.2) by Laxuman Gurung and on the younger girl (P.W.3) by Krishna Pradhan both on 24.07.2013 at hotel Carnation at Singtam.

25. The learned Special Judge has come to the conclusion that the girls may have been used to sexual intercourse and may have had sexual intercourse with Krishna Pradhan voluntarily but taking into consideration their age (below 18 years) it amounts to an offence under the POCSO Act, 2012.

26. The deposition of the girls does suggest that they had voluntarily gone with Krishna Pradhan and Laxuman Gurung to Singtam. Both the girls depose about spending two nights with them in two hotels at Singtam. The elder girl (P.W.2) deposes that she spent the first night with Laxuman Gurung while the younger girl (P.W.3) stayed with Krishna Pradhan. According to her the next night she spent with Krishna Pradhan and the younger girl (P.W.3) spent it with Laxuman Gurung. The younger girl (P.W.3) also deposed that she spent the first night with Krishna Pradhan when he forced himself on her and had sexual intercourse. However, regarding the next day the younger girl (P.W.3) had a completely different story to tell. She deposed that the two girls spent the second night with each other in one room.

27. The two girls and their father (P.W.1) admit that they were habituated in travelling to different places hailing vehicles on the highway and coming back after few days. Both the girls hesitate to speak the truth though it is obvious that they were afraid of being reprimanded by the parents. It is also apparent that the parents of the girls were used to the

girls travelling and staying out for several days. The father (P.W.1) candidly admitted about this fact in cross-examination.

28. There is a material difference between voluntarily indulging in sexual act and someone forcing themselves on the girls and having sexual intercourse. Whereas the POCSO Act, 2012 may make no difference and consent of minors would be no consent the reliability of the deposition would suffer when it is found that the girls in spite of having indulged in consensual sexual acts had sought to give it the colour of forceful sexual assault against the accused. We are of the view that the evidence of the girls is neither wholly reliable nor wholly unreliable. When the Court is faced with such situation it is essential that corroboration is necessarily sought for. In such circumstances, oral testimony of the girls alone would not be sufficient as it would be difficult to sift the grain from the chaff.

29. At this juncture it is important to examine the evidences which the learned Special Judge held corroborated the depositions of the girls resulting in the conviction of Krishna Pradhan.

30. A perusal of exhibit-13 shows that it is hotel Carnation's daily domestic visitors report register. One Krishna Pradhan's name is written therein with details of age, sex, father's name, address and occupation. However, the other two entries are not in the name of the girls. The learned Special Judge has held that the involvement of Krishna Pradhan has not only been confirmed by the girls but also been proved by the guest register. Ganesh Gurung (P.W.6), Sishir Lamichaney (P.W.8) and Poonam Lamichaney (P.W.13) have merely proved the seizure of the hotel guest register but did not prove the entries therein. They did not identify either Krishna Pradhan or Laxuman Gurung in Court. There is no explanation about the other two names which are not of the girls. There is no entry in the name of Laxuman Gurung in the guest register of hotel Carnation. None of the entries have been exhibited or proved by the prosecution witnesses. The guest register of carnation hotel does not corroborate the testimony of the girls against Laxuman Gurung and Krishna Pradhan.

31. The charges framed against Laxuman Gurung and Krishna Pradhan were of commission of the offence at hotel Carantion on 24.07.2013 and not at Sangam hotel on 25.07.2013. The Learned Special Judge has however relied upon the guest register of hotel Sangam (exhibit-24) to hold

Krishna Pradhan guilty too. The entries if proved along with the entries in the hotel guest register of hotel Carnation would have been relevant. Mel Maya Pradhan (P.W.12), Arun Subba (P.W.14) and Biswas Amirul (P.W.15) are the relevant witnesses. Mel Maya Pradhan (P.W.12) admitted that the entries made in the hotel guest register were not made by her. She also admitted that she was not certain that the entries therein were correct. Arun Subba (P.W.14) only deposed about the seizure of the guest register. Biswas Amirul (P.W.15) did not even know whether the police seized any hotel register or not. They also did not identify Krishna Pradhan or Laxuman Gurung in Court. The entries in the hotel guest register have not been exhibited or proved. These entries pressed into service are the entries dated 25.07.2013. It has the name of one Krishna Pradhan written therein. Had the prosecution proved the relevant entry in the hotel guest register it was permissible for the learned Special Judge to compare the signature therein with the admitted signature of Krishna Pradhan on the charge dated 23.09.2014. The Court under Section 73 of the Indian Evidence Act, 1872 is entitled to compare the disputed and admitted signature. However, besides producing the hotel guest register no attempt was even made to prove the relevant entries therein. If the prosecution had identified the relevant entry and exhibited the same the defence would have had occasion to dispute the entries. As this was not done the learned Special Judge could not have taken the entry therein as the *"disputed"* entry and compared the same at the time of writing judgment. It is seen that no expert opinion was obtained about the signature and handwriting appearing in the alleged entry in the hotel guest register. The other name entered therein was not of Laxuman Gurung but of one Laxmit Pradhan. The Investigating Officer has admitted that he had not found any entry in the hotel register pertaining to Laxuman Gurung and he also could not find any witness who had seen Laxuman Gurung check in or check out of the hotels. He honestly admitted that he did not seize any document which Krishna Pradhan or Kiren Chettri may have provided to the hotels where they checked in. Similarly the names of the girls are not entered therein. Thus, contrary to what the learned Special Judge has held neither the entries in the guest registers of Carnation hotel and hotel Sangam have been proved nor have they corroborated the statements of the girls. Suspicion do arise that Laxuman Gurung and the girls had used false names in the hotels and the entry in the name of Krishna Pradhan is in fact the Appellant in Criminal Appeal No. 31 of 2016. Suspicion however so strong cannot take place of proof.

32. The learned Special Judge has further held that the medical evidence supports the prosecution case that the girls were subjected to sexual intercourse.

33. Dr. Paras Mani Karki (P.W.7), the Gynaecologist on examination of the younger girl (P.W.3) recorded that on local examination no perennial injury was detected and the vaginal examination reflected that the hymen was ruptured and admitted two fingers at ease. He also recorded that no active bleeding was found at the time of examination. The Gynaecologist recorded that no motile or non-motile spermatozoa were seen in the vaginal and vulva wash. In his deposition in Court the Gynaecologist stated that on the basis of his examination and the pathological report he was of the opinion that there was no evidence of forcible sexual intercourse and accordingly he prepared the medico legal examination report (exhibit-14). This opinion is however, missing from the medico legal examination report (exhibit-14). In the medico legal examination report (exhibit-14) the Gynaecologist has recorded his observation but has not given his opinion. In cross-examination the Gynaecologist has admitted that during the time of the younger girl's (P.W.3) examination she was not bleeding from her genital and if she had been subjected to several sexual assaults as mentioned by her she would have sustained serious injuries in her genital. The Gynaecologist admitted that on his examination of the younger girl (P.W.3) as two fingers could be easily inserted in her genital he was of the opinion that she is used to having frequent sexual intercourse. He admitted that he did not find any injury over the part of her body including her genital and that he could not say whether she had had recent sexual intercourse. The Gynaecologist admitted that if the girl had recent forceful sexual intercourse, in all probability, there would have been bleeding and injury in a genital.

34. The Gynaecologist also examined the elder girl (P.W.2). He recorded that there were no injuries in her perennial area. The vaginal examination reflected torn hymen but no fresh bleeding and it admitted two fingers at ease. Based on his examination the Gynaecologist opined that there was no evidence of recent forcible sexual intercourse on the girl and accordingly he prepared the medico legal examination report (exhibit-14). The medico legal examination report (exhibit-14) however, does not record his opinion of there being no evidence of recent forcible sexual intercourse as narrated by him in his deposition. The Gynaecologist admitted that during the time of his examination the elder girl (P.W.2) was not bleeding from her

genital and had she been subjected to several sexual assaults, as mentioned by her, she would have sustained serious injuries in her genital. He also admitted that on his examination of the elder girl (P.W.2) as two fingers could be easily inserted in her genital, he was of the opinion that she was used to frequent sexual intercourse. The Gynaecologist admitted that he did not find any injury over any part of her body including her genital and that on her examination he could not say whether she had had recent sexual intercourse. He admitted that if the girl had recent forceful sexual intercourse, in all probability there would have been bleeding and injury in her genital.

35. The allegations made by the girls were of recent forcible sexual intercourse. The medical evidence may have reflected possible previous sexual intercourse. However, the opinion of the Gynaecologist was that there was no evidence of recent forcible sexual intercourse. The girls were medically examined on 27.07.2013 after they were taken to the police station. The elder girl (P.W.2) stated that she had sexual intercourse twice with Kiren Chettri on the 23.06.2013, with Laxuman Gurung on the next day and with Krishna Pradhan the day after. The younger girl (P.W.3) deposed that she had sexual intercourse with Krishna Pradhan two days before they were found by their father (P.W.1) after which they were medically examined. The medical evidence does not point to any specific accused. The conclusion of the learned Special Judge that the medical evidence supports the prosecution case of the girls being subjected to sexual intercourse cannot fasten the verdict of guilt specifically upon any individual. There is no other corroborative evidence found relevant by the learned Special Judge or available.

36. The defence has however, examined six witnesses in their defence including the accused persons themselves. As we have held that the prosecution has failed to establish the minority of the girls we do not propose to examine their evidence in detail. However, Kiren Chettri, Laxuman Gurung and Krishna Pradhan have all deposed that they have been falsely implicated and denied the prosecution version. In fact the oral evidence of Kiren Chettri (D.W.1) and Laxuman Gurung (D.W.3) is sought to be corroborated by the oral evidence of Anand Pradhan (D.W.2) and Ajit Tamang (D.W.4) respectively. The evidence led by the defence has not been demolished by the prosecution. However, the cross-examination of the elder girl (P.W.2) by Kiren Chettri reflects that he had admitted having given

lift to the two girls thus, rendering his defence false. This would definitely be a link. However, we have found that the prosecution has not been able to establish the offences charged against Kiren Chettri. Thus, even when we consider this link it is seen that the evidence produced against Kiren Chettri is not enough for the purpose of conviction. Similarly, if the prosecution had established the commission of the alleged offences by leading cogent and unflinching evidence then the oral evidence of the defence witnesses led by Laxuman Gurung and Krishna Pradhan could have been held to be false. However, we find that the evidence led by the prosecution in the present case wavering in proving the offences beyond reasonable doubt. In fact both the girls have also unequivocally admitted during their cross-examination that their parents had tutored them to give evidence against Kiren Chettri, Laxuman Gurung and Krishna Pradhan. The Investigating Officer admitted having recorded statement of both the girls under Section 161 Cr.P.C. 1973 on three occasions and that in the first statement given by the girls to him they had not mentioned about the accused persons committing sexual assault on them.

37. The acquittal of Laxuman Gurung cannot be faulted. We cannot also agree with the finding of the learned Special Judge that the involvement of Krishna Pradhan has been proved by the hotel guest registers and the medical evidence or that the statements of the girls against Krishna Pradhan have been corroborated by the hotel guest registers.

38. Consequently, we must give the benefit of doubt to Krishna Pradhan. The learned Special Judge has acquitted Kiren Chettri and Laxuman Gurung. We do not consider this a fit case to interfere with their acquittal.

39. Resultantly, Criminal Appeal No. 31 of 2016 is allowed and the conviction of Krishna Pradhan is set aside. Krishna Pradhan's bail bonds are discharged. He shall be released forthwith if he is not required in any other case.

40. In Criminal Appeal No.07 of 2017 the acquittals of Kiren Chettri and Laxuman Gurung are upheld.

41. A copy of this judgment shall be sent to the Court of the learned Special Judge, POCSO Act, 2012, East District at Gangtok, East Sikkim.

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SLR (2019) SIKKIM 232

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

Crl. A. No. 28 of 2017

Garja Bir Rai ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. N. Rai, Senior Advocate with
Ms. Tamanna Chhetri and Ms. Malati Sharma.

For the Respondent: Mr. Karma Thinlay and Mr. Thinlay Dorjee,
Additional Public Prosecutors with Mr. S. K.
Chettri, Assistant Public Prosecutor.

Date of decision: 29th May 2019

A. Code of Criminal Procedure – S. 154 – Requirement of Disclosing a Cognizable Offence – Report first filed by P.W.7 would tantamount to one under S. 174 devoid as it was of disclosure of a cognizable offence. The second complaint lodged by P.W.7 after the autopsy was conducted discloses a cognizable offence and indeed qualifies as an F.I.R under S. 154.

(Para 12)

B. Code of Criminal Procedure – Ss. 174 and 175 – Power to Summon During Inquiry on Suicide – S. 175 provides that a Police Officer proceeding under S. 174, may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case. Every person so summoned shall be bound to attend and to answer truly all questions other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. If the facts do not disclose a cognizable offence to which S. 170 applies, such persons shall not be required by the police officer to attend a Magistrate's Court –

The Section requires the Officer concerned to prepare a report, which without ambiguity requires investigation.

(Para 15)

C. Indian Evidence Act, 1872 – Circumstantial Evidence – The principle of circumstantial evidence is that the hypothesis of guilt must lead to the accused and none else by a chain of circumstances which are cogent, consistent and reliable.

(Para 16)

D. Indian Evidence Act, 1872 – Interested Witnesses – Evidence – Evidence of an interested witnesses requires careful scrutiny, however if tested and found credible nothing debars reliance on it.

(Para 36)

Appeal allowed.

Chronological list of cases cited:

1. Jose *alias* Pappachan v. Sub-Inspector of Police, Koyilandy and Another, (2016) 10 SCC 519.
2. Ram Kishan Singh v. Harmit Kaur and Another, (1972) 3 SCC 280.
3. R. Shaji v. State of Kerala, (2013) 14 SCC 266.
4. Mohar Singh and Others v. State of Punjab, AIR 1981 SC 1578.
5. State of U.P. v. Krishna Gopal and Another, AIR 1988 SC 2154.
6. Narayan Dutta v. The State, 1980 Cri. L.J. 264 (Calcutta).
7. Babubhai v. State of Gujarat and Others, (2010) 12 SCC 254.
8. Sucha Singh v. State of Punjab, 2009 Cri.L.J. 3444 (SC).
9. Stateof UP v. Jai Prakash, 2007 Cri. L.J. 3534 (SC).
10. Upendra Pradhan v. State of Orissa, (2015) 11 SCC 124.
11. Raj Kumar Singhalias Raju alias Batya v. State of Rajasthan, (2013) 5 SCC 722.
12. M. Nageshwar Rao v. State of Andhra Pradesh, (2011) 2 SCC 188.
13. Mandhari v. State of Chattisgarh, (2002) 4 SCC 308.

14. Mulakh Rajand Others v. Satish Kumar and Others, (1992) 3 SCC 43.

15. Ravirala Laxmaiah v. State of Andhra Pradesh, (2013) 9 SCC 283.

16. Gangabhavani v. Rayapati Venkat Reddy and Others, (2013) 15 SCC 298.

17. Lalita Kumari v. Government of Uttar Pradesh and Others, (2014) 2 SCC 1.

18. Madhu Bala v. Suresh Kumar and Others, (1997) 8 SCC 476.

19. Yogesh Singh v Mahabeer Singh and Others, (2017) 11 SCC 195.

20. Tehseen Poonawalla v. Union of India and Another, (2018) 6 SCC 72.

21. Gambhir v. State of Maharashtra, (1982) 2 SCC 351.

22. Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116.

23. Laxmibai (Dead) through Lrs. and Another v. Bhagwantibuva (Dead) through Lrs. and Others, (2013) 4 SCC 97.

24. Dayal Singh and Others v. State of Uttaranchal, (2012) 8 SCC 263.

25. Abdul Sayeed v. State of M.P., (1975) 4 SCC 497.

26. Sachchey Lal Tiwari v. State of U.P., (2004) 11 SCC 410.

27. State of U.P. v. Ramesh Prasad Misra and Another, (1996) 10 SCC 360.

28. Mrinal Das and Others v. State of Tripura, (2011) 9 SCC 479.

29. Nagaraj v. State, Rep. by Inspector of Police, Salem Town, Tamil Nadu, 2015 Cri.L.J. 2377 (SC).

Journal Referred:

Fracture of Hyoid Bone in cases of Asphyxial Deaths resulting from constricting force round the Neck, Published in Journal of the Indian Academy of Forensic Medicine-2005 : 27(3).

JUDGMENT

Judgment of the Court was delivered by ***Meenakshi Madan Rai, J***

1. The Appellant was convicted under Section 302 of the Indian Penal Code, 1860 (hereinafter, IPC) by the impugned Judgment, dated 31-08-2017, of the Learned Sessions Judge, Special Division – I, Sikkim, at Gangtok, in Sessions Trial Case No.03 of 2016. By an Order on Sentence of the same date, the Appellant was to suffer simple imprisonment for life and to pay a fine of Rs.50,000/- (Rupees fifty thousand) only, with a default clause of imprisonment. Dissatisfied thereof, the Appellant is before this Court.

2. Shorn of details, the facts as per the Prosecution is that, on 14-02-2016, at around 2130 hours, one Hubkey Rai P.W.7, lodged a written Complaint to the effect that, at around 0600 hours, the same morning, he was telephonically informed by his elder brother, Mandhoj Rai P.W.3, of Machong, East Sikkim, that their sister Purnimaya Rai (married to the Appellant) was found dead in her home. On reaching the victim‘s house, P.W.7 found some marks over her neck. Suspecting foul play he reported the matter to the Pakyong Police Station seeking ascertainment of the cause of death.

(a) The Pakyong P.S. registered UD (Unnatural Death) Case No.03 of 2016, dated 14-02-2016, under Section 174 of the Code of Criminal Procedure, 1973 (hereinafter, Cr.P.C.), and endorsed it to ASI Nim Tenzing Bhutia P.W.20, for investigation. Following an autopsy over the dead body and based on the opinion of P.W.22 the Doctor who conducted the autopsy, P.W.7 submitted another Complaint, Exhibit 3, accusing the Appellant (his brother-in-law), of having strangulated the victim to death.

(b) Pursuant to Exhibit 3, the UD Case was converted into Pakyong P.S. Criminal Case No.04 of 2016, dated 14-02-2016, under Sections 302/201 of the IPC, formal FIR Exhibit 22, drawn up against the Appellant and investigation taken up.

3. The Prosecution narration is that the Appellant, aged about 60 years, a Government Primary School Teacher was married to the deceased, his second wife, for the last 25 years, after the demise of his first wife from whom he had one son, aged about 31 years, employed in the Police Department. From the deceased he had another son, aged about 21 years, a student of Class XI. At the relevant time, both the sons were living elsewhere. The couple had also adopted a girl P.W.6, about 11 years ago, who was aged about 16 years at the time of the incident and shared their room. Her alleged illicit relations with the Appellant was the apple of discord between the couple and the motive for the crime. The Appellant and the deceased quarrelled on 13-02-2016 about the impending marriage of the elder son P.W.11. At 1900 hours, P.W.6 fell asleep but not before having witnessed both the Appellant and the deceased entering the room, bolting the door and confronting each other. The argument escalated into a scuffle during which the Appellant strangulated the deceased with a muffler. To conceal the offence he attempted to hang the body from the nearby *Nebhara* tree (Fig tree) and having failed in his effort he returned the dead body to their room. The following morning, i.e., on 14-02-2016, at about 4 a.m., he woke P.W.6 and on her enquiry into the whereabouts of her mother, he told her that she had passed away due to illness on the intervening night. The Appellant thereafter called his younger brother one Manoj Rai P.W.5, Panchayat of Riwa Machong, informing him of the death, who in turn informed Tula Bir Rai P.W.23 another brother, both of whom then arrived at the house of the Appellant. The Appellant informed them that the deceased had died due to acute stomachache during the night. P.W.5 then called Ashok Kumar Rai P.W.24, their cousin, informing him of the death and requesting him to come to the house of the victim. Thereupon, P.W.5 telephonically informed P.W.3, the brother of the victim. Meanwhile, the Appellant is alleged to have tutored P.W.23 to concoct a false story that he had spent the night in the Appellant‘s house. The Prosecution case is also that in September, 2015, the victim had reported to her brother at Riwa Machong that the Appellant had assaulted her concerning his relations with P.W.6. The victim had requested the biological parents of P.W.6 to take her back, but the Appellant was in disagreement. Charge-Sheet was accordingly submitted against the Appellant under Sections 302/201 of the IPC.

4. The Learned Trial Court framed Charge under Section 302 of the IPC and on the plea of not guilty by the Appellant, the Prosecution

examined twenty-seven witnesses to establish their case. On closure thereof, the Appellant was afforded an opportunity under Section 313 of the Cr.P.C. to explain the incriminating circumstances appearing in the evidence against him, to which, he *inter alia* responded that he had been falsely implicated by P.W.7, brothers and relatives of the deceased. The Learned Trial Court on considering the entire gamut of evidence on record concluded that the Appellant was guilty of the offence under Section 302 of the IPC and pronounced the impugned Judgment and Order on Sentence.

5. Claiming that the Prosecution case rests entirely on circumstantial evidence, Learned Counsel for the Appellant contended that the Prosecution ought to have proved that the circumstances were wholly and unerringly consistent with the theory of guilt of the Appellant and excluded any hypothesis of his innocence. The Prosecution has established no such chain of circumstances, consequently the benefit of doubt ought to be extended to the Appellant. On this count, support was garnered from the ratio in ***Jose alias Pappachan*** vs. ***Sub-Inspector of Police, Koyilandy and Another***[1]. That, the impugned Judgment of the Learned Trial Court is also based on the resiled Section 164 Cr.P.C. statement of P.W.23 a hostile Prosecution witness, which is not substantive and can only be utilized for corroborating or contradicting the witness. This aspect was fortified by reliance on ***Ram Kishan Singh*** vs. ***Harmit Kaur and Another***[2] and ***R. Shaji*** vs. ***State of Kerala***[3]. The Prosecution has failed to pinpoint the article of clothing used for strangulating the victim as the Investigating Officer (I.O.) himself has testified that the muffler was not used for the said purpose. That, it has emerged in the investigation that leaves, grass and weeds were found on the bed sheet, inside the house, clothes and person of the victim which remains unexplained. That, concerted efforts have been made by the Prosecution to conceal the fact that the death occurred due to suicide as she was found hanging from the *Nebhara* tree (Fig tree) outside the house. No written instructions were issued to P.W.20 by P.W.27 to conduct an enquiry into the UD Case under Section 174 of the Cr.P.C. and the inquiry was conducted on verbal instructions. Although P.W.20 was vested with the investigation of the UD Case only, he has encroached into the jurisdiction of

[1] (2016) 10 SCC 519
[2] (1972) 3 SCC 280
[3] (2013) 14 SCC 266

P.W.27 by making seizures of articles but his report is devoid of such entries. His report was submitted before the Police Station and not before the Executive Magistrate in contravention of law. It is clear that the Prosecution attempt is to falsely implicate the Appellant as two brothers and a nephew of the deceased are Police personnel and as such are interested witnesses. That, the conviction of the Appellant was based to a large extent on the medical evidence of P.W.22, who conducted the post-mortem examination and opined that death was due to strangulation. The ocular evidence of P.W.6 which is contrary to that of P.W.22 and the Prosecution case was singularly ignored without declaring her hostile or cross-examining her to decimate her evidence, hence her account of the incident stands as credible and trustworthy. Relying on ***Mohar Singh and Others*** vs. ***State of Punjab***[4] Learned Senior Counsel submitted that where the ocular evidence and the medical evidence are in direct conflict with each other it would be unsafe and hazardous to maintain the conviction of the Appellant on such evidence. To buttress this point further, reliance was placed on ***State of U.P.*** vs. ***Krishna Gopal and Another***[5]. That, from the Prosecution case it can be culled out that two FIRs had been lodged in the matter one pertaining to the UD Case and the other after the post-mortem examination was carried out, however, only one FIR is found in the records of the case and the Prosecution did not deem it worthwhile to furnish reasons for the missing first FIR. Citing the ratio in ***Narayan Dutta*** vs. ***The State***[6] it was held that the importance of the FIR lies in it being the first recorded statement of the occurrence, when this is missing, the veracity of the Prosecution case is doubtful. On this aspect, strength was also drawn from ***Babubhai*** vs. ***State of Gujarat and Others***[7]. That, Exhibit 3 is hit by the provisions of Section 162 of the Cr.P.C. being information given after commencement of investigation pursuant to the lodging of the first FIR. That no motive was fixed on the Appellant for the offence when the FIR was lodged but efforts were made during the course of trial to foist a motive on him by insinuation of a relationship with his adopted daughter, when infact, she had been adopted from the age of five years. In this context reliance was placed on ***Sucha Singh*** vs. ***State of Punjab***[8]. The settled position of

[4] AIR 1981 SC 1578
[5] AIR 1988 SC 2154
[6] 1980 CRI.L.J. 264 (Calcutta)
[7] (2010) 12 SCC 254
[8] 2009 CRI.L.J. 3444 (SC)

law that where two conclusions are possible one pointing to the guilt of the Appellant and the other to his innocence, the view which is favourable to the Appellant should be adopted to prevent miscarriage of justice was reiterated by Learned Senior Counsel, as held in ***State of UP*** vs. ***Jai Prakash***[9] and ***Upendra Pradhan*** vs. ***State of Orissa***[10]. That, suspicion however grave cannot take the place of proof which has been propounded in ***Raj Kumar Singh alias Raju alias Batya*** vs. ***State of Rajasthan***[11] and ***M. Nageshwar Rao*** vs. ***State of Andhra Pradesh***[12]. That, the Learned Trial Court was in error in convicting the Appellant as the Prosecution had failed to establish its case beyond a reasonable doubt, hence the impugned Judgment and Order on Sentence, both dated 31-08-2017, be set aside.

6. *Per contra*, Learned Additional Public Prosecutor would contend that P.W.22 who conducted the post-mortem examination has unwaveringly opined that there was a well-defined transverse ligature mark over the front of the neck of the deceased, coupled with multiple bruises under the ligature site, indicative of strangulation and struggle by the victim. In this context, Learned Additional Public Prosecutor placed reliance on ***Mandhari*** vs. ***State of Chattisgarh***[13]. That, the hyoid bone of the victim was fractured as occurs in instances of strangulation, thereby ruling out death by suicide in the instant matter, contrary to the contention of the Appellant. This submission was fortified with reliance on ***Mulakh Raj and Others*** vs. ***Satish Kumar and Others***[14]. An attempt was made to elucidate that in cases of hanging the ligature mark would usually be oblique and non-continuous, placed high up in the neck between the chin and the larynx, while in strangulation, as in the instant case, the ligature mark is transverse, continuous, round the neck, low down in the neck below the thyroid. On this count, Learned Additional Public Prosecutor drew support from the ratio in ***Ravirala Laxmaiah*** vs. ***State of Andhra Pradesh***[15]. Learned Additional Public Prosecutor also sought to draw support from the decision in ***Gangabhavani*** vs. ***Rayapati Venkat Reddy and Others***[16], with regard to the evidence of a medical

[9] 2007 CRI.L.J. 3534 (SC)
[10] (2015) 11 SCC 124
[11] (2013) 5 SCC 722
[12] (2011) 2 SCC 188
[13] (2002) 4 SCC 308
[14] (1992) 3 SCC 43
[15] (2013) 9 SCC 283
[16] (2013) 15 SCC 298

witness. That, the medical opinion of P.W.22 that the cause of death of the victim was due to asphyxia as a result of strangulation, homicidal in nature, ought to be given priority over the ocular evidence of P.W.6, in view of the evidence of P.W.4 and P.W.10 who have stated that P.W.6 and the Appellant were in an incestuous relationship thereby rendering P.W.6 as an interested witness and her evidence suspect. This relationship was the motive for the Appellant to do away with the deceased. That, Exhibit 10 reveals that a Complaint was lodged initially by P.W.7 which resulted in the UD Case, while Exhibit 3 was the FIR pertaining to the offence, consequently Exhibit 3 is not hit by the provisions of Section 162 of the Cr.P.C. As per P.W.27 the I.O., P.W.22 has opined that the muffler and shawl seized by P.W.20 could cause the death of a person by strangulation, thereby establishing the Prosecution case on this aspect. That, an attempt was made by the Appellant to simulate the strangulation as a suicide for which purpose he attempted to unsuccessfully hang the body on a tree, resulting in leaves and grass being lodged in her hair and clothes. That, it is now settled law that evidence of a hostile witness can also be considered to the extent that it is relevant and undemolished, hence the evidence of P.W.23 Tulabir Rai cannot be ignored in totality. That, in view of the cogent and consistent evidence of the Prosecution witnesses the findings of the Learned Trial Court ought not to be disturbed.

7. The submissions made *in extenso* were heard and afforded careful consideration, in conjunction with meticulous examination of the evidence, documents and photographs placed before us. We have also perused the impugned Judgment and Order on Sentence.

8. The Learned Trial Court while convicting the Appellant relied on the medical evidence of P.W.22 and also found the evidence of P.Ws 4, 10 and 3 credible. However, the Learned Trial Court had difficulty in believing the version of P.W.6 as it observed that P.W.6 in her Section 164 Cr.P.C. statement was silent about having seen the victim hanging from the nearby tree, but deposed so, untruthfully, before the Court to aid the Appellant. That, both P.W.5 and P.W.23 younger brothers of the Appellant also narrated a false account before the Court, their statements being in contradiction to their Section 164 Cr.P.C. statements. The Learned Trial Court thus found the evidence of P.Ws 5, 6 and 23 which failed to support

the Prosecution case, unworthy of credence. The Learned Trial Court reproved the conduct of the Appellant on his failure to raise a hue and cry on seeing his wife allegedly hanging from the tree and therefore found this conduct improbable. The Learned Trial Court also concluded that the report initially lodged by P.W.7 was an information of the nature contemplated under Section 174 of the Cr.P.C. and cannot be categorized as one under Section 154 of the Cr.P.C., hence only Exhibit 3 can be treated as an FIR. That, there was substantial compliance of the provisions of Section 174 of the Cr.P.C. That, overwhelming medical and circumstantial evidence outweigh that of P.W.12 who had stated that his father treated his mother very well. The Learned Trial Court was also of the opinion that as a general rule hyoid bone does not sustain fracture by any means other than strangulation. That, even the study report/research article relied on by the Ld. Counsel for the accused suggests that throttling accounts for the highest incidence of ante mortem fractures of hyoid bones. That, as a general rule in cases of suicidal hanging the neck of the deceased would be stretched and elongated, particularly in fresh bodies but no such sign existed in the instant matter. That, fingernail abrasions were quite uncommon in cases of suicidal hanging, but abrasions were found in the instant matter, indicating death by strangulation. The Learned Trial Court was impressed with the Prosecution case of marital discord between the couple on account of P.W.6 as deposed by P.W.4 and P.W.10 and concluded that the circumstantial evidence left no manner of doubt that the Appellant alone was the author of the crime.

9. It is thus to be considered whether the conclusion of guilt of the Appellant, arrived at by the Learned Trial Court was a correct conclusion?

10. We propose to address the issue pertaining to the FIR in the first instance. According to P.W.7, he lodged an FIR before the Pakyong P.S. at 09.30 a.m. on 14-02-2016 seeking inquiry into the victim‘s death on suspicion of foul play. The Police personnel came to the victim‘s house and took the body to the STNM Hospital for post-mortem, which was then conducted by P.W.22 Dr. O. T. Lepcha. He opined that the death was due to strangulation and informed P.W.20, P.W.7 and other relatives of the victim accordingly. Pursuant thereto, P.W.7 lodged Exhibit 3, the second report before the Pakyong P.S., bearing his signature Exhibit 3(a). P.W.27

would by his evidence vouch for this deposition of P.W.7. From the above discussions, it emanates that two Complaints were lodged by P.W.7.

11. In ***Lalita Kumari*** vs. ***Government of Uttar Pradesh and Others***[17] it was *inter alia* held that if the information discloses commission of a cognizable offence the registration of an FIR is mandatory under Section 154 of the Cr.P.C. and no preliminary enquiry is permissible in such a situation. In ***Madhu Bala*** vs. ***Suresh Kumar and Others***[18] the Supreme Court would discuss what a cognizable offence entails as follows;

> **"6.** ..... Under Section 2(*c*) cognizable offence means an offence for which, and cognizable case means a case in which a police officer may in accordance with the First Schedule (of the Code) or under any other law for the time being in force, arrest without a warrant. Under Section 2(*r*) police report means a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of the Code. Chapter XII of the Code comprising Sections 154 to 176 relates to information to the police and their powers to investigate. Section 154 provides, inter alia, that the officer in charge of a police station shall reduce into writing every information relating to the commission of a cognizable offence given to him orally and every such information if given in writing shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. ....."

Disclosure of a cognizable offence is therefore the *sine qua non* for registration of an FIR.

12. Bearing the afore-extracted ratiocination in mind, it may be noted that the first Complaint lodged by P.W.7 before the Pakyong Police Station

[17] (2014) 2 SCC 1
[18] (1997) 8 SCC 476

was apparently a quest to ascertain the cause of death of the victim. It is also worth noting that the first Complaint is admittedly untraceable in the records of the case. That, there was a first Complaint can only be assumed from the evidence of P.W.7, P.W.20, P.W.27 and Exhibit 9 the final report pertaining to the unnatural death purportedly prepared by P.W.20 and from Exhibit 10, a requisition by P.W.20 to P.W.22 requesting autopsy of the dead body of the victim. Presuming candour in the evidence and documents *supra*, the report first filed by P.W.7 would tantamount to one under Section 174 of the Cr.P.C., devoid as it was of disclosure of a cognizable offence. Exhibit 3, the second Complaint lodged by P.W.7 after the autopsy was conducted discloses a cognizable offence and indeed qualifies as an FIR under Section 154 of the Cr.P.C. Therefore, Exhibit 3 cannot be said to be hit by the provisions of Section 162 of the Cr.P.C. On this point, we are in agreement with the Learned Trial Court. Even if the absence of the first Complaint raises doubts on the veracity of the Prosecution case this conclusion would not differ since Exhibit 3 would be the only FIR pertaining to the case.

13. However, it is relevant to point out here that although the Learned Trial Court observed that the provisions of Section 174 of the Cr.P.C. had been substantially complied with we cannot bring ourselves to agree with this observation, since neither P.W.20 nor P.W.27 have stated that pursuant to receiving the Complaint they intimated the Executive Magistrate. It is also not in the evidence of the Prosecution that the report prepared by P.W.20 was forwarded to the District Magistrate or the Sub-Divisional Magistrate as required under Section 174(2) of the Cr.P.C. P.W.15 witness to the inquest could not enlighten the Court as to why he signed on Exhibit 5, although he identified Exhibit 5(a) as his signature on it. The other witness of Exhibit 5 is one Sangay Bhutia, Panchayat President, Machong and his signature appears to be Exhibit 5(b), but was not examined. That, having been said, it is essential to clarify that the Supreme Court while discussing the evidentiary value of a report under Section 174 of the Cr.P.C. in ***Yogesh Singh*** vs. vs. ***Mahabeer Singh and Others***[19] observed as follows;

> **"41.** Further, the evidentiary value of the inquest report prepared under Section 174 CrPC has also been long settled through a series of judicial

[19] (2017) 11 SCC 195

> pronouncements of this Court. It is well established that inquest report is not a substantive piece of evidence and can only be looked into for testing the veracity of the witnesses of inquest. The object of preparing such report is merely to ascertain the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or caused by animals or machinery, etc. and stating in what manner, or by what weapon or instrument, the injuries on the body appear to have been inflicted. ……..**"**

14. In ***Tehseen Poonawalla*** v. ***Union of India and Another***[20] the Supreme Court held as under;

> **"39.** The purpose of holding an inquest is limited. The inquest report does not constitute substantive evidence. Hence matters relating to how the deceased was assaulted or who assaulted him and under what circumstances are beyond the scope of the report. The report of inquest is primarily intended to ascertain the nature of the injuries and the apparent cause of death. On the other hand, it is the doctor who conducts a post-mortem examination who examines the body from a medico-legal perspective. Hence it is the post-mortem report that is expected to contain the details of the injuries through a scientific examination ……. ."

15. The next argument of Learned Counsel for the Appellant that P.W.20 proceeded to conduct the investigation under Section 174 of the Cr.P.C. as if he was the I.O. of the case is superfluous, in view of the provisions of Section 175 of the Cr.P.C. which provides that a Police Officer proceeding under Section 174, may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case. Every person so summoned shall be bound to attend and to answer

[20] (2018) 6 SCC 72

truly all questions other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. If the facts do not disclose a cognizable offence to which Section 170 of the Cr.P.C. applies, such persons shall not be required by the police officer to attend a Magistrate's Court. The Section requires the Officer concerned to prepare a report, which without ambiguity requires investigation.

16. Now, we turn to address the issue as to whether the death occurred by strangulation. The principle of circumstantial evidence is that the hypothesis of guilt must lead to the accused and none else by a chain of circumstances which are cogent, consistent and reliable. On this aspect, in ***Gambhir*** vs. ***State of Maharashtra***[21] the Supreme Court observed as follows;

> **"9.** It has already been pointed out that there is no direct evidence of eyewitness in this case and the case is based only on circumstantial evidence. The law regarding circumstantial evidence is well settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests: (*1*) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (*2*) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (*3*) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. ……."

[21] (1982) 2 SCC 351

17. In ***Sharad Birdhichand Sarda*** vs. ***State of Maharashtra***[22] the Supreme Court held that graver the crime, greater should be the standard of proof. An accused may appear to be guilty on the basis of suspicion but that cannot amount to legal proof. When on evidence two possibilities are available or open, one which goes in the favour of the prosecution and the other benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. The principle has special relevance where the guilt or the accused is sought to be established by circumstantial evidence.

18. That, there is no eye-witness to the alleged offence in the instant case requires no reiteration, the Prosecution case is indeed based entirely on circumstantial evidence. As per P.W.27 the I.O., the Doctor P.W.22, after post-mortem opined that the victim died due to strangulation with a *gamcha"* like cloth. When M.O.III Muffler and M.O.V Shawl were forwarded to P.W.22 by P.W.27, he opined that death could be caused by the said articles. P.W.20 the I.O. of the UD Case had seized M.O. III Muffler and M.O. V Shawl. Where these articles were seized from or from whose possession is a question unanswered by P.W.20 or P.W.27. As per P.W.15 a witness to the seizure, M.O.III was on the bed with the two caps M.O.I and M.O.II and the bed sheet M.O.IV and navy blue shawl M.O.V, but M.O.III has not been identified by the Prosecution as the article of the crime or linked inextricably to the Appellant. This circumstance also leads us to ponder as to whether the Appellant alleged to have *mens rea* would have left the articles used by him in the crime in open view for all to detect. P.W.6 is the only ocular witness. Her testimony before the Court reveals that she and the Appellant saw the deceased hanging from a nearby tree in the early hours of 14-02-2016. The Appellant then carried the deceased into the house and kept her body on the cot, she was already dead. He instructed P.W.6 not to tell the Police that the victim had hanged herself. The Prosecution for reasons unknown did not declare the witness hostile or cross-examine her nor was she confronted with the statements made by her Section 164 Cr.P.C., where she had stated *inter alia* that, on the following morning her father woke her up and told her that her mother had passed away and she saw her father carrying the body of her mother on his shoulder. When she saw her father carrying her mother‘s body, he was inside the bedroom. No statement of having seen the victim hanging from

[22] (1984) 4 SCC 116

the tree was made therein, but she has stated so before the Court. Her evidence before the Court in the aforementioned circumstances thus stood undecimated and her credibility unimpeached. In ***Laxmibai (Dead) through Lrs. and Another*** vs. ***Bhagwantibuva (Dead) through Lrs. and Others***[23] the Supreme Court examined the fact of non-cross-examination of witness on a particular fact and held as under;

> **"40.** Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination-in-chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter alia, in order to test his veracity. **Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.** ……."
>
> **[emphasis supplied]**

[23] (2013) 4 SCC 97

19. In ***R. Shaji*** (*supra*) the Supreme Court held as follows;

> **"26.** Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. …….
>
> **27.** So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted. ……
>
> **28.** Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence.**"**

Hence the evidence of P.W.6 before the Court being substantive evidence, in contradistinction to her statement under Section 164 Cr.P.C., due weight has to be conferred to it.

20. The Prosecution laid great emphasis on the evidence of P.W.22 Dr. O. T. Lepcha, the Medicolegal Consultant who conducted post-mortem on

the victim. Prolix arguments were advanced by both parties as to whether the fracture of the hyoid bone is indicative only of homicidal death or whether it could also be suggestive of suicide, with the Prosecution asserting that fracture unequivocally indicated strangulation.

21. Beneficial reference can be made to Page 456 of the ***Modi A Textbook of Medical Jurisprudence and Toxicology, 24th Edition 2013***, wherein the differences between hanging and strangulation have been tabulated as follows;

	Hanging		**Strangulation**
1	Mostly suicidal.	1	Mostly homicidal.
2	Face—Usually pale and petechiae rare.	2	Face—Congested, livid and marked with petechiae.
3	Saliva—Dribbling out of the mouth down on the chin and chest.	3	Saliva—No such dribbling.
4	Neck—Stretched and elongated in fresh bodies.	4	Neck—Not so.
5	External signs of asphyxia, usually not well marked.	5	External signs of asphyxia, very well marked (minimal if death due to vasovagal and carotid sinus effect).
6	Ligature mark—Oblique, non-continuous placed high up in the neck between the chin and the larynx, the base of the groove or furrow being hard, yellow and parchment-like.	6	Ligature mark—Horizontal or transverse continuous, round the neck, low down in the neck below the thyroid, the base of the groove or furrow being soft and reddish.
7	Abrasions and ecchymoses round about the edges of the ligature mark, rare.	7	Abrasions and ecchymoses round about the edges of the ligature mark, common.

8	Subcutaneous tissues under mark—White, hard and glistening.	8	Subcutaneous tissues under the mark—Ecchymosed
9	Injury to the muscles of the neck—Rare.	9	Injury to the muscles of the neck—Common.
10	Carotid arteries, internal coats ruptured in violent cases of a long drop.	10	Carotid arteries, internal coats ordinarily ruptured.
11	**Fracture of the larynx and trachea—Very rare and may be found that too in judicial hanging.**	11	**Fracture of the larynx trachea and hyoid bone.**
12	Fracture-dislocation of the cervical vertebrae—Common in judicial hanging.	12	Fracture-dislocation of the cervical vertebrae—Rare.
13	Scratches, abrasions and bruises on the face, neck and other parts of the body—Usually not present.	13	Scratches, abrasions fingernail marks and bruises on the face, neck and other parts of the body—Usually present.
14	No evidence of sexual assault.	14	Sometimes evidence of sexual assault.
15	Emphysematous bullae on the surface of the lungs—Not present.	15	Emphysematous bullae on the surface of the lungs—May be present.

[emphasis supplied]

22. At *ibid* Page 454 while describing death caused by strangulation it is elaborated *inter alia* as follows;

> ***"(i) Whether death was caused by strangulation***.—..... Irregularities in the fingernail marks may pinpoint a killer.
>
> .....
>
> Abrasions and fingernails marks may be produced on the neck by a person gasping for air in

an intoxicated condition or in an epileptic or a hysterical fit.

To arrive at a conclusion that death was due to strangulation, it is necessary, therefore, to note the effects of violence in the underlying tissues in addition to the ligature mark or bruise marks caused by the fingers or by the foot, knee and other appearances of death from asphyxia. At the same time, the possibility of other causes of suboxic or asphyxia death should be excluded.**"**

23. In a study conducted by Dr. Shrabana Kumar Naik, Associate Professor and Dr. D. Y. Patil, Departmental of Forensic Medicine, Medical College (Deemed University), Pimpri, Pune, Maharashtra, on ***Fracture of Hyoid Bone in cases of Asphyxial Deaths resulting from constricting force round the Neck***[24], it has been held as follows;

"……

DISCUSSION

Sometimes it becomes difficult to differentiate ligature strangulation from hanging especially in case of partial hanging where the ligature mark lies low in the neck, more or less in a horizontal manner. Therefore, it is only the internal tissue damage as well as damage to the laryngeal cartilages and hyoid bone decides the actual manner of death. Similarly, in case of grossly decomposed dead bodies where the neck skin are grossly discolored or lost, it is the internal damage to neck tissue and hyoid bone, which tells the actual cause of death even months and years after death. So importance given to hyoid bone fracture is justifiable and will remain there where mechanical asphyxia is the mode of deaths.

Though percentage of hyoid bone fracture in manual or ligature strangulation cited by many authors are more or less equal and noncontroversial, *the*

[24] Published in Journal of the Indian Academy of Forensic Medicine - 2005 : 27(3)

percentage of hyoid bone fracture in hanging deaths vary greatly from 0% to 68% from author to author ……

……

Out of total 257 cases of different types of hanging including 4 cases of homicidal hanging, the present author did not found (sic) hyoid bone fracture in a single case. Though many authors claim that hyoid bone fracture increases with increasing age above 40 years, the present author did not get any hyoid bone fracture in the 18 cases of hanging victims over the age of 40 years. **So incidence of hyoid bone in hanging can be taken as rare or very few** as observed by authors like Smith, Sydney and Fiddes …, J.P.Modi … and J.B.Mukherjee ……..……

On the other side, out of total 7 cases of ligature strangulation, the present author detected hyoid bone fracture in … (42%) cases where as out of total 5 cases of throttling, the present author detected hyoid bone fracture in almost all i.e., 4 (80%) cases, which is more or less same as noticed by most of the previous authors …

CONCLUSION

Taking the present study of Hyoid bone fracture in cases of asphyxial deaths resulting from constricting force round the neck it is concluded that incidence of hyoid bone fracture is **almost nil or rare** in cases of hanging where the constricting force act on the neck in a sliding or tangential manner. **However, increasing incidence of hyoid bone fracture after the age of 40 years can be concluded only after taking larger numbers of such cases, which need further continuous study in this regard.**

……."

[empahsis supplied]

24. In Page 361 of ***HWV Cox Medical Jurisprudence and Toxicology, Seventh Edition 2008***, differences between hanging and strangulation are enumerated as follows;

	Trait	***Hanging***	***Ligature Strangulation***
1.	Face	Pale and petechiae are not common	It is livid, congested and full of petechiae
2.	Ligature mark	Oblique usually seen high up in the neck above the thyroid cartilage and incomplete	Transverse, completely encircles the neck and usually below the thyroid cartilage
3.	Base	Pale, hard and parchment like	Soft and reddish
4.	Subcutaneous Tissue	It is white, hard and glistening below the mark	Ecchymoses present below the mark
5.	Neck	Stretched and elongated	Not so
6.	**Hyoid Bone**	**Fracture is common**	**Fracture is rare**
7.	Thyroid Cartilage	Fracture is rare	Fracture is common
8.	Tongue	Swelling and protrusion are not so common	Are well marked
9.	Saliva	Usually runs out of mouth	Absent
10.	Bleeding	From the nose, mouth and the ears are not so common	From the nose, mouth and ears are common
11.	Involuntary Discharge	Of the faeces and urine are not common	Are commonly seen
12.	Seminal Fluid	Usually seen at the glans penis	Rarely seen

[emphasis supplied]

25. As per ***Cox*** the external appearances in strangulation by ligature naturally vary greatly according to the object used and explains at Page 351 as follows;

> **"**…….
> Apart from the mark due to the ligature and any possible asphyxial' changes above, such as congestion, oedema, cyanosis, petechiae and nose bleeding, certain other marks may be discovered on the skin in cases of ligature strangulation. The most frequent ones are those inflicted by the victim in an attempt to tear away the ligature and are usually seen as scratches on the skin of the neck near the position of the ligature. They are often vertical in direction, as the nails of the victim try to pull away after constricting object. However, they are frequently so irregular so as not to show any vertical pattern.
> ……**"**
>
> **[emphasis supplied]**

At Page 352-353 it is stated as follows;

> **"**…….
> In strangulation by a ligature, the level of the ligature is often such that it is well below the hyoid bone and fractures are thus less frequent than in manual strangulation where the grip is usually higher.
> ……
> ……**"**
>
> **[emphasis supplied]**

26. In ***Taylor's Principles and Practice of Medical Jurisprudence, Thirteenth Edition 1984***, edited by *A. Keith Mant*, at Page 305, post-mortem appearances in strangulation are recorded as follows;

> **"***Post-mortem appearances in strangulation*
> …….....…….
> *General internal appearances.* Internally the air passages contain fine froth, often blood stained. The lungs are congested with subpleural petechiae. Microscopically there is usually intense interalveolar

congestion with haemorrhages of varying size, fluid in the alveoli, areas of collapse and intervening areas of ruptured alveoli. The air passages often contain large areas of desquamated respiratory type epithelium, red blood cells and fluid. The remaining organs show only congestive changes. Petechiae are usually more common in the brain than elsewhere.

……..**"**

[emphasis supplied]

27. On the anvil of the authorative medical literature *supra* it emerges with clarity that there is no fool proof method to differentiate and distinguish ligature strangulation from hanging. It is also not established beyond all proof that hyoid bone fracture is completely devoid in all cases of hanging. Infact the literature in ***Modi*** and ***Cox*** referred to *supra* vary with regard to the breakage of the hyoid bone in cases of strangulation.

28. On this note we may now examine the evidence of P.W.22. He received the body at around 3.30 p.m. and started autopsy at the same time on 14-02-2016 and concluded the same by 04.30 p.m. He would depose as follows;

"……. The body was brought with the history of having been found lying on the bed with injuries over the neck. On general examination of the body I came to the following category-wise findings:-

(1) The hair was dishevelled with many dry leaves stuck on it. The wearing apparel worn by the deceased(*greenish woolen sweater*) also contained some vegetations and leaves. (sic)

(2) Rigor mortis was present all over the body. Post-mortem staining was present over the back and fixed. There was generalized cyanosis over the lips and fingernails.

Ante-Mortem injuries:-

(1) There was a well-defined ligature mark 30 x 8.2 cms over the front of the neck with 03 nos. of linear marks over the said area. The upper

border of the ligature mark extended from the base of the mandible upto 8 to 9 cms below the neck and was interrupted by an area of abrasion (*3.3 x 2 cms*)(*fingernail abrasion*) present over the right side of the neck with the abraded skin directed from upward to downwards. The ligature moved posteriorly leaving a faint impression over the back of the neck and at no stage did it run upwards. The ligature mark was reddish blue in colour and was parchmentised.

(2) There were abraded contusion 12 x 3 cms placed vertically over the antero-medial aspect of the right lower leg(*medial to the shin bone*).

Head and Neck:-

There were multiple bruises under the ligature site and over the fascia and muscles (*that were detected on dissection of the skin*). There was fracture of the hyoid bone (*left side*) with fracture of outer periostium (*with normal inner side*) over the right side of the hyoid bone which was suggestive of manual strangulation. The brain was congested.

Lungs:-

Both the lungs were congested and oedematous.

Abdomen:-

The stomach contained around 300 to 400 ml of undigested food materials. The uterus was non-gravid.

Opinion:-

On the basis of my examination and the findings above I came to the following opinion:-

The approximate time since death was 12 to 24 hours and the cause of death was asphyxia as a result of strangulation, homicidal in nature."

29. The medical literature extracted hereinabove indicates that in cases of strangulation the eyes may be suffused and bulging with dilated pupils, the tongue protruding, frothy blood tinged fluid from nose and mouth, petechial haemorrhages usually seen in the skin of the eye lid, the face, the scalp and sometimes larger haemorrhage is present in the eyes, congestion, oedema,

cyanosis and likelihood of nail marks of the victim near the position of the ligature. These symptoms are absent in Exhibit 11. The Doctor has also observed that the ligature moved posteriorly leaving a faint impression over the back of the neck and at no stage did it run upwards. It is may pertinently be mentioned that the Prosecution having relied on Exhibit 24, these photographs cannot be overlooked. These do not reveal the back of the neck of the deceased. From Exhibit 11 it can be culled out that the ligature mark extended from the base of the mandible up to 8-9 cms below the neck and was interrupted by an area of abrasion present over the right side of the neck, but the Doctor has not opined as to whether the ligature mark itself was indicative of strangulation and why it was so. The argument of the Prosecution that it was transverse and placed low down in the neck below the thyroid is denuded of support by Exhibit 24 the photographs of the deceased, as the ligature mark is seen to be oblique on both sides of the neck and placed high in the neck. Neither P.W.20 nor P.W.27 have taken photographs of the back of the neck of the victim to enable the Court to assess as to whether the ligature was transverse. The Doctor has opined that there was an area of fingernail abrasion present over the right side of the neck with the abraded skin directed from upward to downwards but has not opined as to what the abrasion was indicative of, neither was investigation on this count taken up by P.W.27. Although multiple bruises in the ligature site and over the fascia and muscles were detected on dissection of bone, the Doctor has not explained whether the bruises over the muscles established strangulation and no other cause. The hyoid bone was found to have been fractured and suggestive of manual strangulation, but no opinion emerged as to why this was conclusive proof of strangulation. In view of the diverse opinion with regard to fracture of the hyoid bone and its causes, we are indeed to carefully and cautiously absorb this evidence as it is not established by any expert studies or medical literature that fracture of the hyoid bone is foolproof conclusion of strangulation and no other cause. Although it was opined that there was abraded contusion 12 x 3 cms placed vertically over the antero-medial aspect of the right lower leg (medial to the shin bone), the Doctor has not opined as to why an injury over the right lower leg would be indicative of strangulation. The instant matter can be distinguished from that of ***Mandhari*** (*supra*), the post-mortem report prepared on autopsy conducted by the Doctor therein showed a ligature mark on the neck of the deceased which was ante-mortem. The opinion of the doctor was clear and definite that such ligature mark of 5 cm. width in horizontal portion cannot be caused by hanging, but could have been caused

by strangulation, which completely demolished the case of the Appellant that he had found his wife hanging. No specific opinion of ruling out hanging has been given by P.W.22. P.W.22 has also detected well-defined ligature mark 30 x 12 cms over the front of the neck with three numbers of linear marks over the said area, but has not opined as to what the linear marks indicated and whether the linear marks were finger marks or nail marks. Besides the report does not mention that there was cyanosis of the face and merely states that there was generalized cyanosis over the lips and finger nails.

30. In ***Dayal Singh and Others*** vs. ***State of Uttaranchal***[25] the Supreme Court held as follows;

> **"39.** ..... The skill and experience of an expert is the ethos of his opinion, which itself should be reasoned and convicting. Not to say that no other view would be possible, but if the view of the expert has to find due weightage in the mind of the court, it has to be well authored and convicting. Dr. C.N. Tewari was expected to prepare the prost-mortem report with appropriate reasoning and not leave everything to the imagination of the Court. He created a serious doubt as to the very cause of death of the deceased. His report apparently shows an absence of skill and experience and was, in fact, a deliberate attempt to disguise the investigation.**"**

31. The evidence of P.W.22 fails to inspire confidence in the absence of specific opinion pertaining to the injuries. Thus in the absence of any conclusive evidence and bearing in mind the evidence of P.W.6, it cannot be ruled out that the case of the victim who was above fifty years of age fell in the rare category where the hyoid bone is broken during hanging. Added to this is the admission of P.W.27 the I.O. under cross-examination that he did not have any evidence to show that any of the articles mentioned in Exhibit 12 had actually caused the death of the deceased. The Learned Trial Court was impressed by the Prosecution version that as a rule the hyoid bone is not fractured except by strangulation, but it has to be appreciated by the Courts that the said circumstance is not absolute, there can be exceptions to the rule as has been elucidated hereinabove.

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[25] (2012) 8 SCC 263

32. The Learned Trial Court also observed that there was no sign of suicidal hanging as the neck of the deceased would be stretched and elongated which was not so in the instant matter. We deem it relevant to reiterate that P.W.22 has given no opinion on this aspect of the matter, therefore the opinion of the Learned Trial Court is sans any expert evidence furnished by the Prosecution.

33. The evidence of P.W.22 is to be juxtaposed with that of P.W.6 the ocular witness and in our considered opinion more weight attaches to the unscathed evidence of P.W.6. In ***Krishna Gopal*** (*supra*) the Supreme Court held as follows;

> **"13.** …….....……
> It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bantham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts the credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.
> ……."

34. In ***Mohar Singh*** (*supra*) the Supreme Court observed as follows;

> **"6.** In view of this glaring inconsistency between the ocular and medical evidence, it will be extremely unsafe and hazardous to maintain the

conviction of the appellants on such evidence. For the reasons, therefore, we are clearly of the opinion that the prosecution case has not been proved beyond reasonable doubt. The appeals are accordingly allowed and the appellants are acquitted of the charges framed against them. The accused-appellants will now be discharged from their bail bonds and need not surrender.**"**

35. In ***Abdul Sayeed*** vs. ***State of M.P.***[26] it was held as follows;

> **"34.** Drawing on *Bhagirath case* [(1999) 5 SCC 96], this Court has held that where the medical evidence is at variance with ocular evidence,
>
> > **"it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant' ".**
>
> **35.** Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. ……**"**
>
> **[emphasis supplied]**

36. The Prosecution had alleged that P.W.6 was an interested witness, if this be so the evidence of an interested witnesses requires careful scrutiny, however if tested and found credible nothing debars reliance on it. In ***Sachchey Lal Tiwari*** vs. ***State of U.P.***[27] the Supreme Court would conclude that;

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[26] (1975) 4 SCC 497
[27] (2004) 11 SCC 410

> **"7.** ..... Murders are not committed with previous notice to witnesses — soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere chance witnesses. The expression chance witness is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter of explaining their presence. ....."

P.W.6 was the adopted daughter of the couple no proof of incestuous relation between her and the Appellant having been established, we find that she is a natural witness and cannot be said to be an interested witness. Her evidence as already discussed cannot be wished away by the Prosecution.

37. That, the Appellant failed to raise a hue and cry was the subject of criticism by the Learned Trial Court, but we find that the Prosecution evidence nowhere reveals that there were houses in the vicinity of the Appellant's house, prompting the Appellant to seek assistance.

38. Admittedly there were dry leaves, grass and weed on the bed of the deceased as testified by P.W.1, P.W.2 supports this statement and adds that grass was found on the floor of the room of the deceased. P.W.3 under cross-examination admitted that the Appellant on enquiry by the Police as to the origin of the dry leaves and grass told the Police that he found the deceased hanging on a tree due to which leaves were found stuck to her clothes. P.W.7 too testified that some dry leaves and wild flowers were stuck on the clothes of the deceased. The evidence of P.W.15 lends support to the evidence of the witnesses *supra* and according to him M.O.III and M.O.V contained dry grass even on the day of his evidence. P.W.17 would depose about grass on M.O.III and M.O.V and that these articles were piled on the bed at the time of seizure and grass was still attached to it.P.W.22 the Doctor, found the hair of the deceased dishevelled with many dry leaves stuck on it as also on the sweater worn by the deceased. The

I.O. P.W.27 admits that he visited the concerned tree and that there was grass around the tree. In the teeth of such evidence the Prosecution ought to have furnished substantial reasons as to how the grass, weed and leaves came about the person, the clothes and the bed sheet of the victim but has failed in their duty to do so leaving the circumstance open to speculation. In the absence of any explanation we are constrained to fall back and rely on the evidence of P.W.6 who has stated unfalteringly that she saw the victim hanging from the tree and her father carried the dead body inside.

39. Addressing the argument advanced by Learned Senior Counsel for the Appellant that the Learned Trial Court has based its decision also on the resiled Section 164 Cr.P.C. statement of P.W.23 a hostile Prosecution witness we may in this context refer to ***State of U.P.*** vs. ***Ramesh Prasad Misra and Another***[28] where the Supreme Court observed as follows;

> **"7.** ..... It is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. ....."

40. In ***Mrinal Das and Others*** vs. ***State of Tripura***[29] the Supreme Court held as follows;

> **"67.** It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other

[28] (1996) 10 SCC 360
[29] (2011) 9 SCC 479

witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of the prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.**"**

41. Before the Learned Trial Court P.W.23 went on to depose that the Appellant told him and P.W.5 that the deceased had committed suicide by hanging on a banyan tree. The witness was declared hostile his deposition being in contradiction to his Section 164 Cr.P.C. statement. When confronted with his Section 164 Cr.P.C., Exhibit 14, he emphatically denied having stated before the Magistrate that the Appellant had told him that the victim died due to stomach ache. When cross-examined by the appellant he asserted that the Appellant had told him that the deceased had hanged herself and denied the version of the stomach ache. Now, merely because the evidence of P.W.23 does not corroborate the Prosecution story his evidence before the Court cannot be faulted and thrown out in its entirety. The Learned Trial Court in the impugned Judgment at Paragraph 30 has erroneously relied on the Section 164 Cr.P.C. statement of the witness, overlooking the settled proposition that the deposition before the Court is infact substantive evidence.

42. Next, dealing with the question of the article of clothing which was used for the alleged strangulation, the Prosecution has failed in its obligation to link any specific article to the alleged offence. P.W.22 had opined vide Exhibit 13 that M.O.III and M.O.V could have caused the death, nevertheless, no efforts at measurement of the articles with the ligature found on the victim's neck was initiated by the I.O. to establish this opinion. No evidence or details were furnished also to establish as to how the I.O. P.W.27 concluded that the Appellant had tried unsuccessfully to hang the body of the deceased from the tree.

43. Motive for the offence as per the Prosecution was the incestuous relations between P.W.6 and the Appellant, the Learned Trial court found credibility on this aspect, in the evidence of P.W.4 and P.W.10. P.W.4 stated

that the victim had told her sometime in September, 2015, she had been physically assaulted by the Appellant when she had found him and P.W.6 in a compromising situation. P.W.10 also vouched for the evidence of P.W.4 and narrated the same facts. P.W.4 and P.W.10 both sister-in-laws of the deceased evidently did not discuss the matter either amongst themselves or together with the deceased, neither did they deem it essential to report the matter to the Police. The evidence of P.W.3 the victim's brother on this aspect also remained unsubstantiated. All that they have stated is that the victim refused to lodge an FIR before the Police Station. This evidence, therefore, in our considered opinion, coming after the death of the victim, cannot in the absence of substantial proof be believed. P.W.21 the mother of P.W.6 contrary to the evidence of P.W.4, P.W.10 and P.W.3 would testify that in September, 2015, the deceased came to her house and asked her to call her father-in-law as well and in their presence asked them to take P.W.6 back as the child was in the habit of going out of the house most of the time and there was some problem due to P.W.6 staying in her house. Her cross-examination elicited that the deceased requested her to take P.W.6 back as she was reluctant to do household works and visited her friends' place while returning from school without permission. The deceased did not tell her about P.W.6 creating any problem in the family of the Appellant and his wife, the deceased. Consequently we are in disagreement on this count with the finding of the Learned Trial Court. Besides which we have also taken into consideration the evidence of P.W.11 and P.W.12 both sons of the deceased who have made no allegations of ill-treatment of their mother by the Appellant. In ***R. Shaji*** (*supra*) the Supreme Court held as follows;

> **"33.** Motive is primarily known to the accused himself and therefore, it may not be possible for the prosecution to explain what actually prompted or excited the accused to commit a particular crime. In a case of circumstantial evidence, motive may be considered as a circumstance, which is a relevant factor for the purpose of assessing evidence, in the event that there is no unambiguous evidence to prove the guilt of the accused. Motive loses all its significance in a case of direct evidence provided by the eyewitnesses, where the same is available for the reason that in such a case, the absence or inadequacy of motive cannot stand in the way of conviction.

> However, the absence of motive in a case depending entirely on circumstantial evidence, is a factor that weighs in favour of the accused as it often forms the fulcrum of the prosecution story. ……..**"**
>
> **[emphasise supplied]**

44. Having examined and appreciated the entire evidence on record, we deem it necessary to extract the relevant portions of the ratio in ***Raj Kumar Singh*** (*supra*) wherein the Supreme Court would expound as follows;

> **"21.** Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that may be proved and will be proved. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between may be and must be is quite large and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between may be true and must be true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between may be true and must be true, the court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. ……**"**

45. At this juncture it would also be fitting to consider the Section 313 Cr.P.C. statement of the Appellant where he in response to question No.6 has stated that he and the victim had gone to sleep together and when he woke up at around 3 a.m. he found her missing. When he started looking for her he found her hanging by a tree. He then brought her dead body inside the house. His adoptive daughter (P.W.6) was also there with him. In ***Nagaraj*** vs. ***State, Rep. by Inspector of Police, Salem Town, Tamil Nadu***[30] the Supreme Court held as follows;

> **"15.** In the context of this aspect of the law it is been held by this Court in *Parsuram Pandey* v. *State of Bihar* [(2004) 13 SCC 189] that Section 313 CrPC is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the Court in reaching its final conclusion; its intention is not to nail the accused, but to comply with the most salutary and fundamental principle of natural justice i.e. audi alteram partem, as explained in Arsaf Ali v. State of Assam [(2008) 16 SCC 328]. ……. Having made this clarification, refusal to answer any question put to the accused by the Court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an evasive or unsatisfactory answer, would not justify the Court to return a finding of guilt on this score. Even if it is assumed that his statements do not inspire acceptance, it must not be lost sight of that the burden is cast on the prosecution to prove its case beyond reasonable doubt. Once this burden is met, the statements under Section 313 assume significance to the extent that the accused may cast some incredulity on the prosecution version. It is not the other way around; in our legal system the accused is not required to establish his innocence. We say this because we are unable to subscribe to the conclusion of the High Court that the substance of his examination Under Section 313 was

[30] 2015 CRI.L.J. 2377 (SC)

> indicative of his guilt. If no explanation is forthcoming, or is unsatisfactory in quality, the effect will be that the conclusion that may reasonably be arrived at would not be dislodged, and would, therefore, subject to the quality of the defence evidence, seal his guilt. Article 20(3) of the Constitution declares that no person accused of any offence shall be compelled to be a witness against himself. In the case in hand, the High Court was not correct in drawing an adverse inference against the Accused because of what he has stated or what he has failed to state in his examination under Section 313, Cr PC.**"**
>
> **[emphasis supplied]**

46. In view of the entirety of the circumstances and on cautious appreciation of the evidence before us, we have no hesitation in holding that, the propositions pertaining to circumstantial evidence which requires an unbroken chain of links to conclusively connect the crime with the Appellant is wanting in the instant matter. The Prosecution story is founded on divergent evidence leading to an improbable circumstance. Resultant, the Prosecution has failed to prove its case beyond a reasonable doubt.

47. Consequently, the Appellant is entitled to the benefit of doubt.

48. Appeal allowed.

49. The conviction and sentence imposed on the Appellant vide the impugned Judgment and Order on Sentence of the Learned Trial Court are set aside and the Appellant acquitted of the Charge under Section 302 of the IPC.

50. The Appellant be released forthwith unless required in any other case.

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

52. No order as to costs.

53. Copy of this Judgment be forwarded to the Learned Trial Court for information, along with its records.

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