

**HIGH COURT OF TRIPURA
AGARTALA**

Crl. App. No.15 of 2023

Sri Arjun Ghosh,
Son of Lt. Manik Ghosh, Age-29,
Profession-Day labor,
Resident of Kashipur, Near Hanuman Tyre,
P.O.- Agartala & P.S.- East Agartala,
District- West Tripura.

.....Appellant

Versus

The State of Tripura

.....Respondent

For Appellant(s)	:	Mr. S. Lodh, Adv.
For Respondent(s)	:	Mr. Raju Datta, P.P.
Date of Hearing	:	18.07.2024
Date of delivery of Judgment and Order	:	29.07.2024
Whether fit for Reporting	:	YES

HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order

This appeal is directed against the judgment and order of sentence and conviction dated 22.06.2023 delivered by Learned Special Judge, POCSO, West Tripura, Agartala in connection with case No.Special (POCSO) 22 of 2020, whereby and wherein the appellant has been convicted under Section 448, 363, 506 & 354 of IPC and Section 8 of the POCSO Act 2012 and the appellant was sentenced to suffer simple imprisonment(SI) for three years and to pay fine of Rs.20,000/- and in default of payment of fine the appellant was further sentenced to simple imprisonment (SI) for

further 02(two) months for the offence punishable under Section 8 of POCSO Act and to suffer simple imprisonment(SI) for further 02 months and to pay a fine of Rs.5,000/- and in default of payment of fine, further SI for 10 days for commission of offence punishable under Section 448 of IPC, and to suffer further simple imprisonment (SI) for 02 years and to pay a fine of Rs.10,000/- and in default of payment of fine, the appellant was also sentenced to suffer (SI) for one month for commission of offence punishable under Section 363 of IPC, to suffer a simple imprisonment (SI) for two months and to pay a fine of Rs.5,000/- and in default of payment of fine, the appellant was also sentenced to suffer (SI) for ten days for the offence punishable under Section 506 of IPC, and no separate punishment was imposed for commission of offence punishable under Section 354 of IPC and it was ordered that all the sentences shall run concurrently.

02. Heard Learned Counsel, Mr. S. Lodh representing the appellant and also Learned P.P., Mr. Raju Datta for the State-respondent.

03. Before entering into the merit of the appeal, let us discuss about genesis of the prosecution story, filed before the Learned Court below.

The case of the prosecution in short was that on 03.04.2020, at night at about 11.40 p.m., the victim aged

about 13 years went out of the dwelling hut to attend natural call but when she was not returning back after a reasonable span of time, that time the informant/mother called her and getting no response, the informant called her husband and he also started shouting on call of their victim-daughter. Accordingly, they started searching of their victim-daughter and after about one hour of the incident, their neighbour Smt. Putul Ghosh came to their residence and informed that the victim is in her house. Immediately, thereafter, the informant accompanied by her niece namely, Tapashi Nag (Sarkar) went to the house of Putul Ghosh and brought the victim girl with them, and returned back to home. On query to the victim, the informant could know that when the victim went out of their dwelling hut to attend the natural call, that time accused Arjun Ghosh gagged the mouth of the victim-daughter with a 'gamcha' and forcefully took her in his house and at the time of taking her the accused also put his hands to the private parts of the victim and outraged her modesty. In his house the accused detained her in a room, closed the door, tried to disrobe the victim and also tried to launch physical relation with the victim forcefully. The appellant-accused threatened her that if she did not allow the accused to fulfill his lust, he will kill the victim. That time victim raised alarm when the mother of the accused along with others rescued the victim and they tried to calm the victim

and noticing that they were also searching the victim, the mother of the accused came to the house of the informant. On this information, a case was registered at East Agartala Women P.S. and the I.O. took up investigation of this case and after completion of investigation, being prima facie satisfied, the I.O. laid charge sheet against the accused-appellant for the commission of offence punishable under Section 448/341/354 of IPC read with Section 8 of the POCSO Act. Before the Learned Trial Court, formal charge under Section 448/363/354 of IPC read with Section 8 of POCSO Act and charge under Section 506 of IPC was framed and the same was explained to the appellant to which he pleaded not guilty and claimed to be tried. Hence, the trial commenced. During trial, to substantiate the charge prosecution has adduced in total seven numbers of witnesses and the prosecution also relied upon some documents which were marked as exhibits in this case. The defence case was that of total denial and as such the appellant-accused during his examination under Section 313 of Cr.P.C. pleaded as innocent and denied to adduce any witness in support of his defence. After that, on conclusion of trial, Learned Trial Court below by the judgment convicted the appellant and challenging that judgment and order of sentence and conviction, this appeal is preferred.

04. Now, before entering into the merit of the appeal, let us discuss the evidence on record of the prosecution. PW-1, is the informant. She deposed that on 09.04.2020, she laid the ejahar against the accused, Arjun Ghosh before the OC, East Agartala Women P.S. which was typed by one person of Kashipur area. She put her signature on the bottom of ejahar and identified the same marked as Exhibit-1/1. According to her, on 03.04.2020, at about 11.45/12.00 p.m. (at night) her daughter, i.e. the victim went out from the room to attend natural call but she did not return back after 10 minutes. So, she became worried and searched her whereabouts along with her husband in the neighbouring houses, but she could not trace her therein. Later on, she entered into the house of the accused, who is one of the neighbours and found the victim-daughter therein and brought her back to home. On query, her daughter disclosed that when she came out from the washroom after attending natural call, that time the accused forcefully grabbed her and after tying 'gamcha' on her mouth, he kidnapped her and took her to the dwelling house, wherein, the accused outraged the modesty of his daughter by toughing the various parts of her body including her breast and also tried to commit rape upon her. Further her daughter disclosed her that the accused threatened her with dire consequences, not to disclose the fact to any person and said accused used to

stalk and vex her daughter wherever, she used to go, i.e., in school, tuition and other places. During investigation, police seized the original birth certificate of her daughter by preparing seizure list and he signed the seizure list as a witness. On identification, the signature of the witness on the seizure list dated 13.04.2020, was marked as Exhibit-2/1, birth certificate of the victim-daughter was marked as Exhibit-3. She further stated that the date of birth of her victim-daughter was 15.12.2006. In course of investigation, police produced her daughter before the Magistrate, when her statement was recorded and she gave her signature and the witness identified her signature on the body of the statement recorded by the Magistrate which was marked as Exhibit-4. She further stated that her daughter is expired on 23.06.2022.

During cross-examination, she stated that during investigation, police only seized the original birth certificate of her daughter. She was further confronted with the statement that she stated to police that on 03.04.2020 at about 11.45/12.00 p.m., her daughter went out from the room to attend natural call but she did not return even after 10 minutes. She became worried and searched her whereabouts along with her husband. But on drawing attention, the witness admitted that the words "ten minutes" and "along with her husband" were not there although the

other portions of statement were found. She was further confronted with the statement that she stated to police that after searching the neighbouring houses, she could not trace her and later on, she entered into the house of the accused. On drawing attention, said part of statement was not found in the statement of witness recorded by I.O. She was further confronted with the statement that she stated to I.O. that the accused outraged the modesty of her daughter by touching various parts of her body including breasts and also tried to commit rape upon her. But on drawing attention, such part of statement was not found in the statement of witness recorded by I.O. under Section 161 of Cr.P.C. She further stated that before the incident, the family members of accused on some occasion visited their house being her adjacent neighbours and in between her house and the house of accused, there were two houses along with a road. She further stated that the accused were having three brothers and out of them two were married, namely, Mithu Ghosh and Titu Ghosh and the mother of the accused was residing in the same house. She further stated that in the house of accused, there is only one dwelling hut and kitchen and the same was visible from the side of the road. The incident occurred on 03.04.2020 and she laid the ejahar on 09.04.2020 and the delay was caused due to lock-down

declared by the Government for Covid situation. Nothing more came out relevant.

05. PW-2, Tanu Ranjan Sarkar deposed that the informant is his wife and the victim is his daughter. On 09.04.2020, his wife laid an ejahar against the accused, Arjun Ghosh before O.C. East Agartala Women P.S. On 03.04.2020, at about 11.45/12.00 p.m., at night his victim-daughter went to attend the natural call but she did not return back. He became worried and searched her whereabouts in the neighbouring houses and after searching the neighbouring houses, she traced her in the house of accused and brought her back. Upon query, his victim-daughter disclosed that when she came out from the washroom after attending natural call, that time the accused forcefully dragged her and after tying "gamcha" on her mouth, he kidnapped her and took her to his dwelling house. His daughter was shivering when she was disclosing the fact. She further disclosed that the accused touched the various parts of her body at his dwelling house. She also disclosed that the accused used to stalk and vex her continuously. He informed the matter to the village elders, who advised him to take the legal recourse of law. He made verbal complaint on three occasions before the P.S. and the police on every occasion gave admonition to the accused not to disturb and vex the victim and even the parents of the accused assured

him that the accused will not disturb his daughter. But even after the said assurance, the accused continuously used to stalk and vex her almost every places, such as her school, tuition and other places. He further stated that the accused forcefully gave a mobile phone to his daughter. During investigation, one day, police seized the original birth certificate of his daughter by preparing a seizure list and obtained his signature. On identification, the signature of witness on the seizure list dated 13.04.2020 was marked as Exhibit-2/2. According to him, at the time of incident, the age of her daughter was about 14 years. He identified the accused.

During cross-examination, he was confronted with the statement that he stated to police that his daughter disclosed that the accused used to stalk and vex her continuously and he informed the matter to the village elders who advised him to take legal recourse of law and accordingly, he made verbal complaint to P.S. and the police on every occasion gave admonition to the accused not to disturb and vex the victim, even the parents of the accused assured him that the accused will not disturb his daughter. But even after said assurance, the accused continuously used to stalk and vex her at almost every place, such as her school, tuition and other places. But this portion of statement was not found in the statement of witness recorded by I.O.

under Section 161 of Cr.P.C. He was further confronted with the statement that his daughter disclosed that the accused touched the various parts of her body at his dwelling house but that portion of statement was not found in the statement of the witness recorded by I.O. under Section 161 of Cr.P.C. He could not say the mobile number which was given by the accused to his daughter and after lodging of the FIR, police did not seize any mobile phone from him. He further stated that he did not say to I.O. that the accused forcefully gave the mobile phone to his victim-daughter. He further stated that as his daughter was a student, in this connection no such document was seized by I.O. No wearing apparels of the victim was seized by I.O. He further stated that the distance between his house and the East Agartala Women P.S. would be about 4 to 5 km. He also stated that he has been working as a driver in the Department of Health Services of Tripura and now posted in the O/o. Director, Goorkhabasti. The ejahar of the instant case was lodged on 09.04.2020 and further admitted that on and from 03.04.2020 to 09.04.2020, he discharged his duties at Goorkhabasti from his house. He further deposed that he did not say to I.O. that the age of his victim daughter at the time of occurrence was about 14 years and also stated that Dulal Biswas, Bidesh Majumder, Gita Sarkar and Krishna Sarkar were his adjacent neighbours.

06. PW-3, Sri Subal Sarkar deposed that he know the informant Parul Sarkar who is his elder sister-in-law, i.e., the wife of his elder brother. About three years back, Parul Sarkar lodged a case against Arjun Ghosh and identified the accused in the Court in the dock. He further stated that the victim of his this case was found missing from their house at about three years back, on one night. After due search, they could not find her and during next day morning, the mother of the accused, Smt. Putul Ghosh came to their house and told them that the victim-girl had gone to their house. Then they brought back the victim to their house. On being asked, the victim-girl told that during the night when she went outside to attend the natural call, that time, the accused Arjun Ghosh gagged her mouth by a red colour gamcha and forcibly took her away to their house. She also told that the accused touched her body including her breasts and outraged her modesty and also threatened her that if she shouts, she would be killed and for that she could not raise her voice. The witness further volunteered that after the occurrence, due to social stigma the victim-girl was unable to come out of her house.

During cross-examination, he could not say the exact date of the occurrence of the offence. He further stated that he did not say to I.O. that at what time his niece went outside to attend natural call. He further stated that the

alleged occurrence took place during night hours. Excepting denial, nothing more came out relevant from his cross-examination.

07. PW-4, Aparna Acharjee could not say anything about the case of the prosecution. She only stated that after few days of the alleged occurrence, police came to her house and that time she could know from police that the victim-girl has eloped with the accused Arjun Ghosh.

08. PW-5, Sumitra Debnath (Biswas) could not say anything about the case of the prosecution, but she identified the accused.

09. PW-6, Sefali Sarkar deposed that the informant is her daughter in law. About three years back, Parul Sarkar lodged a case against the accused Arjun Ghosh. She stated that about three years back, her grand-daughter, i.e. the victim slept with her. After some time, she went outside to attend her natural call. Thereafter, she went missing from their house and after due search, they could not find her. She further stated that at about 3 a.m. of that night, the mother of the accused came to their house and told that the victim girl had gone to their house. Then, she herself, her daughter-in-law went to that house and brought back the victim-girl to their house. On being asked, the victim-girl told that the accused Arjun Ghosh gagged her mouth by a 'gamcha' and forcibly took her to their house. She also told

them that the accused touched her breasts. She identified the accused in the dock.

During cross-examination, she stated that she was unable to say the date of lodging the case. She further stated that at that relevant point of time she was sleeping. She again admitted that there was a dispute going on between the family of the victim and the family of the accused.

10. PW-7, Ramfanmawii the I.O. deposed that on 13.04.2020 she was posted as WSI of police at East Agartala Women P.S. On that day, she received one ejahar from Parul Sarkar of Kashipur Reshambagan and accordingly, registered as East Agartala Women P.S. case No.2020/WEA/024 under Sections-448/341/354 of IPC read with Section-8 of the POCSO Act. She identified the endorsement on the original FIR marked exhibit-1/2 as a whole. She further stated that she filled up the printed form of FIR and identified her signature marked Exhibit-5 and Exhibit-5/1 and this case was endorsed to her for investigation. During investigation, he took all the necessary steps, visited P.O. and prepared hand sketch map with index marked Exhibit-6 and Exhibit-6/1. She also produced the victim before the Court for recording her statement. She also seized the birth certificate of the victim and prepared one seizure list for the same and identified the seizure list dated 13.04.2020 marked as

Exhibit-2 as a whole and Exhibit-2/3 respectively. She further confirmed Exhibit-3, i.e. the original birth certificate of the victim-girl. On 16.04.2020 she arrested the accused namely Arjun Ghosh and forwarded him before the Learned Court on the same date itself and on completion of investigation, laid charge sheet against the accused.

During cross-examination, she stated that there is no entry point of the P.O. as per the hand sketch map. In the hand sketch map of the P.O., there was no mention that where was the point for water supply and others inside the P.O. She has not mentioned the source of light at the P.O. at the relevant point of time. She also did not examine D, E, F, I, L, M and N of the hand sketch map of the P.O. as a witness in this case and there was no such explanation in this regard in the case diary. On 13.04.2020, i.e. on the date of registration of the case, there was prevailing lock-down regarding COVID 19 upsurge. Nothing was mentioned in the case diary that why no FIR was registered on 09.04.2020. She has not seized any wearing 'churidar' (wearing) of the victim-girl. She has not seized any 'dori' and 'gamcha' in connection with this case. She also did not arrange for any medical examination of the victim-girl regarding finding her physical and mental condition to be fit before sending her before the Learned Magistrate. She further stated that the accused surrendered at P.S. and during investigation,

nothing came out that the victim-girl accepted the proposal for developing love affair given by the accused and continued their love affair.

These are the sums and substance of the evidence on record of the prosecution in respect of the determination of the charge.

11. In course of hearing of argument, Learned Counsel for the appellant, Mr. S. Lodh submitted that in this case, the FIR was submitted on 03.04.2020 but the case was registered on 13.04.2020. There was no explanation from the side of prosecution. Learned Counsel for the appellant, Mr. S. Lodh further submitted that in this case the victim was not examined as during trial she expired and from the evidence of mother and father of the victim, it appears that in course of their examination before the Court, they made some improvements to their deposition but the prosecution, in course of hearing of argument has failed to explain the same. No neighbouring persons, according to Learned Counsel were produced to support the case of the prosecution. More interestingly, police also did not examine the mother of the accused. Learned Counsel, Mr. S. Lodh further submitted that from the evidence on record, it appears that a long standing dispute was going on in between the family of the victim and the family of the accused for which the accused has been falsely implicated in

this case. It was further submitted by Learned Counsel for the appellant that PW-4 was not declared as hostile by the prosecution in this case. Even the I.O. in course of investigation, did not seize any 'gamcha' or 'tag' to substantiate the prosecution case. So, finally, Learned Counsel for the appellant urged for allowing this appeal and to set aside the judgment and order of sentence and conviction against the appellant.

12. On the other hand, Learned P.P., Mr. Raju Datta, representing the prosecution fairly submitted that, admittedly in this case, the prosecution could not adduce the victim, since, during pendency of the case she has expired. But the prosecution in this case, by the evidence of the witnesses could prove the charge against the appellant. Furthermore, Learned P.P., Mr. Raju Datta for the State-respondent submitted that at the time of admission of birth certificate no objection was raised regarding admissibility of the same, so, at this stage, there is no scope to raise any objection by the appellant before the Appellate Court. Learned P.P., Mr. Raju Datta further submitted that since on that relevant point of time, there was Covid Pandemic, so, the delay cannot be treated as fatal and more so, Hon'ble the Supreme Court also during the Covid period has extended the period of limitation. So, considering the circumstance, there is no scope to disbelieve the prosecution

story on the ground of delay which was properly explained by the witness and lastly, Learned P.P. submitted that in this case, the presumption would go against the appellant under Section 29 of the POCSO Act and finally, Learned P.P. submitted that there was no room to disbelieve the evidence of the prosecution and the Learned Trial Court below rightly and reasonably awarded conviction upon the appellant and prayed for dismissal of this appeal upholding the sentence and order of conviction delivered by Learned Trial Court. Both the parties have adduced certain citations in course of hearing, which would be discussed later on. More so, Learned P.P., the silence of appellant during examination under Section 313 of Cr.P.C. went against him.

13. Admittedly, in this case, the victim could not be produced as she expired on 23.06.2022. To substantiate the charge, prosecution has adduced in total 7 nos. of witnesses. It is also on record that the prosecution in this case could not adduce the neighbouring persons to support the prosecution story. The alleged incident took place at the late night. Naturally, on that relevant point of time, it was very difficult to find out any independent public witness, because when the victim after going out of the room, for attending natural call did not turn up, so, her mother naturally became anxious and started searching her in different places. Finally, the mother of the alleged appellant came and reported that the

victim was available at her house. The appellant thoroughly examined PW-1, Parul Sarkar, the mother of the victim, PW-2, Tanu Ranjan Sarkar, the father of the victim, PW-3, Subal Sarkar, who is also the relative of the victim. PW-4 and PW-5 could not say anything about the case of the prosecution. PW-6, Sefali Sarkar also the relative of the victim. The appellant by the trend of cross-examination could not raise any circumstance to disbelieve their evidence. Admittedly, in this case, the I.O. did not cite any neighbouring person as witness, nor seized the 'gamcha' and any tag to support the prosecution story but for want to those, it cannot be said that the entire prosecution case is doubtful, because if we go through the evidence of the parents of the victim, their evidence is so reliable and trustworthy that there is no scope to disbelieve their evidence. One of the witnesses admitted that a dispute was going on between the family of the victim and the accused. But this cannot be a reason that the guardian of the victim has utilized their daughter to lodge a false prosecution against the alleged accused, i.e. the present appellant herein. The victim during investigation was produced before the Court and her statement was recorded by Magistrate but the Magistrate was not produced by the prosecution in this case although the mother of the victim, as witness identified her signature on the margin of 164 statement. It is also on record that birth certificate of the

victim was duly exhibited and that was marked without any objection from the side of the appellant. Learned Counsel for the appellant, Mr. S. Lodh although submitted that that was not proved in accordance with law but I cannot agree with the submission made by Learned Counsel for the appellant.

14. In course of hearing of argument, Learned P.P., Mr. Raju Datta for the State-respondent relied upon certain citations. In **Rajkumar vs. State of Madhya Pradesh** dated 25.02.2014 reported in **(2014) 5 SCC 353**, Hon'ble the Supreme Court in para Nos.21 and 22 observed as under:

"21. Admittedly, the appellant did not take any defence while making his statement under Section 313 CrPC, rather boldly alleged that the family of the deceased had roped him falsely at the instance of the police. However, appellant could not reveal as to for what reasons the police was by any means inimical to him.

22. The accused has a duty to furnish an explanation in his statement under Section 313 CrPC regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313 CrPC is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law. (Vide: *Ramnaresh v. State of Chhattisgarh*: (2012) 4 SCC 257; *Munish Mubar v. State of Haryana*: (2012) 10 SCC 464 and *Raj Kumar Singh v. State of Rajasthan*:(2013) 5 SSC 722."

15. In **CIDCO vs. Vasudha Gorakhnath Mandevlekar** dated 15.05.2009, reported in **(2009) 7 SCC**

283, wherein in para No.18, Hon'ble the Supreme Court observed as under:

"18. The deaths and births register maintained by the statutory authorities raises a presumption of correctness. Such entries made in the statutory registers are admissible in evidence in terms of Section 35 of the Evidence Act. It would prevail over an entry made in the school register, particularly, in absence of any proof that same was recorded at the instance of the guardian of the respondent. (See *Birad Mal Singhvi v. Anand Purohit*:1988 Supp SCC 604)."

16. In **Harpal Singh and Anr. vs. State of Himachal Pradesh** dated 14.11.1980 reported in **(1981) 1 SCC 560**, wherein Hon'ble the Supreme Court in para No.3 observed as under:

"3. In the instant case the prosecution has proved the age of the girl by overwhelming evidence. To begin with, there is the evidence of Dr. Jagdish Rai (PW 14) who is a radiologist and who, after X-ray examination of the girl found that she was about 15 years of age. This is corroborated by Ex. PF, which is an entry in the admission register maintained at the Government girls' High School, Samnoli (wherein the girl was a student) and which is proved by the Headmaster. That entry states the date of birth of the girl as October 13, 1957. There is yet another document, viz., Ex. PD, a certified copy of the relevant entry in the birth register which shows that Saroj Kumari, who according to her evidence was known as Ramesh during her childhood, was born to Lajwanti wife of Daulat Ram on November 11, 1957. Mr. Hardy submitted that in the absence of the examination of the officer/chowkidar concerned who recorded the entry, it was inadmissible in evidence. We cannot agree with him for the simple reason that the entry was made by the concerned official in the discharge of his official duties, that it is therefore clearly admissible under Section 35 of the Evidence Act and that it is not necessary for the prosecution to examine its author. From whatever angle we view the evidence, the conclusion is inescapable that Saroj

Kumari was below 16 years of age at the time of the occurrence. Accordingly we agree with judgments of the courts below and see no merit in this appeal which is dismissed."

17. In Lachhmi Narain Singh (Dead) Through Legal Representatives and Ors. vs. Sarjug Singh (Dead) Through Legal Representatives and Ors. dated 17.08.2021, reported in **(2022) 13 SCC 746**, wherein Hon'ble the Supreme Court in Para No.25 observed as under:

"25. In view of the foregoing discussion, it is clear that plea regarding mode of proof cannot be permitted to be taken at the appellate stage for the first time, if not raised before the trial court at the appropriate stage. This is to avoid prejudice to the party who produced the certified copy of an original document without protest by the other side. If such objection was raised before the trial court, then the party concerned could have cured the mode of proof by summoning the original copy of document. But such opportunity may not be available or possible at a later stage. Therefore, allowing such objection to be raised during the appellate stage would put the party (who placed certified copy on record instead of original copy) in a jeopardy and would seriously prejudice interests of that party. It will also be inconsistent with the rule of fair play as propounded by Ashok Bhan, J. in *R.V.E. Venkatachala*:(2003) 8 SCC 752."

18. In State of Madhya Pradesh vs. Preetam dated 29.08.2018, reported in **(2018) 17 SCC 658**, wherein in para No.11 observed as under:

"11. In our considered view, the approach of the trial court was not correct. In each and every case the prosecution cannot be expected to examine the person who has admitted a student in the school. The school registers are the authentic documents being maintained in the official course, entitled to credence of much weight unless proved otherwise. In our view, considering the evidence of Headmaster, Bhaulal (PW 8), and the school certificate

produced by him i.e. Ext. P/13-A, age of the victim has to be taken as 12 years at the time of occurrence."

19. In **Amar Singh vs. Balwinder Singh and Ors.**

dated 31.01.2003 reported in **(2003) 2 SCC 518** wherein

Hon'ble the Supreme Court in para No.10 observed as under:

"10. The High Court has gone to the extent of observing that the delay of 26 hours in sending the Special Report by itself was enough to allow the appeal and to set aside the conviction of the accused. In our opinion, the period which elapsed in lodging the FIR of the incident has been fully explained from the evidence on record and no adverse inference can be drawn against the prosecution merely on the ground that the FIR was lodged at 9.20 p.m. on the next day. There is no hard-and-fast rule that any delay in lodging the FIR would automatically render the prosecution case doubtful. It necessarily depends upon facts and circumstances of each case whether there has been any such delay in lodging the FIR which may cast doubt about the veracity of the prosecution case and for this a host of circumstances like the condition of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station, etc. have to be taken into consideration. There is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging of the FIR. In this connection it will be useful to take note of the following observation made by this Court in *Tara Singh v. State of Punjab*:1991 Supp (1) SCC 536 (SCCp. 541, para 4)

"The delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are, one cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in giving the report to the police. At times being grief-stricken because of the calamity it may not immediately occur to them that they should give a report. After all it is but natural in these circumstances for them to take some time to go the police station for

giving the report. Of course, in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts should be cautious to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case."

20. In **Jarnail Singh vs. State of Haryana** dated 01.07.2013 reported in **(2013) 7 SCC 263**, wherein Hon'ble the Apex Court in para Nos.23 to 27 observed as under:

"23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, 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. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule

12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion.

24. Following the scheme of Rule 12 of the 2007 Rules, it is apparent that the age of the prosecutrix VW, PW 6 could not be determined on the basis of the matriculation (or equivalent) certificate as she had herself deposed, that she had studied up to class 3 only, and thereafter, had left her school and had started to do household work. The prosecution in the facts and circumstances of this case, had endeavoured to establish the age of the prosecutrix VW, PW 6, on the next available basis in the sequence of options expressed in Rule 12(3) of the 2007 Rules. The prosecution produced Satpal (PW 4) to prove the age of the prosecutrix VW, PW 6. Satpal (PW 4) was the Head Master of the Government High School, Jathlana, where the prosecutrix VW - PW6 had studied upto class 3. Satpal (PW 4) had proved the certificate Ext. PG, as having been made on the basis of the school records indicating that the prosecutrix VW, PW 6, was born on 15-5-1977. In the scheme contemplated under Rule 12(3) of the 2007 Rules, it is not permissible to determine age in any other manner, and certainly not on the basis of an option mentioned in a subsequent clause. We are therefore of the view that the High Court was fully justified in relying on the aforesaid basis for establishing the age of the prosecutrix VW, PW 6. It would also be relevant to mention that under the scheme of Rule 12 of the 2007 Rules, it would have been improper for the High Court to rely on any other material including the ossification test, for determining the age of the prosecutrix VW, PW 6. The deposition of Satpal, PW 4 has not been contested. Therefore, the date of birth of the prosecutrix VW, PW 6 (indicated in Ext. PG as 15-7-1977) assumes finality. Accordingly it is clear that

the prosecutrix VW, PW 6, was less than 15 years old on the date of occurrence i.e. on 25-3-1993. In the said view of the matter, there is no room for any doubt that the prosecutrix VW, PW 6 was a minor on the date of occurrence. Accordingly, we hereby endorse the conclusions recorded by the High Court, that even if the prosecutrix VW, PW 6 had accompanied the appellant-accused Jarnail Singh of her own free will, and had had consensual sex with him, the same would have been clearly inconsequential, as she was a minor.

25. Since the judgment relied upon by the learned counsel for the appellant is distinguishable on facts. And since the judgment relied upon had not made any reference to the 2007 Rules, we are of the view that the same would not be relevant for the purposes of determining the age of the prosecutrix VW, PW 6, specially in the background of the evidence led by the prosecution through Satpal (PW 4) to establish.

26. The next contention advanced at the hands of the learned counsel for the accused-appellant Jarnail Singh was that the oral testimony of the prosecutrix VW, PW 6 ought not to be accepted as sufficient to return a finding of guilt against the appellant-accused Jarnail Singh. Insofar as the testimony of the prosecutrix VW, PW 6 is concerned, it is pointed that there were a number of discrepancies and contradictions therein. It was submitted that such discrepancies can be seen on a comparison of her deposition before the trial Court, with the statement of the prosecutrix recorded under Section 164 of the Code of Criminal Procedure on 6-4-1993, as also, the statement of the prosecutrix recorded by the Investigating officer under Section 161 of the Code of Criminal Procedure on 29-3-1993.

27. We have given our thoughtful consideration to the abovenoted submission advanced at the hands of the learned counsel for the appellant. We however find no merit therein. It is not as if the prosecution version is entirely based on the statement of the prosecutrix VW, PW 6. It would be relevant to mention that her recovery from the custody of the appellant-accused Jarnail Singh from the house of Shashi Bhan at Raipur is sought to be established from the statement of Moti Ram, PW 3. There can therefore be no room for any doubt that after she was found missing from her father's residence on 25-3-1993, and after her father Jagdish Chandra, PW 8 had made a complaint to the

police on 27-3-1993, she was recovered from the custody of the appellant-accused Jarnail Singh. Thereafter, the prosecutrix VW, PW 6 was subjected to medico-legal examination by Dr. Kanta Dhankar, PW 1 on 29-3-1993 itself at 3.00 p.m. Dr. Kanta Dhankar, PW 1, in her independent testimony affirmed that she had been subjected to sexual intercourse, inasmuch as her hymen was found ruptured. Even though the visual examination of the prosecutrix VW, PW 6, during the course of her medico-legal examination did not reveal the presence of semen or blood, yet the report of the forensic science laboratory (Ext. PL) and of the Serologist (Ext. PL/1) clearly establish the presence of semen on her salwar, underwear and pubic hair. The serologist's report also disclose, medium and small blood stains on her "salwar". In her own deposition, she had mentioned that, when she was raped by the appellant-accused Jarnail Singh and his accomplices, bleeding had taken place and she had felt pain, and her clothes were stained with blood. Her deposition stands scientifically substantiated by Exts. PL and PL/1. The suggestion put to the prosecutrix VW, PW 6 at the behest of the appellant-accused Jarnail Singh, during the course of her cross-examination, that she had accompanied the appellant-accused Jarnail Singh of her own free will and had had sexual intercourse with him consensually leaves no room for any doubt that she was in his company, and that, he had had sexual intercourse with her.

21. Anversinh alias Kiransinh Fatesinh Zala vs. State of Gujarat dated 12.01.2021 reported in **(2021) 3 SCC 12**, wherein Hon'ble the Apex Court in para Nos.16 & 17 observed as under:

"16. A bare perusal of the relevant legal provisions, as extracted above, show that consent of the minor is immaterial for purposes of Section 361 IPC. Indeed, as borne out through various other provisions in the IPC and other laws like the Indian Contract Act, 1872, minors are deemed incapable of giving lawful consent: *Satish Kumar Jayanti lal Dabgar State of Gujarat: (2015) 7 SCC 359* Section 361 IPC, particularly, goes beyond this simple presumption. It bestows the ability to make crucial decisions regarding a minor's physical safety upon his/her guardians. Therefore, a minor girl's infatuation with

her alleged kidnapper cannot by itself be allowed as a defence, for the same would amount to surreptitiously undermining the protective essence of the offence of kidnapping.

17. Similarly, Section 366 of IPC postulates that once the prosecution leads evidence to show that the kidnapping was with the intention/knowledge to compel marriage of the girl or to force/induce her to have illicit intercourse, the enhanced punishment of 10 years as provided thereunder would stand attracted."

22. Referring the above citations, Learned P.P. drawn the attention of the Court that prosecution in this case has been able to prove the charge levelled against the appellant and Learned Court below rightly convicted the appellant for which this present appeal is liable to be dismissed. He further added that the silence of accused during examination under Section 313 of Cr.P.C. went against him and entry in statutory register regarding birth is admissible in law as per provision of Section 35 of Evidence Act.

23. On the other hand, Learned Counsel for the appellant in course of hearing also relied upon few citations. In **Parminder Kaur alias P.P. Kaur alias Soni vs. State of Punjab** dated 28.07.2020 reported in **(2020) 8 SCC 811**, wherein Hon'ble the Apex Court in para No.16 observed as under:

"16. Non-examination of Bhan Singh and Karnail Singh is also a noticeable lapse, given the gaps in the prosecution story. It appears that no serious attempt was made to get them examined to resolve the contradictions in the testimonies of PWs 1 and 2. Such lack of examination of material independent witnesses, adversely affects the case of the prosecution. This Court

in *Takhaji Hiraji v. Thakore Kubersing Chamansing*:(2001) 6 SCC 145 , viewed that: (SCC p. 155, para 19)

"19. ... It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case."

24. In **Jarnail Singh vs. State of Haryana** dated 01.07.2013 reported in **(2013) 7 SCC 263**, wherein Hon'ble the Supreme Court in para No.22 observed as under:

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

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

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if

available, and send him to the observation home or in jail.

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

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

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

(iii) the birth certificate given by 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.

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

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

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

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

25. In **Raja Ram vs. State of Rajasthan** dated 29.02.2000 reported in **(2005) 5 SCC 272**, wherein Hon'ble the Apex Court in para No.9 observed as under:

"9. But the testimony of PW 8 Dr. Sukhdev Singh, who is another neighbour, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW 5 making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the Public Prosecutor in the trial court to seek permission of the court to heard (*sic* declare) PW 8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW 8 is binding on the prosecution. Absolutely no reason, much less any good reason, has been stated by the Division Bench of the High Court as to how PW 8's, testimony can be sidelined."

26. In **Vijayalakshmi and Another vs. State Rep. By the Inspector of Police and Anr** dated 27.01.2021, reported in **(2021) SCC OnLine Mad 317**, wherein the Hon'ble Madras High Court in para nos.11 & 17 observed as under:

"11. There can be no second thought as to the seriousness of offences under the POCSO Act and the object it seeks to

achieve. However, it is also imperative for this Court to draw the thin line that demarcates the nature of acts that should not be made to fall within the scope of the Act, for such is the severity of the sentences provided under the Act, justifiably so, that if acted upon hastily or irresponsibly, it could lead to irreparable damage to the reputation and livelihood of youth whose actions would have been only innocuous. What came to be a law to protect and render justice to victims and survivors of child abuse, can, become a tool in the hands of certain sections of the society to abuse the process of law.

17. This Court is not turning a blind eye to cases where the victim or survivor may, under the effect of trauma that they have undergone, studies on which show that they might tend to reconcile with the same by blaming themselves or convincing themselves that the element of consent was infact present. Nor is this Court scientifically justifying in toto, the genuineness or predicament of the accused in every case where it appears that the accused and victim child have been in a romantic relationship. That will depend on the facts and circumstances of each and every case."

27. In **Shri. John Franklin Shylla vs. State of Meghalaya & Anr.** in **Crl. Petn. No.3 of 2023** dated 21.06.2023, wherein the Hon'ble Meghalaya High Court in para No.9 observed as under:

"9. The only ground raised by the learned counsel is that there is no element of sexual assault involved in the whole episode, inasmuch as, the alleged victim herself in her statement under Section 164 as well as in her deposition before the Court, has clearly stated that she is the girlfriend of the petitioner at the relevant point of time and that it was only on that fateful night on 18.01.2021 that they had sexual intercourse, but the same was with her consent and there was no force involved in it. Since there is no evidence of any penetrative sexual assault, the petitioner has therefore made a prayer before this Court for the proceedings against him to be set aside and quashed."

Referring the aforesaid citations, Learned Counsel for the appellant, Mr. S. Lodh submitted that the age of the victim was not proved by the prosecution as per law in this case. So, the charge under the purview of POCSO Act was not proved in this case and relying upon the said citations, Learned Counsel for the appellant submitted that the evidence of the prosecution suffered from various infirmities and on the basis of that, there was no scope to found the appellant to be guilty but the Learned Court below did not consider the same and finally, urged for allowing this appeal by setting aside the judgment.

28. We have discussed the evidence on record in detail and also gone through the citations as referred by Learned Counsel of both the sides. It is on record that the victim could not be produced as by this time she expired. It is also on record that certain improvements were there in the version of PW-1 and PW-2 but for those improvements, this Court does not find any scope to disbelieve the entire prosecution story. Since the victim by this time has expired, so it was the duty of the prosecution to produce the Magistrate, who recorded the statement of the victim, because the appellant in this case could not raise any circumstance to disbelieve the prosecution story. Even during examination under Section 313 of Cr.P.C., the accused did

not submit anything rebutting the evidence on record of the prosecution.

29. There is a general perception that in view of Section 80 of the Indian Evidence Act, there is no need to examine any Magistrate who recorded the initial statement of the victim under Section 164(5) of Cr.P.C. It is the settled position of law that even in absence of the victim, there is scope for convicting any person if the commission of offence is proved otherwise i.e. from the evidence of other witnesses also. Here in the given case, the victim after the commission of offence was produced before the Learned Magistrate and her statement was recorded. Although later on, after a considerable period, she expired, for which her evidence could not be recorded by the Learned Trial Court. It is on record that during trial the prosecution produced the mother of the victim, who identified her signature on the margin of the statement recorded by Learned Magistrate, under Section 164(5) of Cr.P.C. But the contents of her statement could not be proved for which there was no scope to place any reliance upon the said statement of the victim recorded by Learned Magistrate, in course of investigation. Learned Trial Court at the time of delivery of judgment, came to the observation that the contents of the statement recorded under Section 164 of Cr.P.C. are not substantive piece of evidence and if the Court is to consider the same, then the

victim girl ought to be confronted with it and the provision of Section 145 of Evidence Act be complied with. But here as the victim was no more, so, Learned Court below relying upon the evidence of other witnesses found the appellant to be guilty, although certain minor inconsistencies were there. This Court also agrees with the view made by the Learned Trial Court below but it appears that for proper administration of justice, the prosecution ought to have produced the Learned Magistrate for his examination who recorded the initial statement of the victim girl. In this regard, Hon'ble the Madras High Court in Criminal Appeal No.642 of 2018 dated 22.07.2022 relied upon a judgment of the Hon'ble Supreme Court in Three Judges'Bench in **Sheo Raj vs. State** reported in **(1963) SCC OnLine All 123**, wherein in para No.20 & 21 of the said judgment, Hon'ble the Madras High Court observed as under:

"20. The question as to whether such presumption is applicable to the statement (memorandum of identification proceedings) recorded by a Magistrate under Section 164 Cr.P.C. has been elaborately dealt with by a Three Judges Bench in Sheo Raj vs. State (1963) SCCOnLine All 123) and held that a statement made under Section 164, Cr. P. C. is not 'evidence', is not made in a 'judicial proceeding' and is not given under oath. It has been held therein as under:-

" it is open to any person to make a statement or confession before a Magistrate (of a certain class) in to course of an investigation, or at anytime thereafter, but before the commencement of an enquiry or trial and the statement or confession will be recorded by the Magistrate under Sec.164 and is not subject to the bar imposed by Sec. 162. Such a statement, being a previous

statement, may be used only to contradict the person when he appears as a witness at the enquiry or trial of the offence or to corroborate him. A statement made by a person before a Magistrate of the required class holding an identification proceeding and recorded by him is a statement governed by Sec. 164; there is no dispute on this point. It is to be noted that Sec. 164 simply mentions "any statement or confession made to him in the course of an investigation" and not "any statement or confession made to him in the course of an investigation by any witness or accused person." It does not state whose statement of confession is to be recorded by him. Actually at this stage, when the offence is still under investigation, there are no witnesses and no accused persons (except in the sense of persons against whom a charge of having committed the offence is levelled and is under investigation). It is only after the investigation has been completed that the police can decide who is to be the accused of the offence before a Magistrate and who are to be the witnesses in the case. Till then there can be no decision about the status of a person as an accused person or as a witness and all persons examined by the police during the investigation are mere interrogatories or informants or statement-makers. The provisions in the Code relating to investigation do not refer to any person as a witness. Though "witness" is not defined in the Evidence Act, Secs. 118, 119 and 120 of it make it clear that a witness is a person who testifies before a court. Under section 59 all facts may be proved by oral evidence and "oral evidence" is defined in Sec. 3 to mean and include all statements made by witnesses before a court. The definition of "proved" shows that the question of proof of a fact arises only before a court so long as there is no court there is no question of a fact being proved and consequently no question of oral evidence and witnesses. Evidence can be given only in respect of the existence or non-existence of a fact in issue or a relevant fact, vide Sec. 5. Which is a fact in issue or a relevant fact is a matter that arises only before a court because only before a court there can arise the question whether a certain fact is proved or not. These provisions of the Evidence Act make it clear that no person can claim the status of a witness except in relation to a proceeding before a court. It follows that while an offence is still under investigation there is nobody who can be called "witness" and there is no statement that can be called "evidence."

.....

A Magistrate is certainly authorized by law to take evidence but only in a case of which he has taken cognizance; he is not authorised by law to take evidence in a case pending before another Magistrate or in a case that has already been decided by himself or another Magistrate or in a case that has not yet reached a court. He is not authorized by law

to record evidence of any person in any matter and in any circumstance. A Magistrate recording a statement under Sec. 164 is not authorized by law to take evidence for the simple reason that he is not charged with the duty (sic for "duty") of deciding any case and there is no matter to be proved or disproved before him. The other alternative is that the evidence must have been given in a judicial proceeding. When a Magistrate records a statement under Sec. 164 there are only two proceedings in which it can possibly be said to have been recorded, (1) the investigation by the police and (2) the proceeding of recording the statement itself. The investigation by the police is not a judicial proceeding. "Judicial proceeding" is not defined in the Evidence Act, but since we are concerned with a statement recorded under the Code of Criminal Procedure the question whether it was recorded in a judicial proceeding or not must be decided in the light of the definition given in the code. "Judicial proceeding" is defined in Sec. 4(1)(m) to mean "any proceeding in the course of which evidence is or may be legally taken on oath." If evidence may be legally taken on oath it is enough even though evidence is actually not taken on oath. An investigation is a judicial proceeding only if it can be predicated that in the course of it evidence may be legally taken on oath. "In the course of which" means "in the carrying out of which" or "in the conducting of which" and not "during the pendency of which." Anything that is done while a proceeding is pending is not necessarily done in the course of it; if it is not a part of it or is done by one not connected with it, it is not done in the course of it even though it is done during its pendency. In the course of an investigation no evidence can be legally taken on oath by anybody concerned in the investigation. The police have no power to administer oath. As I explained earlier, there is no question of evidence being taken in the course of an investigation. If a Magistrate does something while an investigation is pending it is not done in the course of it. An investigation which would not be a judicial proceeding if a Magistrate did not do something during its pendency does not become one simply because he does something, such as recording a statement under Sec. 164. Since an investigation is to be done solely by the police nothing that he does during its pendency becomes a part of it and can be said to have been done in the course of it. Consequently even if a Magistrate can legally administer oath to a person before recording his statement under Sec. 164 the investigation does not become a judicial proceeding.

.....

12. Thus I find that the statement made by a person under Sec. 164 cannot be said to be made in a judicial proceeding. Sec. 80,

Evidence Act, is, therefore, not applicable to it."

21. The principles laid down in the above decision make it clear that presumption under Section 80 of the Indian Evidence Act, 1872 cannot be drawn to rely upon the Statements of witnesses recorded under Section 164 Cr.P.C during investigation to render a conviction."

From the aforesaid citation, it appears that the statement made by a person under Section 164 of Cr.P.C. cannot be said to be made in a judicial proceeding, so, Section 80 of the Evidence Act is not applicable to that meaning thereby in view of the provision provided under Section 80 of the Evidence Act, Magistrate cannot be exempted from giving deposition in a Court in discharge of his duties, if he or she records any statement of any witness, as there is no scope to take any presumption in view of the said provision of law.

30. Further Hon'ble the High Court of Jammu and Kashmir at Srinagar in **Mst Sakeena vs Mohammad Hussain Sheikh and another** dated 11.12.2015 reported in **(2015) SCC OnLine J & K 228** wherein in para Nos.31, 32 and 33, the Hon'ble J & K High Court observed as under:

"31. Section 80 Evidence Act deals with presumption as to documents produced as record of evidence. It provides:-

"Whenever any document is produced before any Court, purporting to be a record of memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by

any such officer as aforesaid, the Court shall presume.”

32. In order to attract the presumption available under Section 80, the document (statement in the present case) must be a record of evidence given in a Judicial proceedings or before any officer authorized by law to take it and the statement must also be duly taken in the manner laid down by law, by competent officer. The Section deals with the relevancy or admissibility of the statement for proving in subsequent proceedings, the truth of the facts stating therein. The provision, therefore, dispenses with the necessity of its formal proof, by raising the presumption that statement was recorded in accordance with law and, therefore, to be genuine. In the present case, the statement under Section 164-A Cr.P.C. was made before an officer authorised by law to record such statement. It is duly signed by the Magistrate. It, therefore, may not be necessary to examine the Magistrate, to prove the statement as a presumption of genuineness is available under Section 80 Evidence Act. However, where the person whose statement is recorded by the Magistrate is not available and the statement therefore may not be pressed into service only as corroborative piece of evidence, it would be always safe for the trial Court to examine the Magistrate, allow him to be cross examined by the other side so as to be satisfied about the genuineness of the statement and the procedure followed by the Magistrate while recording such statement.

33. Learned Trial Judge has conveniently avoided to look into all above aspects of the case and found an escape route by ignoring statement of deceased recorded under Section 164-A Cr. P.C. Learned Trial Judge opined that as victim died before her statement was recorded and prosecution case rested on statement of victim, charge against respondent was not proved and respondent deserved to be acquitted and charge-sheet dismissed. Trial Judge did not put incriminatory material come across in statement of PW Mst Sakeena, mother of deceased, to respondent. PW Mst Sakeena stated before Trial Court that a few months after occurrence when her daughter (deceased) complained of pain in abdomen, she took her to local doctor and doctor on examining her daughter informed her that her daughter carried pregnancy of 06 months and that when she enquired from deceased, her daughter (deceased) told her that accused had committed rape on her and left her pregnant. PW Mst Sakeena added that statement of her daughter was

recorded under Section 164 Cr.P.C. before Magistrate. Details of occurrence narrated by deceased to her mother were relevant in terms of Section 6, Evidence Act, to prove alleged occurrence and therefore, open to proof. PW Mst Sakeena had, therefore, by her testimony proved that deceased identified respondent as person, who had committed rape on her. Similarly, PW Mst Sakeena having deposed that statement of deceased under Section 164-A Cr.P.C. was recorded before Magistrate and PW Imtiyaz Ahmad, Investigating Officer, having claimed to have got statement of deceased recorded under Section 164-A Cr.P.C., it was bounden duty of Trial Judge to put statements made in this regard to respondent and also to summon Chief Judicial Magistrate, Ganderbal (Shri Parvaiz Husain Kachroo), so that statement of deceased was proved, the witness was allowed to be cross-examined by respondent and thereafter statement of witness on its proof put to respondent."

In Para No.38 last part further, Hon'ble Jammu & Kashmir High Court observed as under:

"38.....It is well settled that death of victim should not be taken as a reason to throw out prosecution case without appreciating other evidence on record. Supreme Court in State of Karnataka v. Mahabaleshwar Gourya Naik 1992 Supp (3) SCC 179 has held that death of victim by itself cannot be a ground to acquit accused. The Court observed:

12. The reason for recording an acquittal of the offence under Section 376 IPC by both the Courts below is the non-availability of the victim for examination. As we have already pointed out, the victim is stated to have committed suicide on 15.11.77 i.e. nearly one and a half months after the occurrence. Whatever might be the reason for her death, the question would be whether the case of the prosecution should be thrown overboard because of the non-availability of the victim for examination on account of her death or whether the Court can record a conviction for any offence that is made out on the available evidence, let in by the prosecution.

15. As stated supra, merely because a victim is dead and consequently could not be examined can never be a ground to acquit an accused if there is evidence otherwise available proving

the criminal act of the accused concerned."

From the above, it appears that in the said case, the accused was acquitted by the Learned Trial Court but in our case the accused is convicted by the Learned Trial Judge. But it appears that the evidence of the Magistrate, who recorded the statement of the victim was not recorded which in my considered view, Learned Trial Court committed gross irregularity in dealing with the matter.

31. Thus, it appears that for non-recording the statement of the Magistrate, Learned Trial Court below committed error in convicting the appellant. So, it appears to this Court that the matter needs to be remanded back to the Learned Trial Court to record the evidence of the Magistrate who during investigation recorded the statement of the victim girl on 13.04.2020.

32. In the result, the judgment and order of conviction and sentence imposed by Learned Special Judge, POCSO, West Tripura, Agartala in connection with case No.Special (POCSO) 22 of 2020 dated 22.06.2023 is hereby set aside. The case is remanded back to the Learned Trial Judge with a direction to record the evidence of the Learned Magistrate to prove the contents of the said statements of the deceased victim in accordance with law and thereafter, to pass a fresh judgment after appreciating the entire evidence on record, without being biased by the judgment of

this Court, so that no injustice is caused to the appellant. The appellant shall appear before the Court of Learned Trial Court below on 12.08.2024. The Learned Trial Judge, on appearance of the accused shall ensure presence of the Magistrate for recording his/her statement fixing a date and there upon shall examine the accused under Section 313 of Cr.P.C., if required, and deliver a fresh judgment within a period of two (02) months from the date of receipt of the copy of judgment.

Send down the LCRs to the Learned Court below immediately.

JUDGE



MOUMITA DATTA

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