THE
SIKKIM LAW REPORTS

FEBRUARY & MARCH - 2019

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offences were of the same species and Charges altered, efforts should be made by the Court to assess the necessity of a *de novo* trial and to ensure that the victims do not face secondary victimisation.
Lakhi Ram Takbi* v. *State of Sikkim ***45-F***

Indian Evidence Act, 1872 – Consistency in the Evidence of Victim – In her statement under Section 164 of Cr.P.C. before the Magistrate, the victim has stated that the appellant/accused touched her chest area as well as her genital area. He then removed her shirt, skirt and her underwear. He also removed his pant and shirt. He then pulled down his underwear and raped her. In her statement she has stated that the accused had on four other earlier occasions raped her but she had not informed anyone since the accused used to threaten to kill her. This was the fifth time the accused raped her and this fact came to the knowledge of everyone only because of her friends having witnessed it. Thus, it can safely be said that the statements given by her are consistent.
Lakpa Dorjee Tamang* v. *State of Sikkim ***1-B***

Indian Evidence Act, 1872 – Distinction Between Admissibility of a Document and its Probative Value – It is indeed explicit that the Indian Evidence Act, 1872 does not give licence to any party to submit and rely on any document sans proof by any measure whatsoever. Even if the strict rules of evidence are excluded in the instant matter, one cannot overlook the fact that there is no proof whatsoever on record that the Appellant had sought Exhibit R-2 from the concerned Office or that it had in fact been issued by the said Office. No registers or entries made were furnished to prove the contention of the Appellant nor was any official examined to oust the doubts that arise on its authenticity – Exhibit R-2 has no probative value.
The Branch Manager, National Insurance Company Ltd, Gangtok Branch* v. *Smt. Aruna Dhakal and Others ***19-B***

Indian Evidence Act, 1872 – S. 35 – The following conditions are to be fulfilled before a document can be held to be admissible under this Section: (i) the document must be in the nature of an entry in any public or other official book, register or record; (ii) it must state a fact in issue or a relevant fact; and (iii) the entry must be made by a public servant in the discharge of his official duties, or in performance of his duties – Such entries however must be established by necessary evidence. In addition to which the entries must be made by or under the direction of the person whose duty it is to

make them at the relevant time. It is essential to show that the document was prepared by the public servant in the discharge of his official duty.
The Branch Manager, National Insurance Company Ltd, Gangtok Branch* v. *Smt. ArunaDhakal and Others ***19-A***

Indian Evidence Act, 1872 – S. 74 – Public Documents – Admissibility – In the present appeal, no objection was raised when the original Birth Certificate was admitted in evidence nor any issue raised on its probative value – Objection to the document being heard in the Appellate Court for the first time – The Birth Certificate, a public document is admissible in evidence and in the absence of objection it is assumed that the Appellant has accepted its probative value – Where a public document had been admitted without formal proof, the same cannot be questioned by the defence at the stage of appeal since no objection was raised by them when such document was tendered and received in evidence.
Lakhi Ram Takbi* v. *State of Sikkim ***45-B***

Indian Penal Code, 1860 – S. 154 – Delay in Lodging F.I.R – In the instant matter, the victim did not confide in anyone about her pregnancy and only when the complainant came to learn of it the F.I.R came to be lodged. The mortification and the apprehension of ignominy in the minds of the parents and the fear of reprisal as well in the mind of the victim appear to have led to the situation and are all sufficient therefore to explain and condone the delay in the lodging of the F.I.R.
Lakhi Ram Takbi* v. *State of Sikkim ***45-D***

Juvenile Justice (Care and Protection of Children) Act, 2015 – S. 94 – Determination of Age – The High Court directed the Juvenile Justice Board, South District at Namchi to examine the case in respect of the age of the appellant and submit a report to this Court. In compliance to that order, the Juvenile Justice Board, South District at Namchi considered the matter of juvenile afresh and passed an order that the appellant was 18 years 05 months and 15 days on the day of the commission of the incident i.e. on 04.09.2015 and as such was held a major on the date of commission of offence. The said order passed by the Juvenile Justice Board was not challenged by the appellant. Thus, appellant cannot claim the benefit of the provision of JJ Act, 2015.
Lakpa Dorjee Tamang* v. *State of Sikkim ***1-A***

Motor Vehicles Accident Claims – Future Prospects – To the question of the Tribunal having added 50% of the Monthly Income of 6,600/- as

future prospects, it needs no reiteration that in *Shashikala's case*, the Hon'ble Supreme Court has specifically laid down that in the case of self-employed or persons with fixed wages in case the deceased victim is below forty years there must be an addition of 50% to the actual income of the deceased while computing future prospects – People who are self-employed or engaged on fixed wages are also entitled to 50% of the actual income of the deceased to be computed as future prospects.

The Branch Manager, National Insurance Company Ltd, Gangtok Branch* v. *Smt. Aruna Dhakal and Others ***19-D***

Motor Vehicles Act, 1988 – S. 14(2)(a) – Licence to drive a transport vehicle will be effective for a period of three years – It is only in the case of any other licence that the validity can be for a period of twenty years from the date of either issuance or renewal provided the person has not attained the age of 50 years – The contest is not to the genuineness of the licence as it is not disputed that the Driving Licence was issued by the Licencing Authority in Darjeeling. It is also not disputed that the offending driver had skills to drive Light Motor Vehicle (Transport). No questions were put forth to the Licencing Authority whether there was any typographical error with regard to the year of validity. In such a circumstance, considering that the Appellant has failed to decimate the validity of Exhibit 15, it stands as a genuine document irrespective of the fact that it does not comply with the provisions of S. 14. This is so since no concerned authority was examined to establish that the period of validity was wrongly entered and neither the driver nor the claimants or the owner can be held to ransom for any alleged erroneous entry in the Driving Licence made by the concerned authority.

The Branch Manager, National Insurance Company Ltd, Gangtok Branch* v. *Smt. Aruna Dhakal and Others ***19-C***

Motor Vehicles Accident Claims – S. 166 –Structured formula spelt out in the table of the Second Schedule to the Motor Vehicles Act, 1988 does not apply for computing compensation for applications under S. 166 – The deceased being approximately 34 years at the time of accident, the correct multiplier to have adopted would be 16 in terms of *Sarla Verma's* case.

The Branch Manager, National Insurance Company Ltd, Gangtok Branch* v. *Smt. Aruna Dhakal and Others ***19-E***

Protection of Children from Sexual Offences Act, 2012 – S. 2 (d) – Child – Admissibility of Birth Certificate prepared *ante litem motam*

– The documents made *ante litem motam* can be safely relied upon when such documents are admissible under S. 35 of the Indian Evidence Act, 1872 – The Court has the right to examine the probative value of a document admissible even under S. 35 of the said Act if it so requires.
Lakhi Ram Takbi* v. *State of Sikkim ***45-A***

Protection of Children from Sexual Offences Act, 2012 – S. 9 (m) – Aggravated Sexual Assault – Whoever commits sexual assault on a child below 12 years is said to have committed aggravated sexual assault – The crucial question is whether forcibly kissing the minor victim, a girl child of 11 years of age and hugging her amounts to "aggravated sexual assault" as defined in S. 9(m) – Sexual assault is defined in S. 7 – 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. The act of forcibly kissing the minor victim, a child below 12 years of age and hugging her in the back seat of a car in the absence of her guardian by a 27 year old male cannot but be with sexual intent. The act of forcibly kissing and hugging involves physical contact although without penetration. Thus it is cogent that the said act amounts to sexual assault. As the sexual assault was committed on a child below 12 years of age it amounts to aggravated sexual assault.
Raju Prasad* v. *State of Sikkim ***12-A***

Protection of Children from Sexual Offences Act, 2012 – Ss. 29 and 30 – S. 29 provides that where a person is prosecuted for committing or abetting or attempting to commit any offence under Ss. 3, 5, 7 and 9 of the POCSO Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. In this case, the appellant failed to prove that he has not committed the offence as alleged by the minor victim – S. 30 provides that the accused has to establish beyond reasonable doubt that he had no culpable mental state. The appellant has made no effort to rebut the presumption of culpable mental state.
Lakpa Dorjee Tamang* v. *State of Sikkim ***1-C***

Protection of Children from Sexual Offences Act, 2012 – S. 30 – Presumption of Culpable Mental State – Absence of culpable mental state has to be established beyond a reasonable doubt – In the reverse

burden of proof as postulated in S. 30, it is not preponderance of probability but "beyond reasonable doubt," thereby distinguishing it from rebuttable presumption – Where the statute so demands no discretion rests with the Court, save to draw the statutory conclusion, while at the same time allowing the accused to rebut the presumption, which under S. 30 demands it to be beyond a reasonable doubt.

Lakhi Ram Takbi* v. *State of Sikkim ***45-E***

Lakpa Dorjee Tamang v. State of Sikkim

SLR (2019) SIKKIM 1

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

Crl. A. No. 33 of 2017

Lakpa Dorjee Tamang ….. APPELLANT

Versus

State of Sikkim ….. RESPONDENT

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

For the Respondent: Mr. Thinlay Dorjee Bhutia, Addl. Public Prosecutor with Ms. Pollin Rai, Asstt. Public Prosecutor.

Date of decision: 21st February 2019

A. Juvenile Justice (Care and Protection of Children) Act, 2015 – S. 94 – Determination of Age – The High Court directed the Juvenile Justice Board, South District at Namchi to examine the case in respect of the age of the appellant and submit a report to this Court. In compliance to that order, the Juvenile Justice Board, South District at Namchi considered the matter of juvenile afresh and passed an order that the appellant was 18 years 05 months and 15 days on the day of the commission of the incident i.e. on 04.09.2015 and as such was held a major on the date of commission of offence. The said order passed by the Juvenile Justice Board was not challenged by the appellant. Thus, appellant cannot claim the benefit of the provision of JJ Act, 2015.

(Para 21)

B. Indian Evidence Act, 1872 – Consistency in the Evidence of Victim – In her statement under Section 164 of Cr.P.C. before the Magistrate, the victim has stated that the appellant/accused touched her chest area as well as her genital area. He then removed her shirt, skirt and her underwear. He also removed his pant and shirt. He then pulled down his underwear and raped her. In her statement she has stated that the

accused had on four other earlier occasions raped her but she had not informed anyone since the accused used to threaten to kill her. This was the fifth time the accused raped her and this fact came to the knowledge of everyone only because of her friends having witnessed it. Thus, it can safely be said that the statements given by her are consistent.

(Para 24)

C. Protection of Children from Sexual Offences Act, 2012 – Ss. 29 and 30 – S. 29 provides that where a person is prosecuted for committing or abetting or attempting to commit any offence under Ss. 3, 5, 7 and 9 of the POCSO Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. In this case, the appellant failed to prove that he has not committed the offence as alleged by the minor victim – S. 30 provides that the accused has to establish beyond reasonable doubt that he had no culpable mental state. The appellant has made no effort to rebut the presumption of culpable mental state.

(Para 27)

Appeal dismissed.

Case cited:

1. Sadashiv Ramrao Hadbe v. State of Maharashtra and Another, (2006) 10 SCC 92.

JUDGMENT

Judgment of the Court was delivered by ***Vijay Kumar Bist, CJ***

The present appeal arises out of the judgment and order dated 18.09.2017 passed by the learned Special Judge (POCSO), South Sikkim at Namchi in Sessions Trial (POCSO) Case No. 23 of 2015, State of Sikkim vs. Lakpa Dorjee Tamang, whereby the appellant/accused has been convicted under Sections 3(a)/5(1), 4/6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act') and Section 376(2)(i)/376(2)(n)/354 of IPC, 1860. He has been sentenced to undergo Rigorous Imprisonment of 7 years under Section 3 (a) punishable under Section 4 of the POCSO Act and Rigorous Imprisonment of 10 years under Section 5 (1) punishable under Section 6 of the POCSO Act.

He has also been sentenced to undergo Rigorous Imprisonment of 10 years under Section 376 (2)(i) of IPC punishable under Section 376(2) of IPC. He is further sentenced to undergo Simple Imprisonment of 3 years under Section 354 of IPC. Although the appellant/accused has been convicted under Section 376(2)(n) of IPC, however in view of Section 42 of POCSO Act the learned trial Judge has not imposed any separate sentence under Section 376(2)(n) of IPC. It is also directed that all the sentences awarded to him shall run concurrently and the period of imprisonment already undergone by the convict be set off against the period of imprisonment imposed upon him.

2. The prosecution story, in brief, is that on 04.09.2015 mother of the victim, lodged an FIR in Jorethang Police Station stating therein that on the said day the victim had gone to school. During lunch break, Lakpa Tamang of Class VIII took her below the *lapsi* tree situated above the school. There he put his hand on her body and did wrongful act. The complainant came to know about the incident in the afternoon at 03.30 pm from her youngest daughter and her two friends. When the complainant reached school she saw her daughter with her teacher. School teacher asked the boy about the incident but he said he had not done anything. He threatened the complainant and then left.

3. On the basis of said complaint, FIR No. 49/2015 dated 04.09.2015 under Section 6 of the POCSO Act was registered against the accused in Jorethang Police Station. The case was handed over to SI Chomu Lachungpa for investigation. The minor victim was medically examined by Dr. Sangey Pelzang Tamang. In his report, the doctor has stated that P/A soft, non tender, no fresh injuries seen, no injuries seen over the vulva perineum or breast, old tear at 2 oclock position and 8 o clock position in the hymen, no fresh injuries over the hymen. 2nd vaginal wash sent to pathology department of Namchi District Hospital at 10.20 pm on the same day. In the report, the doctor stated that the victim had not taken bath following the incident, her clothes and undergarments were handed over to the police at Jorethang PHC which were sent thereafter for forensic examination. Further clinical examination did not suggest recent forceful penetrative sexual intercourse vaginal and/or anal. The vaginal swab and underwear of minor victim collected during the medical examination were forwarded to the Regional Forensic Science Laboratory Sikkim, Saramsa, Ranipool, for analysis and report.

4. Statement of victim was duly recorded under Section 164 Cr. P.C. by the Judicial Magistrate, South Sikkim at Namchi on 18.09.2015. The investigating officer after completing the investigation, filed a charge-sheet against the accused under Section 6 of the POCSO Act.

5. The learned Special Judge (POCSO Act) framed five charges. Same were read over and explained to the appellant/ accused, to which he pleaded not guilty and claimed trial. Prosecution witnesses were examined. Thereafter the appellant/ accused was also examined by the Court under Section 313 of Code of Criminal Procedure, 1973. The learned Special Judge (POCSO Act) after considering materials available and also considering the statement of minor victim as well as witnesses, convicted the appellant/accused.

6. Prosecution has examined as many as 14 witnesses namely, PW 1, PW 2, PW 7 Schoolmates of the victim, PW 3 Dr. Robin Rai, PW 4 the victim, PW 5 victims mother, PW 6 Pooja Lohar, PW 8 Santosh Baniya, PW 9 Dr. Meenakshi Dahal, PW 10 Dr. Sangay Pelzong Tamang, PW 11 Dr. Nedup Dolma Bhutia, PW 12 Kunti Kumari Subba, PW 13 Chomu Lachungpa and PW 14 Thinlay Gyatso Rai.

7. PW 4 is the minor victim. At the time when her statement was recorded, she was 13 years old. In her statement she stated that she knew the appellant/accused as he was her senior in the Government school, where they were both studying. On 04.09.2015, while she was in school along with her classmates PW 7 and PW 1, the accused asked them to accompany him to the nearby jungle for collecting *lapsi*/sour fruit. When they reached the jungle, the accused took the victim further deep inside while her friends remained behind. Inside the jungle the accused started putting his hands all over her body including breasts and vagina. He then made her lie down on the ground and put his penis into her vagina. Thereafter while they were still in the jungle, PW 1 and PW 7 came looking for them. Thereafter all of them returned back. Later, the minor victim told about the incident to PW 2. She stated that even on earlier occasions the accused had raped her in the jungle, in her house and near the road. He had as such raped her five times. She also stated that she had given her statement to one Judge Madam downstairs. She recognized her initials on the statement given before the Judge. With the permission of the Court two sealed packets were opened. From one of the packets a blue school skirt

and a white shirt were taken out. From other packet three sealed packets were taken out. From one of those packets marked BIO-152(A) one pink underwear was taken out. Underwear marked MOI, skirt marked MOII and white shirt marked MOIII, which the minor victim was wearing at the time of incident. In her cross-examination she stated that she used to often go to the jungle along with her friends to collect *lapsi*. In her cross-examination she further admitted that the appellant/accused and she were not in good terms. She denied that she had been tutored by her mother to give false evidence against the appellant/accused. She further stated that it is wrong that she was deposing falsely to implicate the appellant/accused as she did not have good relation with him. In her cross-examination she reiterated the same fact as she has stated in the examination-in-chief.

8. PW 1 friend of the victim, stated that she knew the appellant/accused who used to study in her school. Sometime during September 2015 the appellant/accused took her, minor victim and PW 7 to collect some *lapsi*/sour fruit in the jungle near to their school. On reaching the jungle PW 7 and she halted at one place while the accused and minor victim went ahead, deep inside the jungle. After some time their another classmate came there and told them that their teacher was calling them. They went back to the school leaving behind the minor victim and the accused at the jungle. After coming back to the school they realized that the teacher had not called them and their classmate had only joked with them. They went back to the jungle in search of minor victim and the accused. It was only later that the accused and minor victim came out of the jungle. Minor victim s skirt was wet while the accused had removed the sweater that he was wearing.

9. PW-2 is a student of the same school where minor victim used to study. In her statement she stated that the victim is her junior. On 04.09.2015, her three juniors namely PW 1, PW 7 and another friend came to her and told her that the accused and the victim, who had gone deep inside the nearby jungle to collect *lapsi*/sour fruit, were not traced out. All of them went to the jungle looking for the accused and the victim and after some time they saw them. She further stated that they noticed that the victims skirt was wet on the backside and there were some dirt/leaves on the back of her shirt suggesting that she was made to lie on her back. They all then came to the school. Initially the victim was reluctant to tell anything, later, on her insistence she told her that the accused had raped her in the jungle. This witness stated that she had reported the matter to her teachers.

10. PW 3 Dr. Robin Rai examined the appellant/accused and found that the appellant/accused was capable of having sexual intercourse.

11. PW-5 is the mother of the victim. She stated that she had lodged the FIR before the Jorethang Police Station after she came to know that the appellant/accused had raped her daughter on 04.09.2015. In her statement she also stated that the date of birth of her daughter is 05.07.2003 but the same has been reflected as 12.07.2003 in her birth certificate which was obtained by her father.

12. PW 6 Pooja Lohar is the Scientific Officer-cum-Chemical Examiner, Government of Sikkim in the Biology Division of the Regional Forensic Science Laboratory (RFSL), Saramsa, East Sikkim who had prepared the forensic report Exhibit-9.

13. PW 7 is the classmate of the victim. She is a minor witness. She recognized the appellant/accused present in the court. She stated the same fact which has been stated by another witness PW-1.

14. PW 8 Santosh Bania is the police officer who was posted as Officer-in-charge of the Jorethang Police Station on 04.09.2015. He proved the Exhibit-5 (FIR). Exhibit-5(a) (signature of the mother of the victim), Exhibit-5(b) (registration/endorsement note) and Exhibit-5(c) (his signature along with his seal).

15. PW 9 Dr. Meenakshi Dahal, Medical Officer, Jorethang Primary Health Centre, before whom the minor victim was produced for medical examination by the investigating officer on 04.09.2015 at around 1945 hrs. The doctor in her statement stated that on the examination of the victim she found no injury on her person. She referred the victim to the Namchi District Hospital. The clothes of the minor victim were handed over to the investigating officer. She stated that the victim was made to wear another set of clothes which had been brought by the IO. In her cross-examination she has stated that the physique/body of a twelve year old girl is more vulnerable as compared to any adult. She stated that there was no visible injury on the body of the minor victim. She also said that there is nothing in the medical report to indicate that she had also examined the private parts of the minor victim. She admitted that there is nothing to suggest that the minor victim has been subjected to sexual assault. It is her submission that the minor victim did

not disclose to her that she had been raped/sexually assaulted by the appellant/accused on four occasions prior to the sexual assault on 04.09.2015.

16. PW 10 Dr. Sangey Pelzang Tamang is the Gynecologist at the Namchi District Hospital, before whom the minor victim was produced on 04.09.2015 at around 10.15 pm with an alleged history of having been sexually assaulted by the appellant/ accused at around 01.30 pm of the same day. He stated that on examination of the victim he did not find any injury on her person including her private parts. However, he found an old tear at 2 o clock and 8 oclock positions of the hymen. He obtained her vaginal-swab/wash and forwarded for pathological examination. The cytopathology report was later received which indicated that no motile or non-motile spermatozoa could be detected in the vaginal-swab/wash. He further stated that in his opinion there was nothing to suggest any recent forceful penetrative sexual intercourse, whether vaginal or anal. In his cross-examination, he has stated that as the minor victim was of tender age she can be regarded as vulnerable. He further stated that no injury in the vaginal/hymen of the minor victim though she was examined within ten hours of the alleged incident. He also stated that old tear of hymen can be caused due to stretching exercises, dancing and sport activities.

17. PW 11 Dr. Nedup Dolma Bhutia is the Pathologist of the Namchi District Hospital, who examined the vaginal wash and swab of the minor victim for detection of spermatozoa.

18. PW 12 is the Principal of the school where the victim was studying. She stated that minor victim was admitted in their school on 12.02.2007 in nursery class. She left the school on 14.02.2008 under Transfer Certificate No. 06 dated14.02.2008. In her statement she admitted that as per the record maintained in the school, the victims date of birth as 12.07.2003, this was not contradicted in her cross-examination. She also stated that Exhibit-13 is the certificate issued by her wherein Exhibit-13(a) is her signature.

19. PW 13 Chomu Lachungpa is the Sub-Inspector, Ranipool Police Station, East Sikkim. She stated that after apprehension of the appellant/ accused, he claimed to be a juvenile aged about 16 years and as such she produced the appellant/accused before the Juvenile Justice Board (JJB). Thereafter, the Juvenile Justice Board sent the appellant/accused to Juvenile Observation Home, Gangtok. Later, on 13.09.2015 she obtained the birth

certificate of the accused from his father Raj Kumar Tamang which revealed that the date of birth of the accused is 19.03.1997 and as such he was 18 years 5 months and 15 days at the time of incident. On finding the appellant/accused to be a major on the date of commission of the crime she submitted a petition before the Chief Judicial Magistrate, South with a prayer to release the accused from Juvenile Observation Home, Gangtok for causing his formal arrest. After her prayer was allowed she brought the accused from Juvenile Observation Home, Gangtok and produced him before the Learned Judicial Magistrate, South, who passed the order remanding the accused to judicial custody at Namchi.

20. PW 14 Thinlay Gyatso Rai is Police Sub-Inspector to whom investigation was handed over subsequently. After completing investigation he filed the charge-sheet.

21. Mr. Gulshan Lama, learned counsel for the appellant first submitted that the appellant/accused was juvenile at the time of alleged incident and he should be given the benefit of provision of Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as "JJ Act, 2015"). We have seen the record of the case. The matter was listed before this Court on 09.03.2018. The Court observed that the investigating officer did not care to bring into notice of the Juvenile Justice Board the fact of discovery of date of birth certificate of the appellant which indicated that the said juvenile was more than 18 years of age at the time of commission of offence. Later, however, on 15.09.2015 filed an application before the Judicial Magistrate, South stating that the accused was not a juvenile on the basis of his birth certificate, upon which he was removed from the Juvenile Observation Home and remanded to judicial custody. It was further observed that the mandatory provisions as contemplated under the JJ Act, 2015 were not complied with and as such the Court directed the Juvenile Justice Board, South District at Namchi to examine the case in respect of the age of the appellant and submit a report to this Court. In compliance to that order, the Juvenile Justice Board, South District at Namchi considered the matter of juvenile afresh and passed the order that the appellant was 18 years 05 months and 15 days on the day of the commission of the incident i.e. on 04.09.2015 and as such was held as major on the date of commission of offence. The said order passed by the Juvenile Justice Board was not challenged by the appellant. Thus, appellant cannot claim the benefit of provision of JJ Act, 2015.

22. Learned counsel appearing for the appellant/accused then submitted that there is no consistency in the statement of the victim under Section 164 Cr. P.C., the statement given before the Court during the trial. He submitted that the appellant has been falsely implicated as the victim herself stated that she was not on good term with the appellant/accused. Since the victim was not on good term with the appellant/accused, the appellant has been falsely implicated. Learned counsel for the appellant referred to the statement of the doctor, PW 9, in which she stated the alleged incident took place around 14.00 hours on 04.09.2015 and the victim was produced before her by the investigating officer at around 19.45 hours of the same day and on examination, she did not find any injury on her person. In her cross-examination doctor stated that there is nothing to suggest that the minor victim has been subjected to sexual assault. He also referred to the statement of doctor, PW 10, who examined the victim at 10.15 pm of the same day. In his statement, the doctor opined that there was no any injury on her person including her private parts. No injury in the vagina/hymen of the minor victim though she was examined within ten hours of the alleged incident. By referring statements of these two doctors, learned counsel for the appellant submitted that in fact the entire story is false and no rape was actually committed on the victim. He relied on the judgment of the Honble Supreme Court reported in ***(2006) 10 SCC 92 Sadashiv Ramrao Hadbe vs. State of Maharashtra and another***.

23. Mr. Thinlay Dorjee Bhutia, learned Addl. Public Prosecutor referred the DNA report prepared by the Regional Forensic Science Laboratory Sikkim, Saramsa, in which it is pointed out that Exhibit number A, one pink underwear of the victim presence of human semen found. He submitted that the statement of the victim with the support of this report is sufficient to prove the case of the prosecution. He further stated that it is a case where the victim is of 13 years of age and as per Section 29 and Section 30 of the POCSO Act, it is the appellant/accused, who has to prove his case, which he could not prove.

24. There is no dispute about the age of victim on the date of commission of offence. On that day admittedly she was a minor. In her statement before the Court she stated that inside the jungle the accused started putting his hands all over her body including breasts and vagina. He then made her lie down on the ground and put his penis into her vagina. After he raped her, they were still in the jungle when PW 1 and PW 7

came looking for them. She also stated that on earlier occasions the accused had raped her in jungle, as such he had raped her five times. In her statement under Section 164 of Cr. P.C., before the Magistrate, she has stated that the appellant/accused touched her chest area as well as her genital area. He then removed her shirt, skirt and her underwear. He also removed his pant and shirt. He then pulled down his underwear and raped her by putting his penis in her vagina. In her statement she has also stated that the accused had on four other occasions had earlier raped her but she had not informed any one since the accused used to threaten to kill her. This was the fifth time the accused raped her and this fact came to the knowledge of everyone only because of her friends having witnessed it. Thus, it can safely be said that the statements given by her are consistent.

25. Learned counsel for the appellant relied on the statement of PW 9 Dr. Meenakshi Dahal, in which she stated that she found no visible injury on the body of minor victim and there is nothing to suggest that minor victim was subjected to sexual assault. The appellant cannot get any benefit of this statement as this witness also stated that it is true that there is nothing in the medical report to indicate that private parts of minor victim were examined by her.

26. Learned counsel for the appellant also relied on statement of PW 10. On medical examination of the victim, PW 10 Dr. Sangey Pelzang Tamang, collected the vaginal-swab/wash of the victim and forwarded for pathological examination. The cytopathology report indicated that no motile or non-motile spermatozoa could be detected in the vaginal-swab/wash. He also stated that there was nothing to say any recent forceful penetrative sexual intercourse was found. But there was an old tear of hymen.

27. We find that in the report of Forensic Laboratory Exhibit-9 the presence of human semen was found on the victims underwear. If we consider this laboratory report with the statement of victim and her friend, as narrated in the preceding paragraphs, then we find the statements of victim as trustworthy. Therefore, merely on the statement of PW 10 the appellant cannot be acquitted. Moreover, Section 29 of the POCSO Act provides that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of the POCSO Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may

be, unless the contrary is proved. In this case, the appellant failed to prove that he has not committed the offence as alleged by the minor victim. Section 30 of the POCSO Act provides that the accused has to establish beyond reasonable doubt that he had no culpable mental state. The appellant has made no effort to rebut the presumption of culpable mental state. The case law referred by the counsel for the appellant does not help the appellant, as at the time of that judgment, the POCSO Act was not in existence.

28. Consequently, the appeal stands dismissed.

SLR (2019) SIKKIM 12

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

Crl. A. No. 17 of 2018

Raju Prasad ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. U.P. Sharma, Legal Aid Counsel assisted by Mr. Mahendra Thapa and Mr. Kushan Limboo, Advocates.

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

Date of decision: 4th March 2019

A. Protection of Children from Sexual Offences Act, 2012 – S. 9 (m) – Aggravated Sexual Assault – Whoever commits sexual assault on a child below 12 years is said to have committed aggravated sexual assault – The crucial question is whether forcibly kissing the minor victim, a girl child of 11 years of age and hugging her amounts to "aggravated sexual assault" as defined in S. 9(m) – Sexual assault is defined in S. 7 – 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. The act of forcibly kissing the minor victim, a child below 12 years of age and hugging her in the back seat of a car in the absence of her guardian by a 27 year old male cannot but be with sexual intent. The act of forcibly kissing and hugging involves physical contact although without penetration. Thus it is cogent that the said act amounts to sexual assault. As the sexual assault was committed on a child below 12 years of age it amounts to aggravated sexual assault.

(Para 19)

Appeal dismissed.

JUDGMENT

Bhaskar Raj Pradhan, J

1. Heard. This is an appeal filed by the Appellant against his conviction under Section 9(m) of the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act, 2012) and sentence under Section 10 thereof vide judgment dated 21.05.2018 and order on sentence dated 22.05.2017 (sic) signed on 22.05.2018. The Appellant has been sentenced to simple imprisonment for a period of 5 years and to pay a fine of Rs.1000/-. In default of payment of fine, the Appellant is required to undergo further simple imprisonment of one month. The period of imprisonment already undergone by the Appellant during investigation and trial is required to be set off against the sentence imposed.

2. Mr. U.P. Sharma, learned Legal Aid Counsel for the Appellant would urge three grounds in the present appeal. Firstly, that the learned Special Judge erred in passing the impugned judgment on the basis of a statement of the minor victim (P.W.1) recorded under Section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.) (exhibit-6) and the preliminary examination (exhibit-7) of the minor victim as the contents of two are contradictory to her deposition in Court. Secondly, that the learned Special Judge failed to take into consideration the fact that prosecution withheld vital and independent witnesses like the driver, one Simon Rai of the Bolero vehicle from which the friends of the victim had seen the Appellant hugging the victim and another driver-Sudhir Tamang who helped the friends of minor victim rescue her from the Appellant and the juvenile in conflict with law. Finally, Mr. U.P. Sharma would also urge that the learned Special Judge had erred in convicting the Appellant under Section 9(m) of the POCSO Act, 2012 alone when he had been charged under Section 9(m) of the POCSO Act read with Section 34 of the Indian Penal Code, 1860 (IPC, 1860).

3. This Court shall examine each of the three grounds raised by the learned Counsel for the Appellant. Before that however, certain uncontroverted facts must be stated.

4. The First Information Report (FIR) was lodged on 07.03.2017 by the uncle (P.W.2) of minor victim after being informed by her school friends about the alleged incident. The investigation pursuant to the (FIR) resulted in a charge-sheet being filed on 05.04.2017. On examination of the charge-sheet and hearing the learned Counsels four charges were framed by the learned Special Judge on

16.08.2017 under Section 9(m) of the POCSO Act, 2012 punishable under Section 10 thereof read with Section 34 of the IPC, 1860; under Section 354/34 of the IPC, 1860; under Section 363/34 of the IPC, 1860 and Section 342/34 of the IPC, 1860.

5. The indictment against the Appellant was that on 07.03.2017 at around 1630 hours the Appellant along with another, in furtherance of their common intention with sexual intent made physical contact with the minor victim, aged about 11 years and thereby committed the offence under Section 9(m) of the POCSO Act, 2012 punishable under Section 10 thereof.

6. In order to prove the charges the prosecution examined 24 witnesses. The defence did not lead any evidence. An opportunity to explain the circumstances appearing in the evidence against the Appellant was granted to the Appellant by the learned Special Judge on 07.05.2018. Ultimately, the learned Special Judge thought it fit to convict the Appellant under Section 9(m) of the POCSO Act, 2012 only. The prosecution has not assailed the acquittal of the Appellant on the other charges framed by the learned Special Judge. The prosecution having found the other person in the vehicle in which the assault was said to have taken place to be a juvenile filed the present charge sheet only against the present Appellant.

7. There is no argument regarding the minority of the victim. The learned Special Judge had satisfied herself about the same. Based on the birth certificate of the victim (exhibit-3), the evidence of Dr. Tsering Laden (P.W.16)-the Chief Medical Officer-cum-District Registrar of Birth & Death confirming the contents of the said birth certificate as well as the evidence of the Principal of the local English School (P.W.18) where the victim was studying during the period 2009 to 2013 from the records maintained in the school. The learned Special Judge has also confirmed the age of the minor victim at the time of the incident to be 11 years. There is no quarrel regarding this fact too.

8. The learned Special Judge while examining both oral as well as documentary evidence came to the conclusion that the prosecution has succeeded in establishing that the Appellant had committed aggravated sexual assault on the minor victim. The learned Special Judge also recorded that the juvenile in conflict with law was driving the Alto vehicle but could not find his active involvement in the incident. The learned Special Judge could not believe that the minor victim was forcibly pulled inside the vehicle but had no doubt that the Appellant had committed aggravated sexual assault on the minor victim.

9. The ground that the learned Special Judge has erred in passing the impugned judgment on the basis of the statement of the minor victim recorded under Section 164 Cr.P.C. (exhibit-6) and the preliminary examination of the minor victim (exhibit-7) as the contents of it are contradictory to her deposition in Court has no factual or legal basis. Primarily, exhibit-6 is the statement of a minor witness recorded under Section 164 Cr.P.C. and exhibit-7 is the preliminary examination of the said witness. They are not the statement and the questionnaire of the minor victim as submitted on behalf of the Appellant. A perusal of the statement recorded under Section 164 Cr.P.C. (exhibit-1) and the preliminary examination of the minor victim (exhibit-2) as well as her deposition reflects that the minor victim has been firm on crucial facts that transpired on the relevant day. A perusal of the impugned judgment also does not reflect that the learned Special Judge has based her judgment solely on the statement of the minor victim recorded under Section 164 Cr.P.C and the questionnaire as sought to be urged both in the ground of appeal as well as during the oral submission before this Court.

10. The failure to examine the driver of the Bolero vehicle from where the friends of the victim had seen the Appellant hugging the minor victim or the failure to examine the other driver who helped the friends of the minor victim rescue her would also be of no consequence as the said friends have in fact been examined and they have all deposed what they saw. The examination of the two drivers would thus only be repetitive and it is settled that the prosecution has the flexibility to avoid repetitive witnesses. In any event the evidence of the minor victim on the crucial point of the Appellant having committed sexual assault on her stands firm and unimpeached.

11. The learned Special Judge has examined the provision of Section 7 of the POCSO Act, 2012 which defines "sexual assault". She has come to the conclusion that sexual assault had been committed on the minor victim who was below the age of 12 years by the Appellant and thus he was guilty of having committed "aggravated sexual assault" as defined under Section 9(m) of the POCSO Act, 2012. The Appellant has been found having himself committed sexual assault on the minor victim. The conviction of the Appellant under Section 9(m) of the POCSO Act, 2012 has been secured through direct evidence of the minor victim as well as other eye witnesses. The commission of the crime by the Appellant has been proved. Although the learned Special Judge had also charged the Appellant under Section 34 of the IPC, 1860 the Appellant has not been convicted under the said section as the learned Special Judge did not find active involvement of the juvenile in conflict with the law in the incident. However, the presence of the juvenile in

conflict with the law along with the Appellant has been adequately and convincingly established. In the present case overt act has been attributed and proved against the Appellant and therefore merely because common intention with the juvenile in conflict with law is not proved it cannot be said that the Appellant could not have committed the offence under Section 9(m) of the POCSO Act, 2012.

12. The learned Special Judge has come to the conclusion about the facts as it transpired after examining the evidence of various witnesses, some of them direct witnesses. The minor victim has identified the Appellant. She has also deposed about the incident in fairly good detail. The minor victim has deposed about what transpired before and after the incident. She has provided not only the names of the witnesses regarding the incident as well as the locations. The minor victim has categorically deposed that the Appellant forcibly kissed her in the second seat of the Alto vehicle. On this crucial aspect the defence, besides a bald denial, has not been able to extract anything to demolish the same in cross-examination. The narration of facts deposed by the minor victim has been corroborated by her school mates present at the time of the incident and some just before and after the incident.

13. The first informant (P.W.2) is the uncle of the victim who also identified the Appellant as the person who used to drive an Alto vehicle in the locality. He deposed that the Appellant and his friend were brought by the senior students in a vehicle. The first informant (P.W.2) lodged the FIR on the basis of the information received from the said students.

14. P.W.3 is a minor student witness who had witnessed the Appellant hugging the minor victim inside the Alto vehicle. She identified the Appellant as the person hugging the minor victim inside the Alto vehicle. P.W.3 is the minor victim's class mate and was in the Bolero vehicle driven by her brother who gave lift to her and four of her friends on the relevant day. While on the way they saw the Alto vehicle and got suspicious as the minor victim had already narrated about how the Appellant had given her a lift and sprayed perfume on her the day before. While crossing the said Alto vehicle they saw the Appellant hugging the minor victim in the second seat. After her brother stopped the Bolero she and her friends decided to rescue the minor victim and requested the gentleman near a shop to accompany them to the Alto vehicle. As they approached the Alto vehicle the man smoking outside immediately got into the vehicle and started to drive it. He stopped the vehicle after being asked by them to do so. When they opened the door the minor victim came out crying. The Appellant was in the second seat. Thereafter, they took the minor victim to her house.

15. P.W.4-a minor student witness of the same school also identified the Appellant as she had seen him on the date of the incident. She was also in the Bolero vehicle driven by the brother of P.W.3. P.W.4 corroborated the statement of P.W.3 about boarding the Bolero vehicle driven by the brother of P.W.3 and seeing the Appellant hugging the minor victim in the back seat of the Alto vehicle. P.W.4 also corroborated P.W.3's deposition about how they rescued the minor victim from the Appellant and the other person.

16. P.W.10 another minor senior student witness of the same school was also in the Bolero vehicle and corroborated the depositions of P.W.3 and P.W.4. She identified the Appellant. When she was returning home from school that day one student told her that a vehicle went ahead in which the minor victim was travelling with two persons. Thereafter she also boarded the Bolero vehicle in which other students were also riding. She saw the Appellant and the minor victim in the second seat of the car when she went with the other students to the parked vehicle. She noticed that the buttons of the house shirt of the minor victim were torn when she came out of the second seat of the said vehicle.

17. P.W.11-a minor student witness of the same school also identified the Appellant as the man who she had seen in the car on the day of the incident when she was returning home along with the minor victim and another student. She was also one of the students who boarded the Bolero vehicle. She saw the Appellant and the minor victim sitting in the second seat of the Alto vehicle and another boy smoking outside. P.W.11 also narrated the same story as deposed by P.W.3, P.W.4 and P.W.10. When she opened the door of the second seat of the Alto car she saw the Appellant hugging the minor victim.

18. The cross examination of these prosecution witness has not destroyed the substratum of the prosecution case. Minor contradictions on peripheral facts do not demolish the central narrative. The identification of the Appellant as the person involved in the crime is certain. The minor victim has categorically deposed that the Appellant forcibly kissed her in the back seat of the Alto car. P.W.3, P.W.4 and P.W.11 have categorically deposed having seen the Appellant hugging the minor victim in the back seat of the Alto car.

19. The crucial question is whether forcibly kissing the minor victim a girl child of 11 years of age and hugging her amounts to "aggravated sexual assault" as defined in Section 9(m) of the POCSO Act, 2012. Whoever commits sexual assault on a child below 12 years is said to have committed aggravated sexual

assault. "Sexual assault" is defined in Section 7 of the POCSO Act, 2012. 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. The act of forcibly kissing the minor victim, a child below 12 years of age and hugging her in the back seat of a car in the absence of her guardian by a 27 year old male cannot but be with sexual intent. The act of forcibly kissing and hugging involves physical contact although without penetration. Thus it is cogent that the said act amounts to sexual assault. As the sexual assault was committed on a child below 12 years of age it amounts to aggravated sexual assault as defined under Section 9(m) of the POCSO Act, 2012.

20. After having examined the impugned judgment as well as hearing the learned Counsels this Court is of the firm view that the impugned judgement of conviction is sound and brooks no interference. Section 10 of the POCSO Act, 2012 mandates a punishment of imprisonment for a term which shall not be less than 5 years but which may extend to 7 years. The learned Special Judge has exercised her discretion to impose the minimum sentence in the facts of the present case which is perfectly justified. The order on sentence dated 22.05.2017 (sic) signed on 22.05.2018 in the circumstances is adequate.

21. The appeal is dismissed. The Appellant is in custody. He shall continue there until the sentence is served.

SLR (2019) SIKKIM 19

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

MAC App. No. 06 of 2017

The Branch Manager, National Insurance Company Ltd. Gangtok Branch. ….. **APPELLANT**

Versus

Smt. Aruna Dhakal and Others ….. **RESPONDENTS**

For the Appellant: Ms. Smita Pradhan, Ms. Rubina Pradhan and Mr. Deven Rai, Advocates.

For Respondents 1-3: Mr. Ajay Rathi, Mr. Rahul Rathi, Ms. Phurba Diki Sherpa and Mr. Aditya Makkhim, Advocates.

For Respondent No. 4: Mr. Ashok Pradhan, Advocate.

Date of decision: 16th March 2019

A. Indian Evidence Act, 1872 – S. 35 – The following conditions are to be fulfilled before a document can be held to be admissible under this Section: (i) the document must be in the nature of an entry in any public or other official book, register or record; (ii) it must state a fact in issue or a relevant fact; and (iii) the entry must be made by a public servant in the discharge of his official duties, or in performance of his duties – Such entries however must be established by necessary evidence. In addition to which the entries must be made by or under the direction of the person whose duty it is to make them at the relevant time. It is essential to show that the document was prepared by the public servant in the discharge of his official duty.

(Para 10)

B. Indian Evidence Act, 1872 – Distinction Between Admissibility of a Document and its Probative Value – It is indeed explicit that the Indian Evidence Act, 1872 does not give licence to any party to submit and rely on any document sans proof by any measure whatsoever. Even if the strict rules of evidence are excluded in the instant matter, one cannot overlook the fact that there is no proof whatsoever on record that the Appellant had sought Exhibit R-2 from the concerned Office or that it had in fact been issued by the said Office. No registers or entries made were furnished to prove the contention of the Appellant nor was any official examined to oust the doubts that arise on its authenticity – Exhibit R-2 has no probative value.

(Para 12)

C. Motor Vehicles Act, 1988 – S. 14(2)(a) – Licence to drive a transport vehicle will be effective for a period of three years – It is only in the case of any other licence that the validity can be for a period of twenty years from the date of either issuance or renewal provided the person has not attained the age of 50 years – The contest is not to the genuineness of the licence as it is not disputed that the Driving Licence was issued by the Licencing Authority in Darjeeling. It is also not disputed that the offending driver had skills to drive Light Motor Vehicle (Transport). No questions were put forth to the Licencing Authority whether there was any typographical error with regard to the year of validity. In such a circumstance, considering that the Appellant has failed to decimate the validity of Exhibit 15, it stands as a genuine document irrespective of the fact that it does not comply with the provisions of S. 14. This is so since no concerned authority was examined to establish that the period of validity was wrongly entered and neither the driver nor the claimants or the owner can be held to ransom for any alleged erroneous entry in the Driving Licence made by the concerned authority.

(Paras 14 and 15)

D. Motor Vehicles Accident Claims – Future Prospects – To the question of the Tribunal having added 50% of the Monthly Income of 6,600/- as future prospects, it needs no reiteration that in *Shashikala's case*, the Hon'ble Supreme Court has specifically laid down that in the case of self-employed or persons with fixed wages in case the deceased victim is below forty years there must be an addition of 50% to the actual income of

the deceased while computing future prospects – People who are self-employed or engaged on fixed wages are also entitled to 50% of the actual income of the deceased to be computed as future prospects.

(Para 18)

E. Motor Vehicles Accident Claims – S. 166 – Structured formula spelt out in the table of the Second Schedule to the Motor Vehicles Act, 1988 does not apply for computing compensation for applications under S. 166 – The deceased being approximately 34 years at the time of accident, the correct multiplier to have adopted would be 16 in terms of *Sarla Verma's* case.

(Para 20)

Appeal dismissed.

Chronological list of cases cited:

1. Compaq International and Another v. Bajaj Allianz General Insurance Company Limited and Another, 2018 (5) Scale 46.
2. The Branch Manager, National Insurance Company Limited v. Indra Maya Biswakarma and Others, 2018 ACJ 1387.
3. Mukund Dewangan v. Oriental Insurance Company Limited with other Special Leave Petitions, AIR 2017 SC 3668.
4. Jagdish Kumar Sood v. United India Insurance Company Limited and Others, MANU/SC/0208/2018.
5. S. Iyyapan v. M/S United India Insurance Company Ltd. and Another, 2013 (7) SCC 62.
6. A.P.S.R.T.C. v. P. Thirupal Reddy, 2005 (12) SCC 189.
7. Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd., (1999) 6 SCC 620.
8. Shashikala and Others v. Gangalakshmamma and Another, 2015 (9) SCC 150.
9. Rajesh and Others v. Rajbir Singh and Others, (2013) 9 SCC 54.
10. State of Bihar v. Radha Krishna Singh and Others, (1983) 3 SCC 118.

11. Madan Mohan Singh and Others v. Rajni Kant and Another, (2010) 9 SCC 209.

12. Branch Manager, National Insurance Co. Ltd. v. Karma Bhutia and Others, 2016 (161) AIC 830.

13. United India Insurance Company Ltd. v. Lehru and Others, (2003) 1 ACC 611 (SC).

14. National Insurance Co. Ltd. v. Swaran Singh and Others, (2004) 1 ACC 1 (SC).

15. Santosh Devi v. National Insurance Co. Ltd. and Others, AIR 2012 SC 2185.

16. Sarla Verma (Smt.) and Others v. Delhi Transport Corporation and Another, (2009) 6 SCC 121.

17. General Manager, Kerala S.R.T.C. v. Susamma Thomas, (1994) 2 SCC 176.

18. UP State Road Transport Corporation v. Trikok Chandra, (1996) 4 SCC 362.

19. New India Assurance Co. Ltd. v. Charlie, AIR 2005 SC 2157.

JUDGMENT

Meenakshi Madan Rai, J

1. The apple of discord in this Appeal is the period of validity shown in the Driving Licence of the driver of the ill-fated vehicle produced by the Claimants *(Respondents No. 1, 2 and 3 herein)* which extends from 08.09.2006 to 07.09.2024. This, according to the Appellant, is contrary to the extract of the office records of the issuance of Driving Licence obtained by the Appellant from the Office of the District Magistrate, Darjeeling Motor Vehicles Department, Government of West Bengal which reflects the period of validity as 08.09.2006 to 07.09.2009. The Driving Licence (Exhibit 15) furnished thus cannot be considered as it was ineffective on the day of the accident *viz.* 02.04.2015, thereby in contravention of the terms of insurance. The other points raised in Appeal are; the granting of 50% as future prospects which according to the Appellant is incorrect as the deceased was not a permanent employee. Further, disgruntlement also ensues on account of the granting of Rs.25,000/- (Rupees twenty five thousand) only, to the Claimants as funeral expenses of the deceased.

2. The above discontentment emanates in a prayer for setting aside the judgment of the Motor Accidents Claims Tribunal, East Sikkim at Gangtok *(for short 'learned Tribunal')* being MACT Case No. 10 of 2015 *(Mrs. Aruna Dhakal and two others v. The Branch Manager, National Insurance Co. Ltd. and another)* dated 06.12.2016, by which a total sum of Rs.14,03,900/- (Rupees fourteen lakhs, three thousand and nine hundred) only, was awarded as compensation to the three Claimants before the learned Tribunal.

3. The Respondents No. 1, 2 and 3 herein were the Claimants No. 1, 2 and 3 and Respondent No. 4 was the Opposite Party No. 2 before the learned Tribunal. The Appellant herein was the Opposite Party No. 1 before the learned Tribunal. They shall be referred to in their order of appearance before this Court.

4. Before the learned Tribunal, the Respondents No. 1, 2 and 3 sought compensation of an amount of Rs.15,89,800/- (Rupees fifteen lakhs, eighty nine thousand and eight hundred) only, on account of the death of the husband of the Respondent No. 1 and father of Respondents No. 2 and 3, in a motor vehicle accident at 23:00 Hrs at Khanigaon under Rangpo Police Station, East Sikkim on 02.04.2015, in which the victim was travelling along with Respondent No. 2. The accident allegedly occurred due to the inability of the driver to control the vehicle on a curve in the road, resultant the vehicle swerved off the road to approximately 1000 feet below causing in the instantaneous death of the victim and injuries on the survivor, Respondent No. 2. The learned Tribunal, on careful consideration of the evidence and the documents on record concluded that the Respondents No. 1, 2 and 3 were entitled to compensation of Rs.14,03,900/- (Rupees fourteen lakhs, three thousand and nine hundred) only, as against the claim of Rs.15,89,800/- (Rupees fifteen lakhs, eighty nine thousand and eight hundred) only, put forth by them. The Appellant was ordered to pay the compensation.

5. Learned Counsel for the Appellant while reiterating the averments made in his Appeal, submitted before this Court, that the Driving Licence (in "Category T") of the driver employed by the Respondent No. 4 cannot be for an extended duration *viz.* 08.09.2006 to 07.09.2024 as reflected in the Licence in view of the provisions of Section 14 of the Motor Vehicles Act, 1988. That Exhibit R-2 furnished by the Appellant which is an extract of the

official records kept in the Office of the District Magistrate, Darjeeling Motor Vehicles Department, Government of West Bengal indicates that the Licence was in fact issued on 08.09.2006 which tallies with the date of issue given on Exhibit 15 but the validity extends only up to 07.09.2009 in terms of the requirement of law. That, Exhibit R-2 was handed over to them on 19.11.2015 from the concerned Office as detailed *supra* and there is no reason to doubt the extract of the official records. Hence the only conclusion that can be arrived at is that Exhibit 15 having doubtful origins ought not to be given consideration. Consequently computation made on the assumption that the Licence was valid amongst other considerations ought to be set aside. It was also contended that the deceased was a worker in a nursery and employed on Muster Roll and not permanently, therefore, the learned Tribunal was in error in granting 50% of monthly income of Rs.6,600/- (Rupees six thousand and six hundred) only, as future prospects while computing the compensation. Also that the learned Tribunal erred in granting Rs.25,000/- (Rupees twenty five thousand) only, for funeral expenses. No reason however was set forth in support of this contention.

6. *Per contra* the arguments advanced by learned Counsel for the Respondents No. 1, 2 and 3 were since the Licence was issued for a Light Motor Vehicle, therefore, the driver was authorized to drive any vehicle in the said category of which the unladen weight did not exceed 7,500 kilograms. Besides merely because Exhibit R-2 is an official record it does not establish that Exbt. 15 the Driving Licence produced by the Respondents No. 1, 2 and 3 could not have been issued for the period 08.09.2006 to 07.09.2024 as indicated therein. That apart, Exhibit R-2 has not been proved by any authority of the concerned Office thereby raising doubts with regard to its authenticity. Placing reliance on the decision of the Hon'ble Supreme Court in ***Compaq International and Anr. vs. Bajaj Allianz General Insurance Company Limited and Anr.***[1] learned Counsel further contended that the Licencing Authority themselves have failed to furnish a purported copy of the true Licence of the driver, hence the issuance of Exhibit 15 by them cannot be denied. Reliance was also placed on the ratio of this Court in ***The Branch Manager, National Insurance Company Limited v. Indra Maya Biswakarma and Others***[2] to press the argument that the insurer cannot disown its liability only for the reason that the validity of the Licence does not tally with the alleged official

[1] 2018 (5) Scale 46
[2] 2018 ACJ 1387

records of issuance. Learned Counsel also took the assistance of the ratio in ***Mukund Dewangan vs. Oriental Insurance Company Limited with other Special Leave Petitions***[3]; ***Jagdish Kumar Sood vs. United India Insurance Company Limited and others***[4]; ***S. Iyyapan vs. M/S United India Insurance Company Ltd. and another***[5]***; A.P.S.R.T.C. vs. P. Thirupal Reddy***[6] and ***Ashok Gangadhar Maratha vs. Oriental Insurance Co. Ltd.***[7] to garner strength for the contention that once a Driving Licence is issued to a driver he is authorized to drive any vehicle in the category mentioned in the Licence. Countering the argument of the Appellant that the learned Tribunal erred in granting 50% as future prospects, reliance was placed on the decision of the Hon'ble Supreme Court in ***Shashikala and Ors. vs. Gangalakshmamma and Anr.***[8] wherein it was *inter alia* observed that in the case of self-employed or persons with fixed wages where the deceased victim was below 40 years, there must be an addition of 50% to the annual income of the deceased while computing future prospects. That, for funeral expenses, the Hon'ble Supreme Court in ***Rajesh and Others vs. Rajbir Singh and Others***[9] has specifically laid down that an amount of Rs.25,000/- (Rupees twenty five thousand) only, is to be computed for the said purpose.

7. I have heard in extenso and considered the rival submissions of learned Counsel for the parties. I have also perused the documents and evidence on record.

8. The question that requires consideration by this Court pertains to the allegation of the Appellant regarding the improbability of the extended validity of the Driving Licence, Exhibit 15 (08.09.2006 to 07.09.2024) produced by the Respondents No. 1, 2 and 3 while official records contrarily indicate validity from 08.09.2006 to 07.09.2009. Peripheral to these are the points regarding 50% addition as future prospects to the loss of earnings and Rs.25,000/- (Rupees twenty five thousand) only, as funeral expenses. In this context, it is but essential to carefully examine the documents and evidence furnished by both contesting parties.

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[3] 2017 AIR (SC) 3668
[4] MANU/SC/0208/2018
[5] 2013 (7) SCC
[6] 2 62005 (12) SCC 189
[7] (1999) 6 SCC 620
[8] 2015 (9) SCC 150
[9] (2013) 9 SCC 54

9. What emerges from the evidence on record is that Exhibit 15 is the Licence which was issued according to the Respondent No. 1 to the driver of the vehicle. Neither of the parties have examined the driver of the vehicle. The validity shown on Exhibit 15 is from 08.09.2006 to 07.09.2024 and it is not denied by the Appellant that the Licence was issued from the Office of the District Magistrate, Motor Vehicles Department, Darjeeling. According to Exhibit 15, the driver was authorized to drive a Light Motor Vehicle Transport (LMV-T). The Respondent No. 4 vide Exhibit 16 had authorized the driver to drive the vehicle having employed him after perusing the Driving Licence, Exhibit 15 which appeared to him to be genuine as it bore the seal and signature of the Licencing Authority. Consequently he had taken the driver for a road test drive and on being satisfied thereof had engaged him. It is no one s case that the vehicle in accident was not maintained properly and not mechanically fit to be in service at the time of the accident. It is also no ones case that the documents pertaining to the vehicle were invalid and ineffective at the time of the accident. The Appellant has failed to take steps with regard to Exhibit 15 inasmuch as no FIR was lodged with the concerned Police Station alleging that the document was fake neither was any report made to the Licencing Authority seeking clarification concerning the extended validity. Admittedly no verification was made from the said Office as to whether there was typographical error committed on Exhibit 15 so far as the typing of the year "2024" was concerned nor was any verification made with regard to extension of dates or revalidation of the document. The authority who had issued Exhibit R-2 has nowhere stated that the seal or signature appearing on Exhibit 15 was fake and in fact no steps had been initiated even by the Licencing Authority although according to the witness of the Appellant when they sought for Exhibit R-2 they had also submitted a copy of Exhibit 15. The Charge-Sheet, Exhibit 30 submitted by the Police reveals that the driver had committed offences under Sections 279, 336, 337, 304 A of the Indian Penal Code, 1860 read with Sections 177 and 178 of the Motor Vehicles Act, 1988. The extract of the Driving Licence Exhibit R-2 contrarily indicates that the Licence was issued on 08.09.2006 and was valid up to 07.09.2009. This document was allegedly issued by the Office of the District Magistrate, Darjeeling Motor Vehicle Department, Government of West Bengal on 19.11.2015. The witness Kishore Kumar Subba failed to establish by any evidence as to how this document was obtained from the said Office. No letter of requisition made to the concerned Office seeking the document was placed before the learned Tribunal for perusal. The

contents of the document remained unproved as also the signature on the document. The argument of the Appellant that Exhibit 15 was invalid on the date of accident thus has no legs to stand. It is indeed settled law that rules of Civil Procedure Code, 1908 and the Indian Evidence Act, 1872 do not strictly apply to matters in Motor Accidents Claims nevertheless the elementary requirements have to be fulfilled inasmuch as once a document is furnished there must be some proof of its authenticity.

10. Section 35 of the Indian Evidence Act, 1872 require the following conditions to be fulfilled before a document can be held to be admissible under this Section;

(i) The document must be in the nature of an entry in any public or other official book, register or record;

(ii) It must state a fact in issue or a relevant fact; and

(iii) The entry must be made by a public servant in the discharge of his official duties, or in performance of his duties.

[State of Bihar vs. Radha Krishna Singh and Others[10]]

Such entries however must be established by necessary evidence. In addition to which the entries must be made by or under the direction of the person whose duty it is to make them at the relevant time. It is essential to show that the document was prepared by the public servant in the discharge of his official duty.

11. Section 74 of the Indian Evidence Act, 1872 defines what public documents are and reads as follows;

> "**74. Public documents**. — The following documents are public documents:-
>
> (1) Documents forming the acts, or records of the acts—
>
> (i) of the sovereign authority,
>
> (ii) of official bodies and tribunals, and
>
> (iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;

[10] (1983) 3 SCC 118

(2) Public records kept in any State of private documents."

12. In ***Madan Mohan Singh and Others vs. Rajni Kant and Another***[11] distinguishing between the admissibility of a document and its probative value, the Hon„ble Supreme Court would explain as follows;

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

19. Such entries may be in any public document i.e. school register, voters' list or family register prepared under the Rules and Regulations,

[11](2010) 9 SCC 209

> etc. in force, and may be admissible under Section 35 of the Evidence Act as held in *Mohd. Ikram Hussain v. State of U.P.* [AIR 1964 SC 1625 : (1964) 2 Cri LJ 590] and *Santenu Mitra v. State of W.B.* [(1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587].
>
> **20**. So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, **they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value**. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. ....."
>
> **[emphasis supplied]**

It is indeed explicit that the Indian Evidence Act, 1872 does not give licence to any party to submit and rely on any document sans proof by any measure whatsoever. Even if the strict rules of evidence are excluded in the instant matter, one cannot overlook the fact that there is no proof whatsoever on record that the Appellant had sought Exhibit R-2 from the concerned Office or that it had in fact been issued by the said Office. No registers or entries made were furnished to prove the contention of the Appellant nor was any official examined to oust the doubts that arise on its authenticity. In such circumstances, in my considered opinion, Exhibit R-2 has no probative value.

13. That having been said, coming to Exhibit 15, undoubtedly the authenticity of this document has remained unchallenged save the extended validity period which was argued by the Appellant as being an impossibility. The provisions of Section 14 of the Motor Vehicles Act, 1988 which reads as follows are relevant for the present purposes;

> "**14. Currency of licences to drive motor vehicles**.-
>
> (1) A learner's licence issued under this Act shall, subject to the other provisions of this Act, be

effective for a period of six months from the date of issue of the licence.

(2) A driving licence issued or renewed under this Act shall,-

(a) **in the case of a licence to drive a transport vehicle, be effective for a period of three years**:

[Provided that in the case of licence to drive a transport vehicle carrying goods of dangerous or hazardous nature be effective for a period of one year and renewal thereof shall be subject to the condition that the driver undergoes one day refresher course of the prescribed syllabus; and]

(b) in the case of any other licence,-

(i) if the person obtaining the licence, either originally or on renewal thereof, has not attained the age of fifty years on the date of issue or, as the case may be, renewal thereof,-

(A) be effective for a period of twenty years from the date of such issue or renewal; or

(B) until the date on which such person attains the age of fifty years, whichever is earlier;

(ii) if the person referred to in sub-clause (i), has attained the age of fifty years on the date of issue or as the case may be, renewal thereof, be effective, on payment of such fee as may be prescribed, for a period of five years from the date of such issue or renewal:

Provided that every driving licence shall, notwithstanding its expiry under this sub-section, continue to be effective for a period of thirty days from such expiry."

14. Section 14(2)(a) of the Motor Vehicles Act, 1988 thus clarifies that a Licence to drive a transport vehicle will be effective for a period of three years. In this context, we may revisit Exhibit 15 and the evidence of Kishore Kumar Subba, the witness has categorically stated under cross-examination as follows;

> *"...It is true that the O.P. No. 1* ***is only disputing with regard to the period of validity of the driving licence of offending driver Tek Bahadur Chettri though the said driving licence was issued by Licencing Authority, Darjeeling****.*
> ***It is true that as per Exbt. R-2 the offending driver is having a skill of driving with regard to light motor vehicle (Transport)****.*
> *It is true that we had not put any queries to Licencing Authority, Darjeeling as to whether there was any typographical mistake with regard to typing of year of validity i.e., 2024.*
> *It is true that the said driving licence as filed by the claimants is tallying with Exbt. R-2 apart from the period of validation.*
> ***It is true that in Exbt. R-2 the authority had not said that the licence, the seal appearing on licence or the signature on the same are fake****. ..."*
> **[emphasis supplied]**

The provisions of Section 14 of the Motor Vehicles Act, 1988 extracted hereinabove clarify that when the Driving Licence is issued or renewed under the Act licencing a person to drive a "Transport Vehicle," the licence is to be issued for a period of three years. It is only in the case of any other Licence that the validity can be for a period of twenty years from the date of either issuance or renewal provided the person has not attained the age of 50 years. The details as to what transpires for issuance and renewal of Licence after a person attains the age of 50 years is not being elucidated herein being irrelevant for the present purposes as the driver to whom Exhibit 15 was issued was approximately 34 years at the time of the accident as emerges from the same document.

15. The evidence of Kishore Kumar Subba is a clear admission of the fact that the only dispute is with regard to the validity of the Driving Licence i.e. the period between the date of issuance and date of expiry. This is indeed a vexed situation since the contest is not to the genuineness of the Licence as it is not disputed that the Driving Licence was issued by the Licencing Authority in Darjeeling. It is also not disputed that the offending driver had skills to drive Light Motor Vehicle (Transport). No questions

were put forth to the Licencing Authority as to whether there was any typographical error with regard to the year of validity. In such a circumstance, considering that the Appellant has failed to decimate the validity of Exhibit 15 it stands as a genuine document irrespective of the fact that it does not comply with the provisions of Section 14 of the Motor Vehicles Act, 1988. This is so since no concerned authority was examined to establish that the period of validity was wrongly entered and neither the driver nor the Claimants or the owner can be held to ransom for any alleged erroneous entry in the Driving Licence made by the concerned authority. There is no allegation that the Driving Licence was prepared by any of the Respondents or for that matter by the driver himself.

16. This Court in ***Branch Manager, National Insurance Co. Ltd. vs. Karma Bhutia and others***[12] has while placing reliance on the decision in ***United India Insurance Company Ltd. vs. Lehru and others***[13] has *United India Insurance Company Ltd. v. Lehru and Others, (2003) 1 ACC 611 (SC)* held that the owner cannot be expected to launch investigation into the genuineness of the Licence when employing the driver. On this count, it would be worthwhile to extract the observation of the Honble Supreme Court in ***United India Insurance Company Ltd. v. Lehru and others*** *(supra)* wherein it was held as follows;

> "17. When an owner is hiring a driver he will therefore have to check whether the driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a Competent Authority or not. The owner would then take the test of the driver. If he finds that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that Insurance Companies expect owners to make enquiries with RTOs, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The Insurance Company would not then be absolved of liability. If

[12] 2016 (161) AIC 830
[13] (2003) 1 ACC 611 (SC)

> it ultimately turns out that the licence was fake the Insurance Company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly even in such a case the Insurance Company would remain liable to the innocent third party, but it may be able to recover from the insured. ..."

17. Further, the Honble Supreme Court also observed in ***National Insurance Co. Ltd. v. Swaran Singh and Others***[14] as follows;

> "109. .....
> (iii) The breach of policy condition e.g., disqualification of the driver on invalid driving licence of the driver, as contained in Sub-section (2)(a)(ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time..."

Hence, in view of the aforestated observations the question of the Licence being invalid on any account does not arise. Section 2 (21) of the Motor Vehicles Act, 1988 defines Light Motor Vehicle as follows;

> "(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms;"

[14] (2004) 1 ACC 1 (SC)

The vehicle in accident was described as a "C Carriage" vehicle with unladen weight of 1720 kilograms in Exhibit 14, the Certificate of Registration. Hence, the driver had the requisite Licence to drive the vehicle in accident.

18. Coming to the question of the learned Tribunal having added 50% of the Monthly Income of Rs.6,600/- (Rupees six thousand and six hundred) only, as future prospects, it needs no reiteration that in ***Shashikala's*** case *(supra)*, the Honble Supreme Court has specifically laid down that in the case of self-employed or persons with fixed wages in case the deceased victim was below forty years there must be an addition of 50% to the actual income of the deceased while computing future prospects. This observation was arrived at after considering the ratio of a two Judge Bench of the same Court in ***Santosh Devi vs. National Insurance Co. Ltd. & Ors.***[15] The relevant paragraphs as discussed by the Court is extracted as under;

> "14. We find it extremely difficult to fathom any rationale for the observation made in para 24 of the judgment in Sarla Verma case that where the deceased was self-employed or was on a fixed salary without provision for annual increment, etc., the courts will usually take only the actual income at the time of death and a departure from this rule should be made only in rare and exceptional cases involving special circumstances. In our view, it will be naive to say that the wages or total emoluments/ income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc., would remain the same throughout his life.
>
> 15. The rise in the cost of living affects everyone across the board. It does not make any distinction between rich and poor. As a matter of fact, the effect of rise in prices which directly impacts the cost of living is minimal on the rich and maximum on those who are self-employed or who get fixed income/ emoluments. They are the worst affected

[15] AIR 2012 SC 2185

people. Therefore, they put in extra efforts to generate additional income necessary for sustaining their families.

16. The salaries of those employed under the Central and State Governments and their agencies/ instrumentalities have been revised from time to time to provide a cushion against the rising prices and provisions have been made for providing security to the families of the deceased employees. The salaries of those employed in private sectors have also increased manifold. Till about two decades ago, nobody could have imagined that salary of Class IV employee of the Government would be in five figures and total emoluments of those in higher echelons of service will cross the figure of rupees one lakh.

17. Although the wages/income of those employed in unorganized sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the government employees and those employed in private sectors, but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching clothes. If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour, like, barber, blacksmith, cobbler, mason, etc.

18. Therefore, we do not think that while making the observations in the last three lines of para

> 24 of Sarla Verma judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30% increase in his total income over a period of time and if he/she becomes the victim of an accident then the same formula deserves to be applied for calculating the amount of compensation."

Hence, people who are self-employed or engaged on fixed wages are also entitled to 50% of the actual income of the deceased to be computed as future prospects. Later in ***Rajesh and Others*** *(supra)* a three Judge Bench of the Honble Supreme Court took into consideration the decision of the case in ***Sarla Verma (Smt.) and Others vs. Delhi Transport Corporation and Another***[16] and ***Santosh Devi*** *(supra)* and held as follows;

> "8. Since, the Court in Santosh Devi case actually intended to follow the principle in the case of salaried persons as laid down in Sarla Verma case and to make it applicable also to the self-employed and persons on fixed wages, it is clarified that the increase in the case of those groups is not 30% always; it will also have a reference to the age. **In other words, in the case of self-employed or persons with fixed wages, in case, the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects**. Needless to say that the actual income should be income after paying the tax, if any. Addition should be 30% in case the deceased was in the age group of 40 to 50 years."
>
> **[emphasis supplied]**

This issue is no more *res integra* and in fact ought to have brooked no discussions in view of the settled position of law.

[16] (2009) 6 SCC 121

19. With regard to the addition of Rs.25,000/- (Rupees twenty five thousand) only, as funeral expenses, the Honble Supreme Court in ***Rajesh and others*** *(supra)* held as follows;

> "18. We may also take judicial notice of the fact that the Tribunals have been quite frugal with regard to award of compensation under the head "funeral expenses". The "price index", it is a fact has gone up in that regard also. The head "funeral expenses" does not mean the fee paid in the crematorium or fee paid for the use of space in the cemetery. There are many other expenses in connection with funeral and, if the deceased is a follower of any particular religion, there are several religious practices and conventions pursuant to death in a family. All those are quite expensive. Therefore, we are of the view that it will be just, fair and equitable, under the head of "funeral expenses", in the absence of evidence to the contrary for higher expenses, to award at least an amount of Rs.25,000."

This is therefore also settled by the aforestated ratio.

20. Now to address the quantum of compensation. The judgment of the learned Tribunal reveals that the Multiplier of 17 has been adopted for computing loss of earnings. It would be relevant to point out that Section 163 A of the Motor Vehicles Act, 1988 contains a special provision for payment of compensation on a structured formula basis as spelt out in the table in the Second Schedule to the Motor Vehicles Act, 1988. This table however does not apply for computing compensation for applications under Section 166 of the Motor Vehicles Act, 1988. The instant Appeal arises out of a petition filed under Section 166 of the Motor Vehicles Act, 1988. In ***Sarla Verma's*** case *(supra)* the Honble Supreme Court while discussing the ratio in ***General Manager, Kerala S.R.T.C. vs. Susamma Thomas***[17]***, UP State Road Transport Corporation vs. Trikok Chandra***[18] and ***New India Assurance Co. Ltd. vs. Charlie***[19] for claims under Section 166 of the Motor Vehicles Act, 1988 *inter alia* held;

[17] (1994) 2 SCC 176
[18] (1996) 4 SCC 362
[19] AIR 2005 SC 2157

"**20**. Tribunals/courts adopt and apply different operative multipliers. Some follow the multiplier with reference to *Susamma Thomas* (set out in column 2 of the table above); some follow the multiplier with reference to *Trilok Chandra*, (set out in column 3 of the table above); some follow the multiplier with reference to *Charlie* (set out in column (4) of the Table above); many follow the multiplier given in second column of the Table in the Second Schedule of MV Act (extracted in column 5 of the table above); and some follow the multiplier actually adopted in the Second Schedule while calculating the quantum of compensation (set out in column 6 of the table above). For example if the deceased is aged 38 years, the multiplier would be 12 as per Susamma Thomas, 14 as per Trilok Chandra, 15 as per Charlie, or 16 as per the multiplier given in column (2) of the Second Schedule to the MV Act or 15 as per the multiplier actually adopted in the second Schedule to MV Act. Some Tribunals, as in this case, apply the multiplier of 22 by taking the balance years of service with reference to the retiring age. It is necessary to avoid this kind of inconsistency. We are concerned with cases falling under Section 166 and not under Section 163A of MV Act. In cases falling under Section 166 of the MV Act, Davies method is applicable.

21. We therefore hold that the multiplier to be used should be as mentioned in column (4) of the Table above (prepared by applying *Susamma Thomas*, *Trilok Chandra* and *Charlie*), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, **M-16 for 31 to 35 years**, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for

56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

In view of the speaking decision, as the deceased was approximately 34 years at the time of accident, the correct Multiplier that the learned Tribunal ought to have adopted would have been 16.

21. In conclusion, the judgment of the learned Tribunal warrants no interference save to the extent of the choice of Multiplier.

22. In light of the above discussions and findings, the compensation stands re-calculated and modified as follows;

Monthly Income of the deceased	Rs.6,600.00
Annual Income of the deceased (Rs.6600x12)	Rs.79,200.00
Add 50% of Rs.79,200.00 as future prospects	Rs.39,600.00
Yearly income of the deceased	Rs.1,18,800.00
Less 1/3rd of Rs. 1,18,800.00 [deducted from the said amount in consideration of the instances which the victim would have incurred towards maintenance had he been alive.]	Rs.39,600.00
Net yearly income	Rs.79,200.00
Multiplier of **'16'** adopted in terms of ***Sarla Verma's case (supra)*** (Rs.79,200 x 16)	Rs.12,67,200.00
Add Funeral expenses	Rs.25,000.00
Add Loss of estate	Rs.2,500.00
Add Loss of consortium	Rs.5,000.00
Add Non-pecuniary damages	Rs.25,000.00
Total	**Rs.13,24,700.00**

(Rupees thirteen lakhs, twenty four thousand and seven hundred) only.

23. The Respondents No. 1, 2 and 3 shall be entitled to simple interest @ 9% per annum on the above amount with effect from the date of filing of the Claim Petition before the learned Tribunal, until its full realisation.

24. The Appellant is directed to pay the awarded amount to the Respondents No. 1, 2 and 3 within one month from today, failing which, the

Appellant shall pay simple interest @ 12% per annum from the date of filing of the Claim Petition till realisation, duly deducting the amounts, if any, already paid by the Appellant to the Respondents No. 1, 2 and 3.

25. The impugned Judgment and Award of the learned Tribunal stands modified accordingly.

26. The Appeal is dismissed.

27. No order as to costs.

28. Copy of this Judgment be sent to the learned Tribunal for information and compliance, and its records be remitted forthwith.

SLR (2019) SIKKIM 41

(Before Hon'ble the Chief Justice)

Tr. P. (C) No. 02 of 2019

(Court on *suo motu*)

Mahesh Chettri and Another ….. APPELLANTS

Versus

State of Sikkim and Others ….. RESPONDENTS

Date of Order: 23rd March 2019

A. Code of Civil Procedure, 1908 – S. 24 – General Power of Transfer and Withdrawal – It was brought to the notice of the learned District Judge that earlier his father, being the Additional Advocate General of the State, had appeared for the State in respect of the same subject matter – The District Judge in his order observed that once the said fact came to his notice, it would not be appropriate for him to proceed with the matter – In my view, this cannot be and should not be ground for recusal from a case. The District Judge, at no point of time, was involved in any manner with the case. He himself was not appearing for any of the parties. It was his father who was appearing for the respondent, that too, for the State as State Counsel/Additional Advocate General. In fact, in many cases the Counsel for the State appear on behalf of the State. They do not even remember in which case they appeared for the State. The father of the District Judge appeared in his private capacity and the District Judge had nothing to do with the said case. In some cases it is found that father appears for one party and son appears for opposite party. They appear for the respective parties in their individual capacity. Nothing wrong in it.

(Para 4)

B. Code of Civil Procedure, 1908 – S. 24 – General Power of Transfer and Withdrawal – It is the duty of a Judge to hear every matter placed before him without fear or favour. A Judge can recuse when he or his family members' interest is involved in the case. He can also recuse

when his close relative is a party in the *lis*. He can recuse from a case where one of the parties is known to him and is closely associated with him. He can also recuse when he had earlier as an Advocate appeared for one of the parties. A Judge can also recuse where he had earlier given legal opinion in the matter or has a financial interest in the litigation.

(Para 5)

Application dismissed.

Chronological list of cases cited:

1. Supreme Court Advocates-On-Record Association and Another v. Union of India, (2016) 5 SCC 808.
2. Trishala v. M.V. Sundar Raj and Another, (2010) 15 SCC 714.

ORDER

Vijai Kumar Bist, CJ

District Judge, Special Division-I, Sikkim at Gangtok (i/c), passed an order stating therein that the Counsel for the appellant informed the Court that earlier the father of the District Judge, Shri N.B. Khatiwada (Senior Advocate) had appeared on behalf of the State-respondent in the capacity of Additional Advocate General, Sikkim, in *Writ Petition (C) No. 64 of 2001, Shri Lal Bahadur Chettri v. State of Sikkim*, which had been filed by the original appellant (deceased) before the High Court in respect of the same subject matter involved in the appeal. The District Judge in his order observed that once the said fact came to his notice, it would not be appropriate for him to proceed with the matter. He, thereafter, referred the matter to the High Court. Copy of the said Order was sent by him along with the letter dated 21.12.2018. The Chief Justice passed an order on administrative side directing the same to be listed on judicial side as transfer petition.

2. I have considered the ground mentioned in the order of District Judge. The Hon'ble Supreme Court in the matter of ***Supreme Court Advocates-On-Record Association and Another vs. Union of India : (2016)5 SCC 808 (****per curiam*) has held that a judge can recuse a matter,

if a Judge has a financial interest in the outcome of a case. In such cases, he is automatically disqualified from hearing the case. In cases where the interest of the Judge is other than financial, then the disqualification is not automatic but an enquiry is required where the existence of such an interest disqualifies the Judge tested in the light of either on the principle of "real danger" or "reasonable apprehension".

3. In the matter of ***Trishala vs. M.V. Sundar Raj and Another : (2010) 15 SCC 714***, the petitioner before the Hon'ble Supreme Court requested that the matter be remanded to the High Court and be heard by another Judge as the Judge who was dealing the case in the High Court earlier had appeared as a Standing Counsel for the Municipal Corporation. The Hon'ble Supreme Court held that it cannot be held that simply because the learned Judge whilst at the Bar was a Standing Counsel for the Municipal Corporation, he is precluded either in law or on propriety from hearing any case in which a Corporator is a party in his personal capacity.

4. In the present case, this fact was brought before the learned District Judge that earlier his father, being the Additional Advocate General of the State, had appeared for the State in respect of the same subject matter. In my view, this cannot be and should not be ground for recusal from the case. The District Judge, at no point of time, was involved in any manner with the case. He himself was not appearing for any of the parties. It was his father who was appearing for the respondent, that too, for the State as State Counsel/Additional Advocate General. In fact, in many cases the Counsel for the State appear on behalf of the State. They do not even remember in which case they appeared for the State. The father of the District Judge appeared in his private capacity and the District Judge had nothing to do with the said case. In some cases it is found that father appears for one party and son appears for opposite party. They appear for the respective parties in their individual capacity. Nothing wrong in it.

5. In my view, it is the duty of a Judge to hear every matter placed before him without fear or favour. A Judge can recuse when he or his family members' interest is involved in the case. He can also recuse when his close relative is a party in the *lis*. He can recuse from a case where one of the parties is known to him and is closely associated with him. He can also recuse when he had earlier as an Advocate appeared for one of the parties.

A Judge can also recuse where he had earlier given legal opinion in the matter or has a financial interest in the litigation.

6. In view of the above, the application sent by the learned District Judge, Special Division-I, Sikkim at Gangtok (i/c), is rejected.

7. This Transfer Petition, accordingly, stands disposed of.

8. Let a copy of this Order be sent to the concerned District Judge.

9. Since notice was not issued to any of the parties, the Registry is directed to send a copy of this Order to the concerned parties also.

SLR (2019) SIKKIM 45

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

Crl. A. No. 15 of 2017

Lakhi Ram Takbi ….. **APPELLANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Appellant: Mr. Udai P. Sharma, Advocate (Legal Aid Counsel) with Mr. Mahendra Thapa, Advocate.

For the Respondent: Mr. S.K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors.

Date of decision: 28th March 2019

A. Protection of Children from Sexual Offences Act, 2012 – S. 2 (d) –Child – Admissibility of Birth Certificate prepared *ante litem motam* – The documents made *ante litem motam* can be safely relied upon when such documents are admissible under S. 35 of the Indian Evidence Act, 1872 – The Court has the right to examine the probative value of a document admissible even under S. 35 of the said Act if it so requires.

(Para 10)

B. Indian Evidence Act, 1872 – S. 74 – Public Documents – Admissibility – In the present appeal, no objection was raised when the original Birth Certificate was admitted in evidence nor any issue raised on its probative value – Objection to the document being heard in the Appellate Court for the first time – The Birth Certificate, a public document is admissible in evidence and in the absence of objection it is assumed that the Appellant has accepted its probative value – Where a public document had

been admitted without formal proof, the same cannot be questioned by the defence at the stage of appeal since no objection was raised by them when such document was tendered and received in evidence.

(Paras 12 and 13)

C. Indian Penal Code, 1860 – S. 154 – Delay in Lodging F.I.R – In the instant matter, the victim did not confide in anyone about her pregnancy and only when the complainant came to learn of it the F.I.R came to be lodged. The mortification and the apprehension of ignominy in the minds of the parents and the fear of reprisal as well in the mind of the victim appear to have led to the situation and are all sufficient therefore to explain and condone the delay in the lodging of the F.I.R.

(Para 15)

D. Protection of Children from Sexual Offences Act, 2012 – S. 30 – Presumption of Culpable Mental State – Absence of culpable mental state has to be established beyond a reasonable doubt – In the reverse burden of proof as postulated in S. 30, it is not preponderance of probability but "beyond reasonable doubt," thereby distinguishing it from rebuttable presumption – Where the statute so demands no discretion rests with the Court, save to draw the statutory conclusion, while at the same time allowing the accused to rebut the presumption, which under S. 30 demands it to be beyond a reasonable doubt.

(Para 17)

E. Code of Criminal Procedure, 1973 – S. 216 – Alteration of Charge – Any direction given by the Court for further trial or directing fresh trial is to be judged on the touchstone of prejudice to the accused or the prosecution – If the Charge is of the same species, the Court ought to be circumspect in ordering a retrial – The emphasis now is to prevent secondary victimisation through repeated appearances in Court, for the victim, who has to face hostile or semi-hostile environment in the Courtroom – Where the offences were of the same species and Charges altered, efforts should be made by the Court to assess the necessity of a *de novo* trial and to ensure that the victims do not face secondary victimisation.

(Para 18)

Appeal dismissed.

Chronological list of cases cited:

1. Biradmal Singhvi v. Anand Purohit, AIR 1988 SC 1796.
2. Alamelu v. State, (2011) 2 SCC 385.
3. Murugan *alias* Settu v. State of Tamil Nadu, (2011) 6 SCC 111.
4. Sancha Hang Limboo v. State of Sikkim, MANU/SI/0001/2018.
5. Sham Lal *alias* Kuldip vs. Sanjeev Kumar and Others, (2009) 12 SCC 454.
6. Madan Mohan Singh v. Rajni Kant and Another, AIR 2010 SC 2933.
7. Umesh Chandra v. State of Rajasthan, (1982) 2 SCC 202.
8. Mahadeo v. State of Maharashtra, (2013) 14 SCC 637.
9. State of Himachal Prasad v. Prem Singh, (2009) 1 SCC 420.
10. Hiten Dalal P. Dalal v. Bratindranath Banerjee, AIR 2001 SC 3897.
11. State of Madhya Pradesh v. Bhooraji and Others, AIR 2001 SC 3372.
12. Ajay Kumar Ghoshal and others v. State of Bihar and Another, (2017) 12 SCC 699.
13. Mallikarjun Kodagali v. State of Karnataka and Others, AIR 2018 SC 5206.

JUDGMENT

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

1. The Appellant was convicted under Section 3(a) and Section 5(j)(ii) of the Protection of Children from Sexual Offences Act, 2012 *(for short "POCSO Act, 2012")* and Section 376(1) of the Indian Penal Code, 1860 *(for short "IPC, 1860")* in S.T. (POCSO) Case No. 07 of 2015 by judgment dated 29.04.2017. Vide the order on sentence also dated 29.04.2017, he was sentenced to undergo Rigorous Imprisonment of seven years under Sections 3(a)/4 of the POCSO Act, 2012 and Rigorous Imprisonment of ten years under Sections 5(j)(ii)/6 of the POCSO Act, 2012. No separate sentence was imposed on him under Section 376(1) of the IPC, 1860 in view of Section 42 of the POCSO Act, 2012. The sentences were ordered to run concurrently. No sentence of fine was imposed.

2. Assailing the judgment and order on sentence, learned Counsel for the Appellant contended that no explanation is forthcoming for the belated lodging of the First Information Report *(for short "FIR")* Exhibit 15 on 17.12.2014, six months from the alleged incident, being June 2014. Neither the prosecutrix nor her immediate family had initiated steps for prosecuting the Appellant regarding the offence allegedly committed by him and it was only her brother-in-law who belatedly took the step. That, although reliance had been placed by the prosecution on the alleged Birth Certificates Exhibit 2 and Exhibit 10, of the prosecutrix, issued by the Registrar of Births and Deaths and the School Principal respectively and also on a certified copy of the School Admission Register, the contents of the documents remained unproved in the absence of examination of any witness in proof thereof. Consequently the age of the alleged victim too was not proved. The original entries in the Register of Births maintained by the Registrar of Births and Deaths and of the School Admission Register were not placed before the learned trial Court. Moreover the Birth Certificate, Exhibit 2, issued by the Registrar of Births and Deaths was prepared fifteen months from the date of birth of the prosecutrix rendering the document suspect, therefore the learned trial Court was in error in relying on the aforestated documents. Besides, considering that the age of the victim was seventeen years and six months at the time of the alleged incident and that of the Appellant twenty one years, assuming that the act was committed it was evidently consensual and hence not a ground for convicting the Appellant. To buttress his submissions, reliance was placed by learned Counsel for the Appellant on ***Biradmal Singhvi vs. Anand Purohit***[1], ***Alamelu vs. State***[2] and ***Murugan alias Settu vs. State of Tamil Nadu***[3]. A peripheral argument emerged that in ***Sancha Hang Limboo v. State of Sikkim***[4] reliance was placed on ***Sham Lal alias Kuldip vs. Sanjeev Kumar and*** **Others**[5] with regard to objection to documents at the appellate stage which was in fact a civil suit and the parameters in proving a criminal case and a civil suit differ. That in view of the facts and circumstances stated the impugned judgment and order on sentence deserves to be set aside.

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[1] AIR 1988 SC 1796
[2] 2011 2 SCC 385
[3] 2011 6 SCC 111
[4] MANU/SI/0001/2018
[5] (2009) 12 SCC 454

3. Mr. S.K. Chettri, learned Assistant Public Prosecutor repelling the arguments of the Appellant would submit that although the victim was seventeen years and six months at the time of the incident, the POCSO Act, 2012 defines a child in Section 2(1)(d) as any person below the age of eighteen years. In such a circumstance, even if the victim was seventeen years and six months she is covered by the ambit of the definition. Although the Appellant may only be twenty one years of age and even assuming that the act was consensual, it does not vindicate the Appellant since law states with clarity that consent of a minor is no consent. It was further urged that the Birth Certificate issued by the Headmaster of the School where the victim was studying reveals her date of birth as 21.12.1996 and is recorded as such in the School Register. This is further fortified by the Birth Certificate issued by the Registrar of Births and Deaths which also reflects the victim's date of birth as 21.12.1996. It was the specific argument of learned Assistant Public Prosecutor that as the Birth Certificate of the victim, Exhibit 2 and the other public documents relied on by the prosecution were admitted unassailed by the Appellant at the stage of evidence, objections cannot be raised in the Appellate forum. On this aspect, reliance was placed on the ratio of ***Sancha Hang Limboo*** *(supra)*. That the date of registration shown as 24.03.1998 on Exhibit 2, the Birth Certificate, is of no consequence in the instant matter as the document was obtained in 1998 much before the occurrence of the incident and cannot be said to be suspect. The statement of the victim suffices to convict the Appellant under the POCSO Act, 2012 as Section 29 therein provides that the Special Court shall presume that a person prosecuted for committing offence under Sections 3, 5, 7 and 9 of the POCSO Act, 2012 had committed the offence, unless the contrary is proved. Nothing to the contrary was proved by the Appellant. In the facts and circumstances stated hereinabove the judgment of the learned trial Court does not require any interference.

4. We have heard the rival contentions of learned Counsel for the parties at length and have carefully considered all evidence and documents on record. The impugned judgment and the order on sentence have also been carefully perused.

5. This Court is to consider whether the learned trial Court was in error in convicting the Appellant for the offences charged, based on the

prosecution evidence. It is also to be considered whether the learned trial Court was in error in concluding that the victim was a minor, based on Exhibit 2, the Birth Certificate of the victim, the School Admission Register of which Exhibit 9 are certified copies and on Exhibit 10 issued by the Headmaster, certifying the date of birth of the victim as 21.12.1996. Whether the documents *(supra)* were proved by the prosecution and whether the delay in lodging the FIR has been adequately explained.

6. We may now take stock of the facts in the instant matter. On 17.12.2014 at around 12:00 Hrs the complainant P.W.11, the brother-in-law of the victim, lodged the FIR Exhibit 15 at the Namchi Police Station, stating that his sister-in-law, the victim, P.W.7, was found to be seven months pregnant. On enquiry from her, she had revealed *inter alia* that the Appellant had been physically intimate with her. Namchi Police Station Case dated 17.12.2014 was registered against the Appellant under Section 376 IPC, 1860 read with Section 4 of the POCSO Act, 2012 and the matter investigated into which revealed that the victim a School dropout had been living with her parents. The Appellant and the victim P.W.7 used to converse frequently over the phone after P.W.8 the victim's friend gave P.W.7 his number. Sometime in the month of June, 2014 P.W.7 met the Appellant during the day, in the house of P.W.8. The same evening the Appellant called her to the house of P.W.8 on the pretext of handing over sweets and money. They however met enroute to the house of P.W.8 and decided to go to a vacant house near the house of P.W.8 where they had sexual intercourse and thereafter returned to their respective homes. The following morning the Appellant told the victim that he was leaving for Assam after which they did not talk to each other for about two-three weeks, however, he returned to Sikkim later and then again left for Assam. Over a period of time her parents learnt of her pregnancy but fearing ignominy did not lodge a complaint before the Police which thus came to be reported only on 17.12.2014, vide Exhibit 15. Charge-Sheet was accordingly filed against the Appellant under Section 376 IPC, 1860 read with Section 4 of the POCSO Act, 2012. A supplementary Charge-Sheet came to be filed after DNA profiling established that the Appellant was the father of the victim's child.

7. The learned trial Court on 22.04.2015 framed charges against the Appellant under Section 3(a) punishable under Section 4 of the POCSO Act, 2012 and under Section 376(2) of the IPC, 1860. The Appellant put

forth a plea of "not guilty" and claimed trial. The prosecution sought to furnish sixteen witnesses and evidence of the witnesses thereafter commenced. Witnesses from P.W.1 upto P.W.15 including the Investigating Officer, as P.W.13, were examined till 23.05.2016. On 14.06.2016 when the matter was fixed for the evidence of Dr. Soma Roy (CFSL expert, Kolkata) who was present, the learned trial Court noted that;

> "... in view of the minor victim having become pregnant as a consequence of the alleged sexual assault on her by the accused the charge under Section 5(j)(ii) of the Protection of Children from Sexual Offences Act, 2012(In short, "the POCSO Act, 2012") is required to be added to the already framed charges under the POCSO Act, 2012. ..."

Parties were afforded an opportunity to put forward their submissions if any in this context. The witness (Dr. Soma Roy) was not examined on that day and directed to appear on receipt of fresh summons from the Court. On 21.06.2016 the parties submitted that charge under Section 5(j)(ii) of the POCSO Act, 2012 was required to be added. The Court further noted that the charge under Section 376(2) of the IPC, 1860 was to be altered so as to indicate the specific charge *viz.* Section 376(2)(i) of the IPC, 1860. The charges as mentioned above were accordingly added and altered respectively, to which the Appellant once again entered a plea of "not guilty." The Court then considered it appropriate to hold a *de novo* trial and ordered accordingly by issuing summons to the Prosecution witnesses, which now numbered seventeen, with the addition of the Headmaster of the School which the victim had attended. (The propriety of ordering a *de novo* trial shall be discussed subsequently). On closure of prosecution evidence the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 *(for short "Cr.P.C., 1973")* thereby extending an opportunity to him to explain the incriminating evidence appearing against him. Final arguments of the parties were then advanced and the learned trial Court on the basis of the evidence and materials placed before it convicted the Appellant and sentenced him as already detailed hereinabove.

8. While considering the evidence of the Prosecution witnesses it is established that the Appellant and the victim were known to each other. The

evidence of P.W.7 reveals that sometime in June, 2014 she became friendly with the Appellant after getting his number from P.W.8, her friend, and conversed with him on the cell phone. A few days later she met with the Appellant in the house of P.W.8. Later, that same evening, the Appellant called her and they met in a vacant house near the house of P.W.8 where she stated unequivocally that they had sexual intercourse. P.W.8, a friend of the victim admitted that she gave the Appellant's phone number to the victim and was witness to the fact that the victim and the Appellant had met each other. That, the victim had revealed to her that she had spent a night with the Appellant in a vacant house located near the house of the witness. P.W.13 and P.W.12 both Doctors, examined the victim on 17.12.2014. P.W.13 Dr. Bishal Pradhan, Medical Officer at District Hospital, Namchi had examined the victim at around 1.50 p.m. on 17.12.2014 i.e. the same day the FIR was lodged. The victim had been brought with an alleged history of sexual assault by the Appellant but no fresh injury was detected on her person. He accordingly referred her to the concerned Gynaecologist P.W.12 Dr. Rajesh Kharel. On examining the victim on the same day, P.W.12 also found no external injuries on her person including her genital. According to this witness the ultrasonography of the victim previously done indicated that she was 24 weeks pregnant. There was however no indication of recent sexual assault. Thereupon he prepared the Medical Report Exhibit 17. It would be trite to point out that since the offence was allegedly committed in June, 2014 and the victim examined in December, 2014, fresh injuries on her person would be out of the question in the absence of allegations of any recent sexual assault. P.W.11 the complainant, brother-in-law of the victim on coming to learn of the victim's pregnancy much later in time, lodged the FIR Exhibit 15.

9. That, the Appellant was the biological father of the victim's son is conclusive from the following evidence; the Pathologist, Dr. Tashi Ongmu Bhutia P.W.10, had drawn the blood samples of the Appellant, the victim and the new born baby on 21.05.2015, on the request of the Police. She was assisted by P.W.4 Man Singh Kalikotey and P.W.5 Ms. Prerna Rai, both Lab Technicians working under her. The blood samples were drawn on filter paper and cotton gauze which were identified by her as MO II the filter paper and cotton gauze piece containing the blood sample of the Appellant, MO III the identical articles pertaining to the victim and MO IV as that of the baby. P.W.4 and P.W.5 would by their evidence substantiate

as much. The Investigating Officer P.W.17 supported this evidence and added that the blood samples were obtained pursuant to a Court order and forwarded to the Central Forensic Science Laboratory *(for short "CFSL")*, Kolkata for DNA profiling/analysis. The CFSL Report revealed that the Appellant was the biological father of the victim's baby and thereupon he filed the supplementary Charge-Sheet. P.W.1 Dr. Rajiv Gurung medically examined the Appellant and concluded that the Appellant was capable of performing sexual intercourse. Dr. Soma Roy, P.W.3., was posted at the CFSL, Kolkata and had examined the Exhibits forwarded to her i.e. MO II, MO III and MO IV as delineated *supra*. On having analyzed the samples she concluded that the genetic profile of the Appellant was consistent as being the biological father of the victim's son. The prosecution evidence on this count therefore does not falter.

10. Now to address the first doubt raised by learned Counsel for the Appellant, that Exhibit 2, the Birth Certificate prepared by the Registrar of Births and Deaths, Health and Family Welfare Department, Government of Sikkim was prepared *ante litem motam* and was therefore suspicious. On perusing Exhibit 2 it is revealed that it is the original Birth Certificate issued in the name of the victim by the Registrar, Births and Deaths, Health and Family Welfare Department, Government of Sikkim where the victim's date of birth is entered as 21.12.1996. The date of registration has been recorded as 24.03.1998. It is undoubtedly prepared almost fifteen months after the birth of the victim. Would this fact by itself make the document unreliable? According to the Black's Law Dictionary, *"ante litem motam"* means "before the law suit started." The principle would imply the meaning "before an action has been raised" or "before a legal dispute arose," at a time when the declarant had no motive to lie. The principle on which this restriction is based is succinctly stated in Halsbury's Laws of England, 3rd Edition, Volume 15 at page 308 in these words;

> "To obviate bias the declarations are required to have been made ante litem motam which means not merely before the commencement of legal proceedings but before even the existence of any actual controversy concerning the subject-matter of the declarations."

While discussing this principle, the Hon'ble Supreme Court in ***Murugan alias Settu* v. *State of Tamil Nadu*** *(supra)* held as follows;

> "**23**. In ***Mohd. Ikram Hussain v. State of U.P.*** this Court had an occasion to examine a similar issue and held as under: (AIR p. 1631, para 16)
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> > "16. In the present case Kaniz Fatima was stated to be under the age of 18. There were two certified copies from school registers which showed that on 20-6-1960 she was under 17 years of age. There [was] also the affidavit of the father stating the date of her birth and the statement of Kaniz Fatima to the police with regard to her own age. These amounted to evidence under the Evidence Act and the entries in the school registers were made ante litem motam. As against this the learned Judges apparently held that Kaniz Fatima was over 18 years of age. They relied upon what was said to have been mentioned in a report of the doctor who examined Kaniz Fatima,.... The High Court thus reached the conclusion about the majority without any evidence before it in support of it and in the face of direct evidence against it."
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> **24**. **The documents made *ante litem motam* can be relied upon safely, when such documents are admissible under Section 35 of the Evidence Act, 1872. (Vide *Umesh Chandra v. State of Rajasthan and State of Bihar v. Radha Krishna Singh*.)**
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> **25**. This Court in *Madan Mohan Singh v. Rajni Kant* considered a large number of judgments including *Brij Mohan Singh v. Priya Brat Narain Sinha, Birad Mal Singhvi v. Anand Purohit, Updesh Kumar v. Prithvi Singh, State Of Punjab*

> *v. Mohinder Singh,* ***Vishnu v. State of Maharashtra*** **and** ***Satpal Singh v. State Of Haryana*** **and came to the conclusion that while considering such an issue and documents admissible under Section 35 of the Evidence Act, the court has a right to examine the probative value of the contents of the document**. The authenticity of entries may also depend on whose information such entry stood recorded and what was his source of information, meaning thereby, that such document may also require corroboration in some cases.
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> **(emphasis supplied)**

The ratio *(supra)* establishes two points (i) that documents made *ante litem motam* can be safely relied upon when such documents are admissible under Section 35 of the Indian Evidence Act, 1872 *(for short "Evidence Act"),* and (ii) that the Court has the right to examine the probative value of a document admissible even under Section 35 of the same Act if it so requires. Exhibit 2 was prepared in 1998 while the FIR came to be lodged in 2014, thus it cannot be said that Exhibit 2 was prepared with a prior motive to distort the truth, consideration being taken of the age of the document and the date when the FIR was filed.

11. The next contention flagged by learned Counsel for the Appellant was that the contents and signature on Exhibit 2 the Birth Certificate remained unproved in the absence of examination of witnesses by the prosecution. While addressing this issue it would be pertinent to recapitulate the provisions of Sections 35 and Section 74 of the Evidence Act which are furnished hereinbelow for easy reference;

> "**35. Relevancy of entry in public [record or an electronic record] made in performance of duty**.-An entry in any public or other official book, register or [record or an electronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially

enjoined by the law of the country in which such book, register, or [record or an electronic record] is kept, is itself a relevant fact."

"**74. Public documents.-The following documents are public documents**:-

(1) Documents forming the acts, or records of the acts –

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, [of any part of India or of the Commonwealth], or of a foreign country;

(2) Public records kept [in any State] of private documents."

The seizure of the Birth Certificate Exhibit 2 has been established by P.W.2. Exhibit 2 fulfils the requirements of both Section 35 and Section 74 of the Evidence Act. No doubts were raised about the authenticity of Exhibit 2 by way of cross-examination of witnesses before the learned trial Court. Therefore, can this question be brought up before the Appellate Court. In ***Murugan alias Settu v. State of Tamil Nadu*** *(supra)* the Hon'ble Supreme Court further held as follows;

"**26. In the instant case, in the birth certificate issued by the Municipality, the birth was shown to be as on 30-3-1984; registration was made on 5-4-1984; registration number has also been shown; and names of the parents and their address have correctly been mentioned. Thus, there is no reason to doubt the veracity of the said certificate. More so, the school certificate has 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.** Both these entries in the school register as well as in the Municipality came much before the criminal prosecution started and those entries stand fully supported and corroborated by the evidence of Parimala (PW 15), the mother of the prosecutrix. She had been cross-examined at length but nothing could be elicited to doubt her testimony. The defence put a suggestion to her that she was talking about the age of her younger daughter and not of Shankari (PW 4), which she flatly denied. Her deposition remained unshaken and is fully reliable."
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> **(emphasis supplied)**

12. In the present appeal, as already pointed out, no objection was raised when the original Birth Certificate Exhibit 2 was admitted in evidence nor any issue raised on its probative value and objection to the document is being heard in the Appellate Court for the first time. Exhibit 2 for its part, a public document is admissible in evidence and in the absence of objection it is assumed that the Appellant has accepted its probative value. The learned trial Court had the option of seeking proof of its contents as held in ***Murugan alias Settu v. State of Tamil Nadu*** *(supra)* where reference was made to the ratio of ***Madan Mohan Singh***[6] but did not exercise the option. In ***Biradmal's*** case *(supra)* relied on by the Appellant, an Appeal before the Hon'ble Supreme Court was directed against the judgment and order of the High Court of Rajasthan, setting aside the election of the Appellant to the State Legislative Assembly of Rajasthan from Jodhpur City Assembly Constituency. The controversy in the Appeal related to the validity of the orders of the Returning Officer *inter alia* rejecting the nomination of one Hukmi Chand and Suraj Prakash Joshi. Neither the candidates nor their representatives were present before the Returning Officer at the time of scrutiny. In his nomination paper Exhibit 2, Hukmi Chand had given a "declaration" that he had completed twenty six years of age while Suraj Prakash Joshi had given a declaration in his nomination paper Exhibit 3, that he had completed twenty five years of age. The Returning Officer found that according to the entries in the "Electoral Roll" the age of Hukmi Chand was twenty three years while that of Suraj Prakash Joshi was twenty two years, thus it was held that the two candidates did not pass the requisite

[6] AIR 2010 SC 2933

qualifications to contest the elections. The Counsel for the Appellant urged that the Returning Officer in the admitted facts and circumstances could not be held to have acted improperly. The Respondent for his part pleaded that the nomination papers were improperly rejected and produced oral and documentary evidence to support his contention. Even before the High Court neither of the candidates whose nomination papers were rejected appeared nor their parents were examined by the Respondent nor any person having special knowledge about the date of birth of the two candidates were examined by the Respondent. The Respondent produced Exhibit 8 (a copy of the entries contained in the Scholar's Register), Exhibit 9 (counterfoil of Certificate of Board of Secondary Education of Hukmi Chand), Exhibit 10 (tabulation record of marks obtained by Hukmi Chand), Exhibit 11 (a copy of counterfoil of Certificate of Board of Secondary Education relating to Suraj Prakash Joshi) and Exhibit 12 (tabulation record of marks obtained by Suraj Prakash Joshi). *Before the High Court the Appellant raised a contention that there was no evidence to prove that Exhibits 8, 9, 10, 11 and 12 related to Hukmi Chand and Suraj Prakash Joshi and therefore the documents could not be pressed into service.* The contention therefore was that the Exhibits could not be proved to pertain to the two individuals named, in other words, the identity of the two individuals Hukmi Chand and Suraj Prakash Joshi were not established. In the instant case, there is no dispute with regard to the identification of the victim or that Exhibit 2, Exhibit 9 and Exhibit 10 pertained to her. It was also not disputed that Exhibit 2 and Exhibit 10 were public documents. The Hon'ble Supreme Court in ***Sham Lal alias Kuldip's*** case *(supra)* held as follows; "

> **21.** One of the documents relied upon by the learned District Judge in coming to the conclusion that the plaintiff is the son of the deceased Balak Ram is Ext. P-2, the school leaving certificate. The learned District Judge, while dealing with this document has observed:
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> > **"On the other hand, there is a public document in the shape of school leaving certificate, Ext. P-2 issued by Head Master, Government Primary School, Jabal Jamrot recording Kuldip Chand**

> **alias Sham Lal to be the son of Shri Balak Ram. In the said public document as such Kuldip Chand alias Sham Lal was recorded as son of Shri Balak Ram."**
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> **The findings of the learned District Judge holding Ext. P-2 to be a public document and admitting the same without formal proof cannot be questioned by the defendants in the present appeal since no objection was raised by them when such document was tendered and received in evidence.**
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> **22. It has been held in *Dasondha Singh* v. *Zalam Singh [16 (1997) 1 PLR 735 (P&H)]* that an objection as to the admissibility and mode of proof of a document must be taken at the trial before it is received in evidence and marked as an exhibit. Even otherwise such a document falls within the ambit of Section 74, Evidence Act, and is admissible per se without formal proof." (emphasis supplied) Crl. A. No. 15 of 2017** 18 **Lakhi Ram Takbi** vs. **State of Sikkim**

Thus the above ratio clarifies that where a public document had been admitted without formal proof the same cannot be questioned by the defence at the stage of appeal since no objection was raised by them when such document was tendered and received in evidence.

13. With reference to the point raised by learned Counsel for the Appellant in ***Sham Lal's*** case *(supra)* and relied on in ***Sancha Hang's*** case *(supra)*, it is pertinent to point that the standards of proof in a criminal case and a civil suit undoubtedly differ. A criminal case is to be proved "beyond a reasonable doubt" while a civil suit requires a "preponderance of probabilities," but it may be borne in mind that so far as proof of documents is concerned the Evidence Act makes no such demarcation and the same standards apply for proof therein.

14. While considering the argument of learned Counsel for the Appellant that the original School Register where the date of birth of the victim was entered was not produced before the learned trial Court is belied by the statement of P.W.6, the Headmaster of the School which the victim attended, who has clearly deposed as follows;

> *"... In connection with this case, I am to state that the minor victim was earlier a student of our school. She had been admitted in our school in the Pre-Primary Section meaning thereby that our school is the first school attended by her. Her date of birth recorded in the concerned School Admission Register is 21.12.1996. The details of her parents are also recorded in the said Register.* ***I have produced the original Register today and pray that it be returned to me after retaining the certified copies of the relevant portions/entries in this Court as the Register is required in the school almost on a daily basis****. Copies of the relevant portions/entries are made for retaining it in the case records. Copies thereof have also been made over to the accused."*
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> **(emphasis supplied)**

The order dated 16.08.2016 of the learned trial Court also lends credence to the above statement which records that the Register was produced. Exhibit 9 is the certified copy of the entry in the concerned Register pertaining to the age of the victim on the basis of which the witness had issued Exhibit 10, the Certificate of date of birth of the victim, bearing his seal and signature. According to him the date of birth of P.W.7 as recorded in the concerned School Admission Register is 21.12.1996. The witness pointed out to the relevant entries in the Register pertaining to the victim. The details of her parents are also recorded in the said Register. The fact of entry of the date of birth of the victim and details regarding her parents went undecimated in cross-examination. No questions were raised in cross-examination about proof of the entries or on whose authority the entries had been made. For that matter the entries in Exhibit 10, the Certificate issued by P.W.6, based on the entries made in the Register, indicating the date of birth of the victim as

21.12.1996 remained undemolished. We may refer to the decision in ***Umesh Chandra vs. State of Rajasthan***[7] wherein the Hon'ble Supreme Court while discussing the provisions of Section 35 of the Evidence Act *inter alia* held that;

> "... Under Section 35 of the Evidence Act, all that is necessary is that the document should be maintained regularly by a person whose duty it is to maintain the document and there is no legal requirement that the document should be maintained by a public officer only. The High Court seems to have confused the provisions of Sections 35, 73 and 74 of the Evidence Act in interpreting the documents which were admissible not as public documents or documents maintained by public servants under Sections 34, 73 or 74 but which were admissible under Section 35 of the Evidence Act which may be extracted as follows:
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> "35. Relevancy of entry in public record, made in performance of duty.-An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such books, register or record is kept, is itself a relevant fact."
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> (emphasis supplied)
>
> A perusal of the provisions of Section 35 would clearly reveal that there is no legal requirement that the public or other official book should be kept only by a public officer but all that is required is that it should be regularly kept in discharge of her official duty. ..."

On the essence of the ratio *(supra)* and in light of the evidence on record furnished by P.W.6 Headmaster, there is no reason to doubt the entries in the School Admission Register and Exhibit 10. On this aspect we

[7] (1982) 2 SCC 202

may beneficially garner support from the ratio in ***Mahadeo vs. State of Maharashtra***[8] wherein the Hon'ble Supreme Court held as follows;

> "**12**. We can also in this connection make reference to a statutory provision contained in the Juvenile Justice (Care and Protection of Children) Rules, 2007, where under Rule 12, the procedure to be followed in determining the age of a juvenile has been set out. We can usefully refer to the said provision in this context, inasmuch as under Rule 12(3) of the said Rules, it is stated that:
>
> "**12.(3)** In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, by the Committee by seeking evidence by obtaining- (a)(i)the matriculation or equivalent certificates, if available; and in the absence whereof;
>
> (ii) the date of birth certificate from the school (other than a play-school) first attended; and in the absence whereof;
>
> (iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;"
>
> Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rules 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the **same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well**."
>
> **(emphasis supplied)**

It may be relevant to note that the afore-extracted provision of Rule 12(3)(a)(i) of the Juvenile Justice (Care and Protection of Children) Rules,

[8] (2013) 14 SCC 637

2007, now finds place in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The date of birth of the victim was produced from the School first attended by the victim and therefore can be relied upon. Hence, considering the evidence of the Headmaster P.W.6, there is no reason to doubt either Exhibit 10, or the original School Register where entries of date of birth of the victim were made, as extracted in Exhibit 9, or the age of the victim. Therefore, Exhibit 10 also stands the prosecution in good stead with regard to the age of the victim. Exhibit 10 and Exhibit 2 bear the same date of birth of the victim i.e. 21.12.1996, thereby indicating consistency and establishing the victim's minority at the time of offence.

15. Now the next question is with regard to the belated lodging of the FIR, Exhibit 15. This Court has oft referred to the ratio in ***State of Himachal Prasad vs. Prem Singh***[9] wherein the Hon'ble Supreme Court held as follows:

> "**6**. So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition-bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR."

In the instant matter it is evident that the victim did not confide in anyone about her pregnancy and only when the complainant, P.W.11, came to learn of it the FIR, Exhibit 15 came to be lodged. The mortification and the apprehension of ignominy in the minds of the parents and the fear of reprisal as well in the mind of the victim appear to have led to the situation and are all sufficient therefore to explain and condone the delay in the lodging of the FIR, on the anvil of the ratio *supra*.

16. Although the victim has not stated that the Appellant used force on her and committed the offence and in all probability the act was consensual however the fact remains that the victim was a minor at the relevant time

[9] (2009) 1 SCC 420

and her consent would therefore be irrelevant. Section 375 of the IPC, 1860 which defines the offence of rape and can be extended to the matter at hand, which at clause six provides that a man is said to commit rape, with or without consent of the victim, if she is under eighteen years of age.

17. Besides, Section 30 of the POCSO Act, 2012 provides for presumption of culpable mental state and reads as follows;

> "**30. Presumption of culpable mental state**.-(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

It is evident from the provision delineated that the absence of culpable mental state has to be established beyond a reasonable doubt. It is also relevant to point out that in the reverse burden of proof as postulated in Section 30 *(supra)*, it is not a preponderance of probability but "beyond reasonable doubt," thereby distinguishing it from rebuttable presumption such as required under Section 304B of the IPC, 1860, which is to the extent of existence of a preponderance of probability. In ***Hiten Dalal P. Dalal vs. Bratindranath Banerjee***[10] the Hon'ble Supreme Court while dealing with an appeal under Section 138 of the Negotiable Instruments Act, 1881 *(for short "N.I. Act, 1881")* and considering the words "shall presume" as appears in Sections 138 and 139 of the N.I. Act, 1881 held as follows;

> "**22**. Because both Sections 138 and 139 require that the Court "**shall presume**" the liability of the drawer of the cheques for the amounts for which the cheques are drawn,

[10] AIR 2001 SC 3897

as noted in *State of Madras vs. A. Vaidvanatha Iyer MANU/SC/0108/1957MANU/SC/0108/1957 : 1958CriLJ232 : 1958CriLJ232*,
it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. **"It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused"**
(ibid). Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the court "may presume" a certain state of affairs.
Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. **In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary**. .....

24. .... In the case of a discretionary presumption the presumption if drawn may be rebutted by an explanation which "might reasonably be true and which is consistent with the innocence" of the accused. On the other hand in the case of a

mandatory presumption "the burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under S. 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. **The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by 'proof' and not by a bare explanation which is merely plausible**. **A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the Crl. A. No. 15 of 2017** 25 **Lakhi Ram Takbi** vs. **State of Sikkim presumption created by the provision cannot be said to be rebutted**..."

(emphasis supplied)

The ratio clears the air on the burden resting on the accused and clarifies that where the statute so demands no discretion rests with the Court, save to draw the statutory conclusion, while at the same time allowing the accused to rebut the presumption, which under the POCSO Act, 2012 demands it to be beyond a reasonable doubt.

18. Turning our attention to the propriety of a *de novo* trial ordered by the learned trial Court the provisions of Section 216(4) of the Cr.P.C., 1973 undoubtedly clothes the Court with powers to add or alter charges and provides as follows;

"**216. Court may alter charge**.-
(1).....
(2).....
(3).....

> (4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court to prejudice the accused or the prosecutor as aforesaid, **the Court may either direct a new trial or adjourn the trial for such period as may be necessary**."
>
> **(emphasis supplied)**

A glance at the provision, would unearth that any direction given by the Court for further trial or directing fresh trial is to be judged on the touchstone of prejudice to the accused or the prosecution. In our considered opinion, if the charge is of the same species the Court ought to be circumspect in ordering a retrial. Once the charge is added or altered, evidence can be led for the limited purpose of the added and altered charge. A *de novo* trial in the instant matter was obviously not necessitated as is apparent from the evidence of the fifteen witnesses examined prior to the added/altered charge that they have had nothing to add to their evidence recorded earlier. PW 3 and PW 6 were the only witnesses who were in fact required to be examined pursuant to the added/altered charge. It is another issue altogether that the pregnancy of the victim was not discovered during the course of the trial which thereby prompted the Court to add the charge under Section 5(j)(ii) of the POCSO Act, 2012 subsequently. It was clearly mentioned in the Charge-Sheet, thereby indicating that the Court failed to act diligently when the charges were framed in the first instance. The Hon'ble Supreme Court in ***State of Madhya Pradesh* vs. *Bhooraji and Others***[11] while dealing *inter alia* with the question of *de novo* trial held as follows;

> "*8.* …A de novo trial should be the last resort and that too only when such a course becomes so desperately indispensable. It should be limited to the extreme exigency to avert "a failure of justice". Observing that any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a de novo trial, ..."

In ***Ajay Kumar Ghoshal and others vs. State of Bihar and Another***[12] while explaining *de novo* trial, the Hon'ble Supreme Court observed;

[11] AIR 2001 SC 3372
[12] (2017) 12 SCC 699

"**12.** "De novo" trial means a "new trial" ordered by an appellate court in exceptional cases when the original trial failed to make a determination in a manner dictated by law. The trial is conducted afresh by the court as if there had not been a trial in first instance. Undoubtedly, the appellate court has power to direct the lower court to hold "de novo" trial. But the question is when such power should be exercised. As stated in *Ukha Kolhe* v. *State of Maharashtra Ukha Kolhe v. State of Maharashtra,* the Court held that: *(AIR p. 1537, para 11)*

> "*11.* An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of retrial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient

> appreciation of the nature of the case or for other reasons." ..."

More recently in ***Mallikarjun Kodagali vs. State of Karnataka & Ors.***[13], the Hon'ble Supreme Court while rueing the rights of victims of crime held as follows;

> "**3**. The travails and tribulations of victims of crime begin with the trauma of the crime itself and, unfortunately, continue with the difficulties they face in something as simple as the registration of a First Information Report (FIR). The difficulties in registering an FIR have been noticed by a Constitution Bench of this Court in *Lalita Kumari v. Government of Uttar Pradesh*. The ordeal continues, quite frequently, in the investigation that may not necessarily be unbiased, particularly in respect of crimes against women and children. Access to justice in terms of affordability, effective legal aid and advice as well as adequate and equal representation are also problems that the victim has to contend with and which impact on society, the rule of law and justice delivery.
>
> **4.** What follows in a trial is often secondary victimisation through repeated appearances in Court in a hostile or semi-hostile environment in the courtroom. Till sometime back, secondary victimisation was in the form of aggressive and intimidating cross-examination, but a more humane interpretation of the provisions of the Indian Evidence Act, 1872 has made the trial a little less uncomfortable for the victim of an offence, particularly the victim of a sexual crime. In this regard, the judiciary has been proactive in ensuring that the rights of victims are addressed, but a lot more needs to be done. Today, the rights of an accused far outweigh the rights of the victim of an offence in many respects. There needs to be some

[13] AIR 2018 SC 5206

balancing of the concerns and equalising their rights so that the criminal proceedings are fair to both. ..." Thus the emphasis now is to prevent secondary victimisation through repeated appearances in Court, for the victim, who has to face hostile or semi-hostile environment in the Courtroom. Consequently we deem it appropriate to observe that where the offences were of the same species and charges altered, efforts should be made by the Court to assess the necessity of a *de novo* trial and to ensure that the victims do not face secondary victimisation.

19. That having been settled the learned trial Court while pointing out that an error in framing of charge had occurred, in paragraphs 30, 31 and 32 of the impugned judgment has observed as follows;

"30. In the case in hand, charge against the accused has also been framed under section 376(2) (i) of IPC. However, from the wording of the charge it is evident that the charge was intended to be prepared under section 376(2) (j) of IPC. **It seems that there occurred clerical error while preparing charge and the charge is read and considered to have been prepared under section 376(2)(j) of IPC**.

31. On detail reading of the provision as laid down in section 376 of IPC it is noted that section 376(2)(j) deals with the situation where the victim is incapable of giving her consent due to some disability like intoxication, disease etc. But the section do not cover the person who is incapable of giving her consent being a minor. Therefore, I am of the view that the accused cannot be convicted under section 376(2)(j) of IPC but the evidence on record and in view of the discussion in the foregoing paragraphs it is clearly (sic) that there are sufficient evidence against the accused to prove the offence beyond doubt punishable under section 376 (1) of IPC,

> 1860. 32. In view of the above discussions and observation and upon careful consideration of the evidence on record I find that the prosecution has established the offence defined under section 3(a)/ 5(j)(ii) of POCSO Act punishable under section 4/6 of POCSO Act, 2012 and the offence punishable under section 376(1) of IPC, 1860 beyond reasonable doubt."
>
> **(emphasis supplied)**

It would be relevant to point out that charge was framed under Section 376(2)(i) of the IPC, 1860 on 21.06.2016. It is clear from a perusal of Section 376(2) of the IPC, 1860 that Clause (i) was omitted by Act 22 of 2018, sec. 4(b) (w.r.e.f. 21.04.2018). Clause (i), before omission, stood as under: "(i) commits rape on a woman when she is under sixteen years of age; or". The charge under Section 376(2)(i) of the IPC, 1860 was thus framed as per the then existing provision. Hence the question of a clerical error does not arise. However, the charge under Section 376(2)(i) of the IPC, 1860 is indeed irrelevant for the instant matter, inasmuch as the victim was seventeen years and six months at the time of the offence, thus it is not necessary to delve further into this issue. The charge under Section 3 (a) and Section 5(j)(ii) of the POCSO Act, 2012 suffices for the present purposes. We may however pertinently point out that so far as sentence is concerned Sections 3(a)/4 and Sections 5(j)(ii)/6 of the POCSO Act, 2012 both provide for fine in addition to incarceration. No fine has been imposed by the learned trial Court and no explanation ensues thereof. Hence, the sentences meted out to the Appellant by the learned trial Court stands modified to the following extent; (i) The Appellant is sentenced to undergo Rigorous Imprisonment of seven years under Section 3(a) punishable under Section 4 of the POCSO Act, 2012 and to pay a fine of Rs.2,000/- (Rupees two thousand) only, in default thereof to undergo Simple Imprisonment of one month. (ii) He shall undergo Rigorous Imprisonment of ten years under Section 5(j)(ii) punishable under Section 6 of the POCSO Act, 2012 and shall pay a fine of Rs. 2,000/- (Rupees two thousand) only, in default thereof to undergo Simple Imprisonment of one month. The sentences of imprisonment shall run concurrently as already ordered.

20. It is further noticed that the learned trial Court has failed to make any order for payment of compensation to the victim as is wont. We thus invoke

the provisions of the Sikkim Compensation to Victims or his Dependents Schemes, 2011, as amended in 2016. In terms of the said Scheme, a sum of Rs.3,00,000/- (Rupees three lakhs) only, is awarded as compensation to the victim and shall be made over to the victim by the Sikkim State Legal Services Authority, upon due verification.

21. In conclusion, save to the extent of the modification *supra* the impugned judgment and order on sentence brook no interference.

22. Appeal fails and is dismissed.

23. No order as to costs.

24. Copy each of this judgment be sent to the learned trial Court along with its records and to the Member Secretary, Sikkim State Legal Services Authority forthwith, for information and compliance.

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