THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Dated : 28th October, 2024

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.14 of 2024

Appellant : State of Sikkim

versus

Respondent : Lall Bahadur Rai

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

Appearance

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

Mr. Karma Thinlay, Senior Advocate with Mr. Chetan Sharma, Mr. Yashir N. Tamang and Mr. Zamyang N. Bhutia, Advocates for the Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The State-Appellant is aggrieved by the acquittal of the Respondent by the Court of the Learned Special Judge (POCSO), at Namchi, Sikkim, vide Judgment dated 29-11-2022, in Sessions Trial (POCSO) Case No.19 of 2019 (*State of Sikkim vs. Lall Bahadur Rai*), under Section 9(m) and Section 9(n), both offences being punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, the "POCSO Act") and under Section 354 of the Indian Penal Code, 1860 (hereinafter, the "IPC").

2. The Learned Trial Court while acquitting the Respondent of the offences charged with, was loathe to rely on the evidence of PW-1 the victim, PW-2 the step father of the victim, PW-3 the mother of the victim and PW-6 Staff of a Child Care Institution (CCI). The following reasons weighed with the Learned

Trial Court while acquitting the Respondent/Accused. PW-1 who deposed that the Respondent touched her vagina, did not remember the date, month or year of the incident neither did PW-2, her step father or PW-3 her mother, who in her evidence before the Court deposed that, the incident had occurred two years prior to the recording of her evidence before the Court. The Court reasoned that, as PW-3 was examined on 08-04-2021, the incident could be presumed to have occurred sometime during 2019, but PW-2 had lodged Ext-2 on 20-12-2018 and contrarily deposed that the incident occurred during 2019. The Court observed that there was no corroboration with regard to the time lines of the incident or the lodging of the FIR. PW-2 deposed that he was informed by the victim in 2019 that the Respondent had fondled her 'private part' but under cross-examination denied knowledge about the incident or of the victim having narrated it to him. That, he lodged Ext-2 on being asked by one Gopal Rai, to do so who however was not furnished as a Prosecution witness, depriving the Court of the benefit of the latter's evidence. As per PW-6 a staff of the CCI, she went with her team to the house of PW-1 after receiving a call in the Helpline number in December 2018, where PW-1 narrated the incident of sexual assault to her following which PW-6 accompanied PW-2 to lodge the FIR. The Court observed that PW-6 made no mention of who she had received the call from or who her team comprised of nor did she mention the presence of any Gopal Rai at the Police Station. The Court was of the view that the above contradictions in the evidence of PW-1, PW-2, PW-3 and PW-6 with regard to the lodging of Ext-2 and the incident was "confusing" and that lodging of Ext-2 did not lend credence to the case of the Prosecution. That, PW-2 had handed over Ext-4, the victim's

original birth certificate to the Police but under cross-examination denied knowledge of the victim's actual date of birth. The Court however concluded that the victim was below twelve years, taking recourse to Ext-6, entry of the victim's date of birth in the school admission register and Ext-13 viz; certification that victim's date of birth was found in Ext-14, the relevant Birth Register of the Primary Health Centre and identified by PW-9. That, the victim in her statement under Section 164 Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C.") stated that during the relevant time she was playing with her brother, the Court observed that the place of occurrence according to PW-2 was a busy thoroughfare. That, PW-3 their mother stated that PW-1 was playing with her minor brother in the courtyard of her house, while PW-3 was working in a nearby field and could hear the voices of her children. When she failed to hear them, she returned home and saw PW-1 on the lap of the Respondent but during cross-examination PW-3 deposed that, she did not witness the incident. That, the cross-examination of the victim revealed that the Respondent loved them both, raising the possibility of the victim having been tutored as she was only 8 — 9 years old at the relevant time. The younger brother of PW-1 was not arraigned as a witness nor examined by the Prosecution. PW-7, the Station House Officer who registered Ext-2 mentioned that the FIR was lodged three days after the incident but his evidence did not indicate whether PW-2 was accompanied by PW-6 or Gopal Rai to the Police Station. The evidence of PW-9 the doctor, who examined PW-1 and the Respondent did not support the Prosecution case and PW-11 had merely conducted the investigation. That, the presumption under Section 29 of the POCSO Act could not be shifted to the Respondent as held by this

Court and the Hon'ble Supreme Court of India. The Court also found that though the Prosecution examined eleven witnesses, there was no evidence worthy of consideration and the possibility thereby of false implication could not be ruled out, hence the Court acquitted the Respondent.

3. Learned Additional Public Prosecutor opening his arguments for the State-Appellant contended that at the time of the offence PW-1 was eight years old while the Respondent was fifty. That, there is no opposition to the finding regarding the age of the victim. The FIR, Ext-2 was lodged on 20-12-2018 by PW-2, where he has categorically complained that his eight year old daughter was sexually assaulted by the Respondent. Pursuant thereto, the statement of PW-1 under Section 164 of the Cr.P.C. was recorded on 28-12-2018 and her statement before the Court was recorded almost a year later. Despite the lapse in time, the evidence regarding the incident of sexual assault perpetrated on her by the Respondent stood the test of cross-examination. The Learned Trial Court without basis or enumerating reasons for her opinion assumed that the child could have been tutored but failed to examine and consider that her statement under Section 164 Cr.P.C. and her deposition before the Court corroborated each other and had withstood the cross-examination. That, PW-2 and PW-3 had corroborated the victim's statement with regard to the occurrence of the incident. That, minor discrepancies that may have arisen in the deposition of PW-2 pertaining to the date of the incident most likely occurred on account of PW-2 being a rustic farmer and lacking education but the case of sexual assault was not decimated by such discrepancy and stood on the bedrock of the victim's evidence. That, the Prosecution case of sexual assault has

been established and mere delay in the lodging of Ext-2 was not fatal to the Prosecution case. The Learned Trial Court was thus in error in having acquitted the Respondent. Reliance was placed on ***Tshering Thendup Bhutia*** vs. ***State of Sikkim***[1] and ***State of Sikkim*** vs. ***Pintso Bhutia***[2] of this Court to buttress his submissions.

4. Repelling the arguments of the Prosecution, it was canvassed by Learned Senior Counsel for the Respondent that consistent anomalies arose in the Prosecution case as according to the FIR the Respondent took PW-1 on his lap and touched her private part. According to PW-1 the incident occurred after she returned from school and was playing with her younger brother in the "courtyard" of their house. Contrary to the evidence of PW-1, PW-3 the victim's mother, stated that "…..*When I reached my 'home' I saw the accused person keeping my victim daughter on his lap……."*. That, on seeing her, the Respondent left her child on the floor and went out of her house. Her cross-examination contrarily indicates that she could hear and see the person in the courtyard of her house from the field where she was working. Thus, the place of incident is unidentified being mired in confusing evidence as seen *supra*. PW-2 under cross-examination admitted that PW-1 did not narrate the occurrence of the incident to him. He was admittedly unaware of the contents of Ext-2, which he lodged on the compulsion of one Gopal Rai who however was not furnished as a Prosecution witness. As per PW-3, her minor son was very talkative, contrarily the Investigating Officer (IO) PW-11 deposed that as the boy was of tender years he could not articulate his thoughts and was thus not furnished as a Prosecution witness.

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[1] 2024 SCC OnLine Sikk 33
[2] 2023 SCC OnLine Sikk 41

Two contradictory views thereby emerge on the verbal competence of the victim's brother. That, in all likelihood the child was not cited as Prosecution witness having been sent to fetch water for the Respondent and did not witness the alleged incident. The non-production of Gopal Rai and the victim's minor brother as Prosecution witnesses leads to an adverse inference against the Prosecution case. Reliance was placed on ***Govindraju alias Govinda*** vs. ***State by Sriramapuram Police Station and Another***[3] and ***Nirmal Premkumar and Another*** vs. ***State represented by Inspector of Police***[4]**.** The predicament thus is whether the FIR is to be relied on or the evidence of PW-2. To support this contention reliance was placed on ***National Insurance Company Limited*** vs. ***Chamundeswari and Others***[5]. That, in an effort to explain the delay in the lodging of the FIR, the Prosecution has insinuated that the Respondent came to the victim's house with his family attempting to reconcile the matter but no evidence fortifies such an allegation. While outlining the powers of an Appellate Court in matters of acquittal, succour was drawn from ***Jafarudheen and Others*** vs. ***State of Kerala***[6] and ***Ballu and Another*** vs. ***State of Madhya Pradesh***[7]. It was also argued that the Prosecution must first establish its case, in the absence of which, a reverse burden cannot be cast upon the Respondent as held in ***State of Sikkim*** vs. ***Karna Bahadur Rai***[8]. Hence, the impugned Judgment warrants no interference.

5. The rival contentions having been heard and considered and all records perused. It would be apposite firstly to look at the decision of the Supreme Court in ***Jafarudheen*** (*supra*) relied on by

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[3] (2012) 4 SCC 722
[4] 2024 SCC OnLine SC 260
[5] (2021) 18 SCC 596
[6] (2022) 8 SCC 440
[7] 2024 SCC OnLine SC 481
[8] 2020 SCC OnLine Sikk 33

Learned Senior Counsel for the Respondent which *inter alia* lays down the powers for an Appellate Court while considering an appeal against acquittal. The Supreme Court observed therein *inter alia* that the Appellate Court has to consider whether the trial court's view can be termed as a possible one, particularly when the evidence on record has been analysed, as an order of acquittal adds up to the presumption of innocence in favour of the accused, requiring the Appellate Court to be relatively slow in reversing the order of acquittal of the trial court. Such a double presumption that enures in favour of the accused is to be disturbed only by thorough scrutiny on the accepted legal parameters. The Judgment also considered the rulings in ***Mohan alias Srinivas alias Seena alias Tailor Seena*** vs. ***State of Karnataka***[9], ***Anwar Ali and Another*** vs. ***State of Himachal Pradesh***[10] and ***Babu*** vs. ***State of Kerala***[11] and a plethora of other decisions on the point.

(i) Relevantly, it may be noticed that in ***Sadhu Saran Singh*** vs. ***State of Uttar Pradesh and Others***[12] the Supreme Court opined as follows;

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

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[9] (2022) 12 SCC 619
[10] (2020) 10 SCC 166
[11] (2010) 9 SCC 189
[12] (2016) 4 SCC 357

> views and against settled position of law, then the interference of the appellate court with such an order is imperative.**"** **[emphasis supplied]**

(ii) In ***Harijan Bhala Teja*** vs. ***State of Gujarat***[13] the Supreme Court held as follows;

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

6. Indeed this Court is conscious and aware that, the High Court is to be slow in interfering with appeals against acquittals, yet it cannot remain a mute spectator, when, on analyzing the evidence on record it arrives at a finding that there has been a travesty of justice. Courts have the rather onerous duty of sifting the chaff from the grain and it cannot be denied that Courts are clothed with the duty of culling out the truth from the evidence furnished, to analyze whether the inconsistencies in the Prosecution case are so glaring as to decimate it in its entirety. It may be reiterated that the Courts not only have the responsibility of ensuring that an innocent man does not suffer the travails of incarceration but are also to ensure that a guilty man does not go unpunished.

(i) The above views of the Supreme Court therefore can be summarized by stating that the role of the High Court as an Appellate Court is ultimately to mete out even handed and if perversity is found in the Judgment of the Trial Court which is

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[13] (2016) 12 SCC 665

against the weight of evidence, the hands of the High Court are not tied.

(ii) On the anvil of these observations, while considering the Judgment of acquittal of the Learned Trial Court the reasons given thereof and the arguments regarding inconsistencies in the evidence of the witnesses the question that falls for determination before this Court is;

> *Whether the Prosecution case of sexual assault for which the Respondent was charged under Section 9(m) and Section 9(n) of the POCSO Act and Section 354 of the IPC stands demolished by minor contradictions in the witnesses evidence?*

It would have to be answered with a resounding 'No', as PW-1 who is the victim of the sexual assault by a predator aged fifty years has been consistent in her evidence pertaining to the sexual assault perpetrated on her. Before the Court she stated as follows;

> **"**..... I do not remember the date, month and the year but on that day my mother had gone to potato field and even my father was not present at home. After coming from school, I along with my brother were playing outside the courtyard of our house. During that time, the accused had come from Ravangla and asked us whether my teachers came today to school or not. **I replied yes and at that time the accused called me and kept me on his lap and he fondled my breasts and also touched *ish garney* (*vagina*)**. Thereafter, my mother came from the potato field. Seeing her, the accused person ran away from our house and at the same time my brother also narrated the entire incident to our mother. .....**"** **[emphasis supplied]**

(iii) In the Court she was confronted with Exbt-1, her statement under Section 164 Cr.P.C. recorded by a Magistrate which she identified and confirmed as having been made by her. She stated therein as follows;

> **"**..... When my brother Pujan and I were sitting under the tree near our house, L.B. "*kopa*" (grandfather) came towards us and made me sit on his lap and started asking whether my teachers came today to school. **I replied yes and at that time he touched my chest by sliding his hands under my t-shirt and also touched my "*pisap garney*" vagina by sliding his hands under my pants. I told him that I**

> **will tell my mother but he said not to tell. Later, he left hurriedly when my mother came searching for us.** My brother Pujan narrated the whole incident to my mother. ....." **[emphasis supplied]**

(iv) Relevantly, it must be mentioned that her statement under Section 164 of the Cr.P.C., Exbt-1, was recorded on 28th day of December, 2018 and her evidence before the Court was recorded on 10th day of December, 2019. Notwithstanding the passage of time of almost a year, she has been consistent and unwavering about the details of the sexual assault and no contradictions are found in her statements. The evidence of PW-1 withstood the prolix cross-examination and confirmed the fact of sexual assault as she stated;

> **"**..... It is not a fact that the accused did not fondle my breasts and did not touch my *ish garney* (*vagina*). ....."

Pertinently, notice is to be taken of the fact that prior to the recording of her evidence, the victim was examined by the Learned Trial Court to assess her competence to testify and she was found competent to depose despite her tender years. The assumption made by the Learned Trial Court about the child having been tutored, remains just that, i.e. an assumption, in the absence of evidence to augment it and being bereft of any reasoning by the Court itself and thereby deserves no consideration whatsoever. The inability of the victim to specify the date of incident cannot be a ground to raze the Prosecution case in the facts and circumstances put forth in the instant matter. Learned Senior Counsel for the Respondent was of the view that the FIR did not specifically mention the place of occurrence of the incident. It would do well to bear in mind that PW-1 was not the person who lodged the FIR, it was PW-2 her step father who did so and evidently was not well versed with the entire 'details' of the

incident, which is well expected, as he was not present at the place of occurrence. Nevertheless, he did report the sexual assault perpetrated on the victim by the Respondent as narrated to him by PW-3. Mere non-mentioning of the place of occurrence in the FIR does not demolish the Prosecution case. In this context, it is no more *res integra* that the FIR is not an encyclopedia. The Hon'ble Supreme Court in ***Amish Devgan*** vs. ***Union of India and Others***[14] while discussing the validity of first information reports (FIRs) observed as follows;

> **"113.** Acronym FIR, or the first information report, is neither defined in the Criminal Procedure Code nor is used therein, albeit it refers to the information relating to the commission of a cognizable offence. This information, if given orally to an officer in charge of the police station, is mandated to be reduced in writing. **Information to be recorded in writing need not be necessarily by an eyewitness, and hence, cannot be rejected merely because it is hearsay. Section 154 does not mandate nor is this requirement manifest from other provisions of the Criminal Procedure Code. Further, FIR is not meant to be a detailed document containing chronicle of all intricate and minute details**. In *Dharma Rama Bhagare* v. *State of Maharashtra* [*Dharma Rama Bhagare* v. *State of Maharashtra*, (1973) 1 SCC 537 : 1973 SCC (Cri) 421] it was held that an FIR is not even considered to be a substantive piece of evidence and can be only used to corroborate or contradict the informant's evidence in the court.**"** **[emphasis supplied]**

(v) In light of the above exposition, the lack of intricate details in the FIR is inconsequential as also information given by a third person, suffice it to have an FIR on record informing the police of an offence which would thereby set the wheels of the criminal justice system in motion.

(vi) The other inconsistencies raised by the Respondent were that, as per PW-1 the incident occurred in the courtyard outside their house, while from the evidence of PW-3 it can be assumed that it was inside her house. Firstly, both PW-3 and PW-

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[14] (2021) 1 SCC 1

1 have stated that PW-1 was on the lap of the Respondent when PW-3 came to the house. On this aspect no contradiction arises. Minor contradictions which arise during the recording of evidence and translation from the Nepali vernacular to English in fact requires the Judicial Officer to be vigilant in the Court room when such evidence is rendered, translated and recorded, to prevent anomalies. Nonetheless, these anomalies do not go to the root of the case of sexual assault, as the place of occurrence described by the Prosecution witnesses are not so disparate as to lead to a total disbelief of the Prosecution case of sexual assault. In my considered view, there is no reason to disbelieve the evidence of either the victim or her mother. The fact remains that the incident occurred within and around the precincts of the house of PW-3 and the minute description of the place of occurrence appears to have been lost in translation. The Trial Court also erroneously observed that a contradiction arose in the evidence of PW-3 who stated that she returned home and saw PW-1 on the lap of the Respondent but while being cross-examined deposed that she did not witness the incident. As evident, PW-3 has nowhere in her deposition claimed to have witnessed the incident of sexual assault, she merely saw the child on the Respondent's lap.

(vii) Learned Senior Counsel for the Respondent also pointed out that as per PW-3 the minor son was talkative but PW-11 deposed otherwise. In my considered view, the child of barely four years not being familiar with PW-11 could have been apprehensive and consequently reticent to speak to an uniformed police officer. The anxiety that the police uniform generates needs no description more so when the child, was only four years old. In fact, when examining the child the police officer ought not to have

been in uniform as prescribed under Section 24(2) of the POCSO Act. The Learned Trial Court observed that, the IO in his "Charge-Sheet" had justified that the child did not speak in front of the police. It would do well to realize that the Charge-Sheet cannot be considered by the Court as it is not an Exhibit in the case and the IO is to depose in Court about the facts within his knowledge. The Court cannot take recourse to the Charge-Sheet to test the veracity and justify the IO's evidence. The argument that Gopal Rai was not furnished as a Prosecution witness, in my considered opinion also does not aid the Respondent in his attempts to wriggle out from the offence or to prove his innocence. Examining Gopal Rai as a Prosecution witness in any event would in no way alter the facts and circumstances of the Prosecution case of sexual assault as it is no one's case that he was an eye witness to the incident, hence his alleged persuasion to lodge the FIR has no adverse repercussions on the Prosecution case, unless the Respondent was able to establish personal acrimony or vendetta of Gopal Rai against him, which he has not done even in his Section 313 Cr.P.C. statement neither has the evidence of any other Prosecution witness established acrimonious relations between the Respondent and the family of the victim which could have instigated them to falsely implicate the Respondent. PW-6 the staff of CCI, who on receiving the information had gone to the house of the victim and was told by her that *Kopa* (grandfather) had come to her house, asked her to sit on his lap and thereafter put his hand on her breasts and vagina.

(viii) After examining the deposition of the victim in Court and her statement under Section 164 Cr.P.C., the statements corroborate each other, are cogent, consistent and unwavering and

thereby gives this Court no reason to conclude that the offence was a figment of the victim's imagination or conjured up by her nor is there evidence of her having been tutored by any person. The evidence of PW-9, the doctor, would obviously have no bearing to the Prosecution case as the victim made no allegations of penetration by the Respondent either by digital methods, or with attempt to penetrate his genital into hers or by any other article. PW-9 during medical examination would not have been able to detect the fondling of the victim's genital which is the crux of the victim's case.

7. The delay in the lodging of the FIR, it is trite to mention does not dent the Prosecution case. The Supreme Court has held in ***State of Himachal Pradesh*** vs. ***Prem Singh***[15] that delay in lodging of FIR in such cases does not vitiate the Prosecution case and observed 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. ....."

8. Thus, having analyzed the entire evidence on record, I am constrained to opine that the Learned Trial Court was in error in acquitting the Respondent of the offences charged with despite the unwavering evidence of the child victim on record and her sole testimony suffices to convict the Respondent, her evidence being wholly trustworthy. It is settled law that the quality of a witness is of relevance and not the quantity. The Court was swayed by and

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[15] (2009) 1 SCC 420

impressed with peripheral extraneous and immaterial considerations which did not in any manner weaken the crux of the Prosecution case of sexual assault on a minor by an adult man of fifty years. The Supreme Court in ***Kuriya and Another*** vs. ***State of Rajasthan***[16] held as follows;

> **"30.** This Court has repeatedly taken the view that the discrepancies or improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened with reference to such minor or insignificant improvements. Reference in this regard can be made to the judgments of this Court in *Kathi Bharat Vajsur* v. *State of Gujarat* [(2012) 5 SCC 724 : (2012) 2 SCC (Cri) 740] , *Narayan Chetanram Chaudhary* v. *State of Maharashtra* [(2000) 8 SCC 457 : 2000 SCC (Cri) 1546], *Gura Singh* v. *State of Rajasthan* [(2001) 2 SCC 205 : 2001 SCC (Cri) 323] and *Sukhchain Singh* v. *State of Haryana* [(2002) 5 SCC 100 : 2002 SCC (Cri) 961]."

9. It may be reiterated here that a purposive interpretation is to be given to the POCSO Act and the specific mandate of Section 29 of the POCSO Act is to be extended due consideration. Matters concerning sexual offences against minors require to be dealt with sensitivity and the victim's case ought to be given due consideration in terms of Section 29 of the POCSO Act when the deposition is evidently trustworthy, moreso when the

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[16] (2012) 10 SCC 433

accused has failed to establish lack of culpable mind as required under Section 30 of the POCSO Act. Adult sexual predators ought not to be dealt with leniency or extended misplaced sympathy they ought to face the penalty that their acts deserve and should not be afforded leeway by the Learned Trial Court by micro analysis of time and place of incident.

10. In light of the above discussions, the impugned Judgment of the Learned Trial Court is accordingly set aside.

11. Vide the Charge framed against the Respondent on 20-11-2019, it is seen that he was charged with Sections 9(m) and 9(n), both punishable under Section 10 of the POCSO Act, along with a Charge under Section 354 of the IPC. It requires no reiteration that the object of a Charge is to give the accused notice of the offence said to have been committed by him and the allegation that he is required to meet. If the necessary information has been conveyed to him, then no prejudice can be said to have been caused to him. The Court is to concern itself with a fair trial and assess whether the accused was subjected to a fair trial. In that context, there is no doubt. In the said circumstances, the Respondent was aware of the Charges framed against him.

(i) That, having been said it is reiterated that the evidence of the child does not point to penetrative sexual assault. Consequently, the offence committed by the Respondent would be one under Section 7 punishable under Section 8 of the POCSO Act. Section 7 and Section 8 of the POCSO Act reads as follows;

> **"7. Sexual Assault.—**Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.
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> **8. Punishment for sexual assault.—**Whoever, commits sexual assault, shall be punished with

> imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.**"**

(ii) The provisions of Section 222(2) of the Cr.P.C. are accordingly invoked and the Respondent convicted of the offence under Section 7 punishable under Section 8 of the POCSO Act. In view of Section 71 of the IPC, it is not necessary to convict the Respondent under Section 354 of the IPC.

12. Appeal is allowed.

13. The Respondent is put to Notice that hearing on Sentence shall be taken up on the next date.

(Meenakshi Madan Rai)
Judge
28-10-2024

Approved for reporting : **Yes**

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