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THE HIGH COURT OF SIKKIM: GANGTOK

(Criminal Appeal Jurisdiction)

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

Crl. Appeal No. 05 of 2022

xxxxx (name redacted)
A/P State Central Prison,
Rongyek, East Sikkim.

..... Appellant

versus

State of Sikkim

..... Respondent

Appeal under Section 374(2) of the Code of Criminal Procedure, 1973.

Appearance:

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

Mr. Yadev Sharma, Additional Public Prosecutor and Mr. Sujan Sunwar, Assistant Public Prosecutor, for the Respondent.

Date of Hearing : 14.08.2024
Date of Judgment : 25.09.2024

JUDGMENT

Bhaskar Raj Pradhan, J.

1. The appellant was convicted for commission of the offence under Section 375 of the Indian Penal Code, 1860 (IPC) and sentenced under Section 376 thereof for commission of rape on his own daughter (victim).

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2. The appellant is aggrieved by the conviction and sentence and assails the impugned judgment rendered by the learned Special Judge, Protection of Children from Sexual Offences Act, 2012 (POCSO Act) Mangan, North Sikkim (the learned Special Judge) in Sessions Trial POCSO Act Case No. 07 of 2021.

The First Information Report (FIR)

3. The First Information Report (FIR) dated 27.06.2021 was lodged by the victim's aunt (P.W.1). It was stated that on 27.06.2021 the victim was overheard telling her cousin (P.W.6) that she was raped by her father (the appellant) multiple times at night at their residence since April 2021. In the FIR, P.W.1 also stated that the victim had bled due to the alleged act and when she cried, the appellant had covered her mouth and told her not to tell anyone threatening to kill her if she did.

The charge-sheet

4. The prosecution filed the charge-sheet alleging commission of rape by the appellant on the minor victim who was five years old.

The charge

5. The learned Special Judge framed charges against the appellant for offences under Section 5 (l), 5(m) and 5(n)

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of the POCSO Act punishable under Section 6 thereof. The learned Special Judge also framed charge under Section 375 for rape punishable under Section 376 IPC read with Section 506 IPC for threatening to kill her.

The Trial

6. During the trial, the prosecution examined 17 witnesses. The appellant's examination under Section 313 Cr.P.C. was conducted on 24.11.2021. The appellant said that he did not have cordial relationship with P.W.3 and P.W.4 as they disliked him. He also stated that he had come to know about the extramarital affair of his wife from P.W.3 and P.W.4 which fact was disclosed to him only after she had eloped. He stated that he had not committed the offence.

The appellant's case

7. This is an appeal filed by the appellant. The State of Sikkim, as in many other cases, chooses not to prefer an appeal.

8. The learned Counsel for the appellant submits that the prosecution has not been able to establish their case; that the victim's deposition is inconsistent and tutoring cannot be ruled out; that the medical evidence does not support the case of rape and although the victim was

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examined soon after the alleged incident there was no active bleeding or swelling; and that the depositions of the prosecution witnesses are inconsistent and contradictory raising serious doubts on their case.

The prosecutions submission

9. *Per contra* the learned Additional Public Prosecutor for the State respondent submits that the deposition of the victim, although a child of 5 years, was consistent with her statement recorded under Section 164 Cr.P.C.; that the forensic examination of her wearing apparel seized during investigation confirmed that there was blood on it; and that the deposition of the victim is corroborated by other prosecution witnesses and therefore the judgment of the learned Special Judge was correct and may not be interfered with.

Consideration

10. We therefore, venture to examine the evidence laid down by the prosecution to establish the charges framed against the appellant.

11. The victim deposed that she was a student studying in LKG. She identified the appellant as her father. She deposed that the appellant had committed penetrative sexual assault on her after undressing himself and her. She

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further stated that the appellant had committed the offence twice. She deposed that she was taken to the Hospital by her aunt where the doctor examined her private part. She also identified her wearing apparel - a frock (M.O.I). However, she did not depose about the threat given by the appellant.

12. The victim confirmed that she had also made a statement which was recorded under Section 164 Cr.P.C and identified her thumb impression therein. In her statement the victim had stated to the learned Magistrate on 29.06.2021 that two days ago the appellant, in a drunken state, had inserted his finger in her "private part". Consequently when she bled he wiped her blood with a cloth and paper. She also stated that the appellant had cupped her mouth, threatened her not to tell anyone about it and gave her Rs.10/-. She had stated that she had disclosed about it to P.W.6.

13. The learned Counsel for the appellant sought to make an issue of contradiction between the victim's statement and her deposition. It was argued that although the victim had stated that the appellant had inserted his finger in her "private part" in the statement recorded under Section 164 Cr.P.C., during her deposition, she had stated that the appellant had committed "penetrative sexual

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assault". The defence failed to seek any clarification from the victim during her cross-examination. "Penetrative sexual assault" as defined in Section 3 under the POCSO Act is wide enough to include penetration by different means. The victim of tender age may not have used the words "penetrative sexual assault". It is obvious that the victim's deposition in court was translated by the learned Special Judge. We are of the view that this cannot be termed as major contradiction to disturb the prosecution case.

14. During her cross-examination the victim on the suggestion of the defence stated:

> ***"****It is true that I was made to depose against my father by my Ani and Rxxxxx in this case. It is true that my father used to love me. It is not a fact that whatever statement I had made against my father in examination-in-chief are not true and correct****".***

15. The learned Counsel for the appellant submitted that due to this admission as quoted above it would be clear that the victim was tutored. P.W.1 was the victim's aunt. The defence did not even suggest that she had tutored the victim. The cross-examination of the victim also does not reflect that the defence even made an attempt to suggest that her deposition about penetrative sexual assault committed by the appellant was untrue.

16. P.W.6 is a child witness who is also named in the FIR as the victim's cousin to whom the victim had disclosed

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about the incident. P.W.6 deposed that the victim had told her that the appellant, after undressing himself and the victim, committed penetrative sexual assault which caused bleeding and pain on her private part. She further deposed that the victim told her that she had cried for help but her mouth was cupped by the appellant. She reiterated about the victim telling her about the commission of penetrative sexual assault by her father during her cross-examination and denied the suggestion that she was tutored. P.W.6 corroborated the victim's deposition.

17. P.W.7, yet another child witness studying in Class V, referred to the appellant as her brother-in-law. She also deposed about the victim disclosing to her about the appellant undressing himself and the victim and then committing penetrative sexual assault and threatening her not to divulge to anyone. During cross-examination, she admitted that although she had spent three nights with the victim she never disclosed about the offence during that period. P.W.7 also corroborated the victim's statement.

18. P.W.4 deposed that she had overheard the victim disclose to P.W.6 about the commission of penetrative sexual assault upon her after which she had inquired from the victim and confirmed the same. Thereafter, she informed about the incident to her sister-in-law (P.W.1). She also

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deposed that she and P.W.5 had taken the victim for medical examination. The medical report (exhibit-17) of the victim corroborates the fact that P.W.4 had taken the victim for medical examination.

19. The defence did not suggest either to P.W.4 or to P.W.3 that they did not enjoy a cordial relationship with the appellant since they had not disclosed about the extramarital affair of his wife which fact was disclosed to him only after she had eloped.

20. P.W.1 in the FIR lodged by her had stated that she had overheard the victim disclosing to P.W.6. However, when in the witness box, P.W.1 stated that P.W.4 had told her about it and clarified the actual fact. The cross-examination by the defence did not question either P.W.1 or P.W.4 on the contradiction between the FIR and the deposition of P.W.6. P.W.1, however, confirmed that the FIR had been lodged by her.

21. According to P.W.5, she too overheard the victim disclose to P.W.6 about the appellant undressing himself and the victim and climbing on top of her. On further inquiry, according to P.W.5, the victim had also disclosed about the appellant threatening her with dire consequences if she disclosed about the incident to any person. She confirmed having taken the victim for medical examination

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along with P.W.4. P.W.5 also corroborated the deposition of the victim.

22. The victim was examined by P.W.12 - the Medical Officer of the District Hospital, on 27.06.2021. Her medical examination indicates that her hymen was “ruptured”. Further, P.W.12 did not notice any bleeding from her private part or any signs of injury on her body. The learned counsel for the appellant stressed on this medical report (exhibit-17) to submit that the version of the victim was untrue.

23. The victim was examined on 27.06.2021. The victim during her deposition could not state exactly when the appellant had committed penetrative sexual assault upon her but she was certain that the appellant had committed the offence twice. The victim is said to be of tender age. It is difficult to expect clarity of date, time and place from a victim of that age who had undergone the trauma of being sexually abused by her own father. There was no reason for the victim to make false allegation against her own father who she loved if the offence had not been committed by him. The evidence does not even suggest so. It is certain that the appellant had committed penetrative sexual assault upon the victim. Merely because the Medical Officer (P.W.12) did not notice active bleeding or signs of injury on her body would not completely destroy the prosecution case. The

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Medical Officer (P.W.12) had noticed that the victim's hymen was "ruptured". Further, the Investigating Officer (P.W.17) had also seized the wearing apparel of the victim (MO-I), i.e., a frock, on 28.06.2021 which was kept under the bed in the appellant's house. The seizure memo (exhibit-3) was proved by the Investigating Officer (P.W.17) as well as P.W.4 and P.W.5 - the seizure witnesses. MO-I was then sent for forensic examination and the Junior Scientific Officer of Regional Forensic Science Laboratory (P.W.14) confirmed that he had detected human blood in MO-I. The forensic report (exhibit-21) was proved by him.

24. The deposition of the victim is also corroborated by MO-I - her frock, which had blood stains on it and her medical examination report (exhibit-17) which confirmed that her hymen had "ruptured".

25. P.W.16 was the Counsellor at the District Child Protection Unit before whom on 27.06.2021, P.W.4 had brought the victim for counselling. P.W.16 also confirmed that the victim had disclosed to her about the appellant having committed penetrative sexual assault on her more than one occasion. The defence did not choose to contradict P.W.16's statement in examination-in-chief that the victim had during the counselling session disclosed to her about

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the appellant having committed penetrative sexual assault on the victim several times.

26. From the above evidence, the prosecution has been able to prove the factum of commission of the alleged offences at least on two occasions on the victim by the appellant beyond reasonable doubt.

Appeal dismissed

27. Therefore, the appeal against the conviction and sentence of the appellant under Section 375/376 IPC must necessarily fail. The appeal filed by the appellant is dismissed.

Exercise of *suo motu* power of revision

28. The learned Special Judge has, however, acquitted the appellant for offences under Section 5(l), 5(m) and 5(n) of the POCSO Act holding that the prosecution had failed to prove certain documents relating to the victim's age although the appellant has been convicted for offence of rape under section 376 IPC. Even while doing so the learned Special Judge has recorded an observation that on the physical appearance of the victim she appears to be a minor. We therefore, propose to revisit the prosecution evidence regarding the victim's age.

29. The State respondent has failed to exercise the prerogative granted by the legislature under the provisions

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of Section 377 Cr.P.C. to file an appeal. This was their duty to protect the interest of the society and the victim. The failure of the State to file an appeal cannot deter us in doing substantial justice. The power of the Appellate Court to enhance the sentence is available under Section 386 (c) of the Cr.P.C. We propose to exercise that power although the State has failed to file an appeal for enhancement of sentence in the facts of this case as we are of the considered view that the judgment of conviction dated 26.11.2021 and sentence dated 27.11.2021, are grossly erroneous both on facts and in law. The learned Special Judge has failed to consider vital evidence placed by the prosecution. The learned Special Judge has also failed to consider the relevant provisions of the POCSO Act and the IPC and adequately sentence the appellant. This has led to grave injustice to the victim and the society. The findings as well as the sentence passed by the learned Special Judge are incorrect, illegal and improper. We are of the opinion that this is an exceptional case where this Court's power to enhance the sentence *suo motu* should be exercised. We therefore, exercise our *suo motu* powers of revision in terms of the judgment of the Supreme Court in ***Nadir Khan*** vs. ***The State (Delhi Administration)***[1], ***Eknath Shankarrao Mukkawr*** vs

[1] (1975) 2 SCC 406

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State of Maharashtra[2], ***Sahab Singh & Ors.*** vs. ***State of Haryana***[3], ***Prithipal Singh*** vs. ***State of Punjab***[4], ***Kumar Ghimirey*** vs. ***State of Sikkim***[5], ***Prakash Jain & Ors.*** vs. ***The State of Karnataka***[6] and ***Radheyshyam & Anr.*** vs. ***State of Rajasthan***[7].

30. In ***Jayaram Vithoba*** vs. ***State of Bombay***[8]**,** the Supreme Court held that *suo motu* powers of enhancement under revisional jurisdiction can be exercised only after giving notice/opportunity of hearing to the accused.

31. In ***Prakash Jain*** (supra), the Supreme Court opined that any notice for enhancement must indicate why the Court wants to enhance the sentence and it must give reasonable time to the accused to answer the notice. It held that such notice cannot be an illusionary notice.

32. We, therefore, propose to indicate why this Court wants to enhance the sentence and give reasonable time to the convict to answer the same. We are of the view that the learned Special Judge failed to determine the age of the victim correctly although there was overwhelming evidence led by the prosecution and thereby erroneously acquitted him of the charges under Section 5(l), 5(m) and 5(n) of the

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[2] (1977) 3SCC 25
[3] (1990) 2 SCC 385
[4] (2012) 1 SCC 10
[5] (2019) 6 SCC 166
[6] Order dated 3rd July 2019 in Criminal Appeal No.956 of 2019
[7] 2022 LiveLaw (SC) 687
[8] AIR 1956 SC 146

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POCSO Act. We are also of the view that the learned Special Judge having framed charges under Section 5(l), 5(m) and 5(n) of the POCSO Act, ought to have framed the corresponding charges under section 376(f), 376(n) and 376 AB of the IPC as well. However, the learned Special Judge framed a charge under section 376 IPC only.

Determination of the age of the victim

33. When a victim who is said to be a minor child is brought before the Court by the prosecution to establish a case of alleged rape, the Special Court under the POCSO Act jurisdiction is mandated to determine two vital facts. Firstly, the fact that the victim is a child and secondly, whether the offence as defined under the POCSO Act as alleged had been committed upon the victim. When the victim is said to be a minor child of the age of 5 years the determination of the age of the victim cannot be a difficult task. The minor victim is brought before the learned Special Judge during the course of trial as a prosecution witness. The learned Special Judge has numerous occasions to examine her physical appearance and interact with the victim. If, therefore, at the end of the trial, if the learned Special Judge concludes that the age of such a victim, who is but a child of 5 years old, has not been established by the prosecution during the trial, it is certain that the trial conducted by the learned Special

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Judge has failed the victim for whom the POCSO Act has established the Special Court and appointed the Special Judge.

34. This question has been repeatedly troubling the Special Courts against which many appeals have been preferred and the question arises yet again.

35. According to the learned Special Judge, the prosecution produced P.W.9, P.W.10 and P.W.11 to prove that the victim was a minor. On examination of the evidence led by the prosecution, the learned Special Judge concluded that the Live Birth Register of STNM Hospital (exhibit-14), the School Admission Register (exhibit-9) and the immunization record (exhibit-12) could not be proved. The learned Special Judge on examination of the victim in the witness box held that it appears that she is a minor. However, as the prosecution had failed to produce any admissible evidence to prove the same, the learned Special Judge concluded that the prosecution could not establish the victim's minority. However, the learned Special Judge was convinced that the prosecution had been able to establish rape and convicted and sentenced the appellant under section 375/376 IPC.

36. The Supreme Court has held that the parents or near relations having special knowledge are the best persons

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to depose about the date of birth of a person. In that context it is important to examine the depositions of P.W.1 - the victim's aunt, P.W.3 - the victim's grandfather and P.W.4 - the victim's relative.

37. We noticed that P.W.1, who was related to the victim and had interacted with her after the incident, examined her, accompanied her to the District Hospital and thereafter lodged the FIR (exhibit-1), deposed that the age of the victim was five years at the time of the incident. The defence made no effort to contradict this fact during her cross-examination.

38. P.W.3 - the grandfather of the victim, stated that the victim was five years old. During his cross-examination, the defence secured an admission that the victim did not have a birth certificate and that he had stated about her age on presumption. We are of the view that failure of the parents to procure a birth certificate does not disprove that the victim was a minor.

39. P.W.4, who was also related to the victim and an important prosecution witness, also deposed that the victim was five years old. She had overheard the victim disclose to her friend about the sexual assault on her by her father. The defence made no attempt to disprove this assertion about the victim's age. In fact, as per the cross-examination, the

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victim was reading at Integrated Child Development Services (ICDS) School indicating that the defence did not contest that the victim was a minor.

40. The victim (P.W.2), who according to the learned Special Judge, was not prevented from understanding the question put to her and gave rational answers in spite of her tender age, stated that she was studying in LKG although she did not know her age. The defence made no attempt to contest the fact that the victim was studying in LKG.

41. P.W.5 is yet another important witness who overheard the disclosure made by the victim and inquired about the incident from her. She had also accompanied the victim to District Hospital for medical examination. P.W.5 also stated that the victim's age was five years. Although the defence did not dispute this assertion, however, they secured an admission that she had no personal knowledge as to when the victim was born.

42. P.W.6 - a minor witness studying in Class V, stated that the victim was her friend aged about five to six years. The defence neither contested the fact that the victim was her friend nor the fact that she was five-six years old.

43. P.W.7 - the other minor witness studying in Class V, also deposed that the victim was five-six years. During her cross-examination, on the suggestion of the defence, she

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fairly stated that she had deposed about the victim's age as per information given by the appellant. The appellant did not dispute this assertion of P.W.7.

44. Besides the above witnesses who deposed about the age of the victim, our attention is also drawn to the deposition of P.W.12 - the Medical Officer, who examined the victim and P.W.16 - the District Child Protection Counsellor, who also examined and counselled the victim.

45. P.W.12 - the Medical Officer examined the victim and made her medical report (exhibit-17). The medical report (exhibit-17) records the age of the victim as five years at the time of the examination. The suggestion of the defence during the cross-examination of P.W.12 that the victim was not forwarded to a paediatrician for her medical examination is also suggestive of the admission that the victim was in fact a minor.

46. P.W.16 posted at the District Child Protection Unit as Counsellor examined and counselled the victim after the assault by the appellant. P.W.16 also confirmed that the age of the victim was five years. During her cross-examination, it was suggested by the defence that she had mentioned about the age of the victim in her counselling report (exhibit-26) as per the information given by her guardian - P.W.4. There is

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no suggestion by the defence that the victim was not a minor.

47. We notice that the School Admission Register (exhibit-9) was exhibited by P.W.9 - the Principal of the School, without any objection from the defence; that P.W.9 deposed that the victim was admitted on 24.01.2019 at the Nursery Level; and that P.W.9 also deposed that the entry made therein was as per the verbal information of the victim's mother. We notice that the immunization records of the victim (exhibit-12) was exhibited by P.W.10 - the In-Charge of ICDS without any objection; and that P.W.10 had deposed that the information about the date of birth of the victim was given by her mother. We notice that the Live Birth Register of STNM Hospital (exhibit-14) was produced in the original by P.W.11 - the Additional Medical Superintendent holding additional charge of Registrar of Birth & Deaths without any objection. We also notice that the defence did not contest the correctness or the truthfulness of the information contained in the above documents.

48. The above depositions of close relatives of the victim, the victim herself, her friends - the minor witnesses and the other prosecution witness who had occasion to interact with the victim does confirm that the observation of

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the learned Special Judge that the victim appears to be a minor is correct. Therefore, even if we accept the opinion of the learned Judge that the prosecution has not been able to prove the documentary evidence, i.e., the Live Birth Register of STNM Hospital (exhibit-14), the Immunization Record (exhibit-12) or the School Admission Register (exhibit-9) which records the date of birth of the victim, we cannot get ourselves to ignore the other evidences led by the prosecution as well as the observation of the learned Special Judge that the victim appears to be a minor.

49. On examination of the evidence led by the prosecution and the cross-examination of the above witnesses, we are of the opinion that there cannot be an iota of doubt that the victim was a minor child.

50. We are reassured about the minority of the child as even the appellant who is admittedly the father of the victim when examined under Section 313 Cr.P.C. confirmed that she was his daughter and she was five years old.

51. The learned Special Judge has confirmed that on her physical examination the victim appears to be a minor. This fact has been confirmed by all the above prosecution witnesses who have had the opportunity to physically examine her or have known her. The prosecution story is that the mother of the victim had eloped and therefore, was

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not examined. The accused was her father who had the right of silence. The failure of the parents to procure the victim's birth certificate cannot be held against the victim. The victim's grandfather - P.W.3 and her aunt - P.W.1 confirmed the victim's age. The minority of the victim was glaring on the face of the record. We are of the considered view that the learned Special Judge swayed by the technicalities of proving documents ignored other vital evidence which would unerringly prove beyond any reasonable doubt that the victim was but a five year old child.

52. We say so because Section 3 of the Indian Evidence Act, 1872 provides that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that the prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

53. In ***Rajesh Yadev*** vs. ***State of U.P.***[9], the Supreme Court held:

> ***"12.*** *Section 3 of the Evidence Act defines "evidence", broadly divided into oral and documentary. "Evidence" under the Act is the means, factor or material, lending a degree of probability through a logical inference to the existence of a fact. It is an "adjective law" highlighting and aiding substantive law. Thus, it is neither wholly procedural nor substantive, though trappings of both could be felt.*

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[9] (2022) 12 SCC 200

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13. *The definition of the word "proved" though gives an impression of a mere interpretation, in effect, is the heart and soul of the entire Act. This clause, consciously speaks of proving a fact by considering the "matters before it". The importance is to the degree of probability in proving a fact through the consideration of the matters before the court. What is required for a court to decipher is the existence of a fact and its proof by a degree of probability, through a logical influence.*

14. *Matters are necessary, concomitant material factors to prove a fact. All evidence would be "matters" but not vice versa. In other words, matters could be termed as a genus of which evidence would be a species. Matters also add strength to the evidence giving adequate ammunition in the Court's sojourn in deciphering the truth. Thus, the definition of "matters" is exhaustive, and therefore, much wider than that of "evidence". However, there is a caveat, as the court is not supposed to consider a matter which acquires the form of an evidence when it is barred in law. Matters are required for a court to believe in the existence of a fact.*

15. *Matters do give more discretion and flexibility to the court in deciding the existence of a fact. They also include all the classification of evidence such as circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc.*

16. *In addition, they supplement the evidence in proving the existence of a fact by enhancing the degree of probability. As an exhaustive interpretation has to be given to the word "matter", and for that purpose, the definition of the expression of the words "means and includes", meant to be applied for evidence, has to be imported to that of a "matter" as well. Thus, a matter might include such of those which do not fall within the definition of Section 3, in the absence of any express bar.*

17. *What is important for the court is the conclusion on the basis of existence of a fact by analysing the matters before it on the degree of probability. The entire enactment is meant to facilitate the court to come to an appropriate conclusion in proving a fact. There are two methods by which the court is expected to come to such a decision. The court can come to a*

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> *conclusion on the existence of a fact by merely considering the matters before it, in forming an opinion that it does exist. This belief of the court is based upon the assessment of the matters before it. Alternatively, the court can consider the said existence as probable from the perspective of a prudent man who might act on the supposition that it exists. The question as to the choice of the options is best left to the court to decide. The said decision might impinge upon the quality of the matters before it.*
>
> ***18.*** *The word "prudent" has not been defined under the Act. When the court wants to consider the second part of the definition clause instead of believing the existence of a fact by itself, it is expected to take the role of a prudent man. Such a prudent man has to be understood from the point of view of a common man. Therefore, a Judge has to transform into a prudent man and assess the existence of a fact after considering the matters through that lens instead of a Judge. It is only after undertaking the said exercise can he resume his role as a Judge to proceed further in the case.* **"**

54. In the present set of facts, there is more than satisfactory evidence for the Special Court to believe that the victim was a five year old child. Even as a prudent man, the evidence led by the prosecution would lead the Special Court to consider that in all probability the victim was a child.

55. There is yet another aspect we need to consider on the question of determination of the age of the minor victim. In ***Jarnail Singh*** vs. ***State of Haryana***[10]**,** the Supreme Court was dealing with a case of rape of a minor under the provision of IPC. When the question arose with regard to the determination of the age of the minor victim the Supreme Court referred to Rule 12 of the Juvenile Justice (Care &

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[10] (2013) 7 SCC 263

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Protection of Children) Rules, 2007 (JJ Rules 2007) and opined that even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, the statutory provision should be the basis for determining age, even of a child who is a victim of a crime as there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Under Rule 12 of the JJ Rules, 2007, the age determination inquiry was required to be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining:-

> *"(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;*
> *(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;*
>
> *(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;*
>
> *(b) and only in the absence of either (i), (ii) or (iii) of clause*
>
> *(a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. ....."*

56. The JJ Act has since been amended. The amended JJ Act has also been examined by the Supreme Court vis-à-vis determination of age of the victim under the POCSO Act.

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57. In ***P. Yuvaprakash*** vs. ***State Rep. By Inspector of Police***[11], the Supreme Court was dealing with a case of conviction under Section 6 of the POCSO Act where the victim was "aged 17 years (running 18 years)". When an issue was raised as to whether the prosecution had been able to establish the minority of the victim, the Supreme Court held that from a conjoint reading of Section 34 of the POCSO Act and Section 94 of the Juvenile Justice (Care & Protection of Children) Act, 2015 (JJ Act), it is evident that wherever a dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act the courts have to take recourse to the steps indicated in Section 94 of the JJ Act and the three documents in order of which the JJ Act requires consideration is that the concerned court has to determine the age by considering the following documents:-

> **"***(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination board, if available; and in the absence thereof;*
> *(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;*
> *(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee of the Board:*
> *Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order***"***.*

[11] 2023 SCC OnLine SC 846

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58. Section 94 of the JJ Act is reproduced herein below:

> ***"94. Presumption and determination of age.-*** *(1)Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.*
>
> *(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –*
>
> *(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;*
>
> *(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;*
>
> *(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:*
>
> *Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.*
>
> *(3)The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person***"**.

59. Although the Supreme Court was dealing with a case involving victims aged 16 years and 17 years in ***Jarnail Singh*** (supra) and ***P. Yuvaprakash*** (supra) respectively, we are of the view that in a case like the one before us it would not be incorrect for the Special Court under the POCSO Act to

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follow the procedure laid down in Section 94 (1) of the JJ Act and record its observation stating the age of the child as nearly as may be when the victim is brought before it to depose and thereafter proceed with the rest of the trial.

60. As settled by the Supreme Court in ***Ramvijay Singh*** vs. ***State of U.P.***[12], as per the scheme of the JJ Act, when it is obvious to the Committee or the Board, based on the appearance of the person, that the said person is a child, the Board or Committee shall record observations stating the age of the child as nearly as may be without waiting for further confirmation of the age. Therefore, the first attempt to determine the age is by assessing the physical appearance of the person when brought before the Board or the Committee. It is only in case of doubt that the process of age determination by seeking evidence becomes necessary.

61. We are of the view that the procedure for the Board or the Committee to follow to determine the age of the person should be followed by the Special Court as well.

62. We are of the view that insofar as the age of a minor victim is concerned the best evidence available before the Special Court is the child produced as prosecution witness. A child of 5 years will definitely physically appear so and cannot look like an adult of 18 years above. It is only in

[12] (2021) 15 SCC 241

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such cases where the court cannot assess the minority of the child victim from her or his physical appearance that it would be difficult for the Special Court to record observation as required under Section 94(1) of the JJ Act.

63. The observation of the learned Special Judge on record at paragraph 15 of the impugned judgment that the victim appears to be a minor would lend assurance to the other evidences placed by the prosecution to establish the minority of the victim. If the defence then wants to contest the minority of the victim it must do so and establish her majority either from the prosecution evidence or by bringing forth any other evidence for the consideration of the learned Special Judge.

64. We hasten to add that our observation is not to be misunderstood by the prosecution and the investigating agencies. It is their primary duty to place before the Special Court credible and conclusive evidence to establish the age of the victim. It is the primary duty of the investigating agencies to collect all such evidence that would go to prove the minority of the victim. It is the duty of the prosecution to ensure that the evidence collected during investigation by the investigating agencies is proved conclusively before the learned Special Judge. Even if on appearance the victim is a minor child investigating agencies and the prosecution must

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ensure all credible evidences must be produced and proved before the Special Court.

65. Determination of the age of the victim is crucial for prosecution under the POCSO Act and the learned Special Judge must ensure that the same is conclusively done. The Supreme Court has repeatedly held that the duty of the Presiding Judge of a criminal trial is not to watch the proceedings as a spectator or a recording machine but he has to participate in the trial by evincing intelligent active interest by putting questions to witnesses to ascertain the truth. It was held so by the Supreme Court in ***Dinesh Kumar*** vs. ***State of Haryana***[13].

66. In ***Anees*** vs. ***State Government of NCT***[14], the Supreme Court held that the Judge is expected to actively participate in the trial, elicit necessary materials from the witnesses in the appropriate context which he feels necessary for reaching the correct conclusion. The Judge has uninhibited power to put questions to the witness either during the chief-examination or cross-examination or even during re-examination for this purpose. If a Judge feels that a witness has committed an error or slip, it is the duty of the Judge to ascertain whether it was so, for, to err is human and the

[13] (2023) SCC OnLine SC 564
[14] (2024) SCC OnLine SC 757

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chances of erring may accelerate under stress of nervousness during cross-examination.

67. We are disturbed that the learned Special Court, who is required to be in absolute control of the trial, could not conclusively determine and conclude the minority of the victim who according to his own observation was a minor. On consideration of the matters before the learned Special Judge we have no hesitation in holding that the learned Special Judge had failed to appreciate the evidence in its correct perspective and by doing so acquitted the appellant for the charges under the POCSO Act on the sole ground that the prosecution had failed to prove that the victim was a child.

68. We, therefore, issue this notice to show cause upon the convict as to why his sentence under Section 376 of the IPC alone shall not be enhanced to Section 376AB of the IPC and Sections 5(l), 5(m) and 5(n) of the POCSO Act as well.

(Bhaskar Raj Pradhan)
Judge

(Meenakshi Madan Rai)
Judge

Approved for reporting: **Yes**

to