GAHC010013592024

2026:GAU-AS:9371

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./21/2024

MD. MANSUR ALI
S/O LATE HABIBUR RAHMAN,
VILL.- BARIGAON, P.S. AND DIST.- MORIGAON, ASSAM- 782104.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY THE P.P., ASSAM.

2:MUSSTT. MAMTAJ BEGUM
D/O MD. DHAN ALI @ KARIF HASAN

R/O- BORIGAON
P.S. AND DIST.- MORIGAON
ASSAM- 782104

Advocate for the Petitioner : MR D K BHATTACHARYYA, MS. C KALITA,MR A ATREYA,DILME R.M. MOMIN,A GAUTAM

Advocate for the Respondent : PP, ASSAM, MS. D GHOSH (LEGAL-AID-COUNSEL FOR R-2)

BEFORE
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date on which judgment is reserved : **05.05.2026**

Date of pronouncement of judgment : **26.06.2026**

Whether the pronouncement is of the operative part of the judgment? : N/A.

Whether the full judgment has been pronounced? : Yes.

JUDGMENT & ORDER (CAV)

Heard Mr. D.K. Bhattacharyya, learned counsel for the accused appellant. Also heard Mr. B. Sarma, learned Addl. P.P., Assam appearing for the respondent No.1 and Ms. D. Ghosh, learned Legal Aid Counsel appearing for the respondent No.2.

2. This appeal has been preferred by the accused appellant against the judgment and order dated 19.12.2023, passed by the learned Addl. Sessions Judge cum Special Judge (POCSO), Morigaon in POCSO Case No.59/2019 (corresponding to Morigaon P.S. Case No.25/2017), whereby the accused appellant was convicted and sentenced to undergo rigorous imprisonment for 7 (seven) years and a fine of Rs.5,000/- (Rupees Five Thousands) under Section 10 of the POCSO Act with default stipulation and rigorous imprisonment for 1 (one) year and a fine of Rs.500/- (Rupees Five Hundreds) under Section 341 of the IPC with default stipulation and the period of detention, undergone by the accused appellant during the trial and investigation shall be set of.

3. The prosecution case, as revealed from the ejahar lodged by the informant (the mother of the minor victim) is that on 15.01.2017 before the Officer-in-Charge of Morigaon Police Station stating *inter alia* that on that day at about 8:00 a.m., accused appellant Monsur Ali of their village threw her 12-year-old

daughter Miss "X" (name is withheld and herein after referred to as victim girl) forcefully on the ground and opened her wearing pant and kissed on her face. Thereafter the accused appellant after taking out his private part started committing sexual relation. At that time the victim girl raised hue and cry and somehow saved herself from the clutches of the accused appellant.

4. On receipt of the ejahar, a case was registered vide Morigaon P.S. case No.25/2017, under Sections 354/3548/352/325/376/511 of the IPC, read with Sections 8/12 of the POCSO Act.

5. The police started investigation of the case and on completion thereof, submitted charge-sheet against the accused appellant under Sections 354/354A/352/376/511 of the IPC, read with Sections 8/12 of the POCSO Act.

6. On appearance of the accused appellant and after furnishing him with the relevant copies, the charges were framed against him under Sections 354A/341/323 of the IPC read with Section 10 of the POCSO Act, to which he pleaded not guilty and claimed to be tried. During the trial, the prosecution examined eight (8) numbers of witnesses including the I.O. and M.O., examined the accused under Section 313 of the CrPC and he denied the allegation levelled against him terming the allegation as false implication by the prosecution. Thereafter, the learned Trial Court, after hearing the parties and upon perusing the materials on record, passed the impugned judgment and order dated 19.12.2023 and being highly aggrieved and dissatisfied with the impugned conviction and sentence, the accused appellant has preferred this appeal.

7. Mr. D.K. Bhattacharyya, the learned counsel for the accused/appellant during the course of argument had submitted that the learned Trial Court committed palpable wrong and illegality, both on facts as well as on law and hence, the impugned judgment and order is liable to be set aside and quashed.

8. Mr. Bhattacharyya, the learned counsel for the accused/appellant further submitted that the learned Trial Court has committed grave error in law and also in evaluating and appreciating the evidence adduced by the prosecution and also in convicting and sentencing the accused/appellant for the offence under section 10 of the POCSO Act as well as under Section 341 of the IPC and as such the impugned judgment is liable to be set aside and quashed. The learned counsel for the accused appellant further submitted that the case of the prosecution, as asserted by the victim girl that upon witnessing a co-villager (PW-5) approaching to graze a cow, the victim took evasive action by pushing the accused/appellant and successfully escaped from his clutches but on the contrary the PW-5 turned hostile, claiming no knowledge of the incident. In the absence of such lack of material evidence against the appellant, the impugned judgment and order is bad and law and liable to be set aside and quashed.

9. Mr. Bhattacharyya, the learned counsel for the accused/appellant contended that the case of the prosecution was that during the time of alleged incident, the victim girl's minor sister was accompanying her however, the victim's sister, although a minor was never brought to testify to prove the sequence of events that had allegedly occurred. Non-examination of such a vital alleged eye-witness renders the prosecution story to be doubtful, calling for the impugned judgment and order liable to be set aside and quashed. Furthermore, the medico-legal report from Morigaon Civil Hospital revealed absence of any

injury marks on the entire body of the victim and opined about the absence of any violent or injury marks on the private parts of the victim or on her body. The absence of any injury mark on the body of the victim, in spite of she being forcefully laid on the ground and molested, casts grave doubt on the veracity of the entire story of the prosecution and as such, the impugned judgment should be set aside and quashed.

10. The further submission of Mr. Bhattacharyya, the learned counsel for the accused/appellant is that in criminal trial, it is the responsibility of the prosecution to prove the charges against the accused/appellant beyond reasonable doubt. According to the principles of criminal jurisprudence, the prosecution cannot merely argue that their case 'may be true'; rather, they must establish that it' must be true'. Upon a thorough examination of the evidence, especially the medical findings that revealed no injuries on the girl the medical examination was conducted within 12 hours of the incident, and considering the absence of the co-villager as a prosecution witness, the impugned judgment is marred by authorized presumptions, surmises, and conjectures. Consequently, it lacks legal sustainability and warrants setting aside and quashed.

11. Mr. Bhattacharyya, the learned counsel for the accused/appellant further submitted that as per the FIR, the incident had taken place at about 8:00 A.M., when the victim along with her sister were returning back from Madrassa. But as per the calendar, on 15.01.2017 it was Sunday and it is stated that on the Sunday itself, the victim along with her sister were returning to their home from Madrassa. In the same time, it is seen that, as per the submission made by the victim under Section 164 CrPC, the incident took place at about 6:00 A.M., while she was returning from Madrassa. If the girls would have returned from the

Madrassa at 6:00 A.M., then she went to the Madrassa at least prior to 1/2 hours, that may be at the very early morning of 4:00 A.M./5:00 A.M., which is practically may not be possible in the month of January and hence, from this aspect also it is seen that some concocted allegations have been brought against the appellant, though as per the FIR as well as the evidence made by her before the Court, she stated that the incident took place at about 8:00 A.M., while she was returning back from Madrassa. Thus, her statement is not found to be consistent and it cannot be considered as a believable statement that on Sunday, she was returning from Madrassa at about 6:00 A.M. Furthermore, except the PW.1 and PW.2 i.e. the informant as well as the victim of this case, the other prosecution witnesses i.e. the PW.3 and PW.4 did not support the case of the prosecution and PW.5 who was stated to be one of the vital witness of the prosecution or who is stated to be one of the eye witness to the incident, is also declared hostile as he did not support the case of the prosecution. Thus, the entire case is based on the evidence of PW.1 and PW.2, where the PW.2/this victim of the case is also not consistent in her statement under Section 164 of the CrPC, as well as adducing her evidence before the Court.

12. The Medical Officer also did not find any injury mark on the private parts of the victim at the time of her examination. Thus the medical evidence also does not support the case of the prosecution. Thus, the learned Special Judge (POCSO), Morigaon had passed the order of conviction solely on the basis of statement of the victim as well as the informant who is the mother of the victim. He further submitted that the conviction can be based on the sole witness of the prosecutrix if she is of sterling quality, believable and trustworthy. But here in the instant case, as it is seen that the victim is not consistent with her statement made in three stages and thus, the evidence of the prosecutrix also

cannot be considered as of sterling quality.

13. Mr. Bhattacharyya, the learned counsel for the accused/appellant further submitted that one birth certificate was seized by the police but the same is issued by the by the concerned authority of Nagaon District and it was also not issued within one year of the birth of the victim which is required to be issued within one year and if the birth certificate to be issued beyond one year of limitation also, in that case there are some formalities which are to be observed, while obtaining the birth certificate. Further, the contents of the birth certificate are also not proved by bringing any official from the issuing authority concerned. So except the production of the birth certificate, the same was not proved as required under the Evidence Act.

14. In support of his submission, Mr. Bhattacharyya, the learned counsel for the appellant relied upon the following decisions:

(i) In the case of ***Mohinder Singh vs. State*** reported in ***1950 SCC 673,*** in para 18, the Hon'ble Apex Court has held as under:

> "*In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are al- leged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of that case".*

(ii) In the case of ***Rai Sandeep @ Deepu vs. State (NCT of Delhi)*** reported ***(2012) 8 SCC 21,*** in para 15 & 31 the Hon'ble Apex Court has held that:

> "*15. Keeping the above basic features of the offence alleged against the appellants in mind, when we make reference to the evidence of the so called 'sterling witness' of the prosecution, namely, the prosecutrix, according to her version in the chief examination when the persons who knocked at the door, were enquired they claimed that they were from the crime branch which was not mentioned in the FIR. She further deposed that they made a statement that they*

had come there to commit theft and that they snatched the chain which she was wearing and also the watch from Jitender (PW-11). While in the complaint, the accused alleged to have stealthily taken the gold chain and wrist watch which were lying near the T.V. It was further alleged that the appellant in Criminal Appeal No.2486 of 2009 was having a knife in his hand which statement was not found in the complaint. After referring to the alleged forcible intercourse by both the appellants she stated that she cleaned herself with the red colour socks which was taken into possession under Exhibit PW-4/B in the hospital, whereas, Exhibit PW-4/B states that the recovery was at the place of occurrence. The police stated to have apprehended the appellants at the instance of Jitender (PW-11) who knew the appellant in Criminal Appeal No.2486 of 2009 even prior to the incident, that Jitender (PW-11) also revealed the name of the said accused to her and that, therefore, she was able to name him in her complaint. When the seized watch was shown to her in the Court, the brand name of which was OMEX, she stated that the said watch was not worn by her nephew Jitender (PW-11) as it was stated to be 'TITAN' and the chain was a gold chain having no pendant. She made it clear that that was not the chain which she was wearing and that it did not belong to her and that the watch found in the same parcel which was a women's watch was not the one which was worn by Jitender (PW-11).

31. When we apply the above principles to the case on hand, we find the prevaricating statements of the prosecutrix herself in the implication of the accused to the alleged offence of gang rape. There is evidence on record that there was no injury on the breast or the thighs of the prosecutrix and only a minor abrasion on the right side neck below jaw was noted while according to the prosecutrix's original version, the appellants had forcible sexual intercourse one after the other against her. If that was so, it is hard to believe that there was no other injury on the private parts of the prosecutrix as highlighted in the said decision. When on the face value the evidence is found to be defective, the attendant circumstances and other evidence have to be necessarily examined to see whether the allegation of gang rape was true. Unfortunately, the version of the so called eye witnesses to at least the initial part of the crime has not supported the story of the prosecution. The attendant circumstances also do not co-relate to the offence alleged against the appellants. Therefore, in the absence of proper corroboration of the prosecution version to the alleged offence, it will be unsafe to sustain the case of the prosecution."

(iii) In the case of ***Deny Bora vs. State of Assam*** reported in ***(2014) 14 SCC 22,*** in para 13 of the said judgment, the Hon'ble Apex Court has held that:

"*13. As we have noticed in the case at hand, the daughter was the eye witness and the wife was slightly away from the scene of occurrence. They are the most natural and competent witnesses. They really could have thrown immense light on the factual score, but for the reasons best known to the prosecution, they have not been examined. It is also not the case of the prosecution that they had not been cited as their evidence would have been duplication or repetition of evidence or there was an apprehension that they would have not supported the case of the prosecution. In the absence of any explanation whatsoever and also regard being had to the presence of wife and daughter of the deceased at the place of occurrence, we are of the considered opinion that it has affected the case of the prosecution. We are obliged to hold so as we find the prosecution has otherwise not been able to establish the case against the appellant and, therefore, non-examination of the material witnesses cannot be regarded as*

inconsequential."

15. Mr. Bhattacharyya, the learned counsel for the accused/appellant further submitted that in case of POCSO, there can be presumption of guilt under Sections 29 & 30 of the POCSO Act but for the said presumption also, it is the duty of the prosecution to prove the foundational facts of the case to take the presumption of guilt under Sections 29 & 30 of the POCSO Act. But without proving the foundational facts of the case, the burden of proving the case or presumption under Sections 29 & 30 of the POCSO Act cannot be considered. In this context also Mr. Bhattacharyya, the learned counsel for the accused/appellant submitted a decision of the coordinate Bench of this Court in the case of ***Manirul Islam vs. State of Assam and anr*** reported in ***(2021) 6 GLR 55,*** wherein in para 51, this Court has held that:

> "*51. From the above, it becomes apparent that mere insertion of sections 29 and 30(2) in the POCSO does not altogether relieve the prosecution of the burden of proof contemplated under sections 101 and 102 of the Evidence Act but merely lessen the burden on the prosecution by shifting the onus upon the accused . However, such reverse onus would shift upon the accused only when the prosecution succeeds in prima facie establishing the charge by adhering to the standard of proof of preponderance of probability. It is only then, the accused would have to displace the presumption of guilt. What therefore, follows is that conviction in a proceeding initiated under the POCSO cannot be based solely on presumption of guilt of the accused under sections 29 &30 of the Act. For the above reasons, we find our- selves in agreement with the guiding principles laid down in paragraph 71of Bhupen Kalita (supra) formulating the parameters to be satisfied for drawing presumption of guilt by the Court under sections 29 and 30(2) of POCSO.".*

16. Accordingly, by citing the above referred judgments, it is submitted by Mr. Bhattacharyya, the learned counsel for the accused/appellant that the prosecution could not establish the case against the accused appellant that he committed any offence of sexual assault on the victim on the fateful day at about 8:00 A.M., as alleged by the prosecution. Thus, it is a fit case wherein the appellant is entitled for acquittal and accordingly, prayed for the same.

17. Mr. B. Sarma, the learned Addl. P.P., Assam appearing for the respondent No.1 submitted that the learned Special Judge (POCSO) at Morigaon had passed the order of conviction after proper appreciation of evidence on record and hence, there is no need of interference in the judgment and sentence passed by the learned Trial Court. He further submitted that the minor age of the victim is also not disputed and that apart, the birth certificate of the victim was also produced before the learned Trial Court. Admittedly the victim girl was 12 to 14 years of age at the relevant point of time of incident. Further, the victim was found to be consistent in her statement recorded under Section 161 and 164 of the CrPC and while adducing her evidence before the learned Trial Court as the PW.2. There is only minor contradictions in the statement made by her recorded under Section 164 of the CrPC, wherein it is recorded that the incident took place at about 6:00 A.M., while she was returning home but in her evidence, in the FIR as well as in her statement recorded under Section 161 of the CrPC also it reveals that she made a clear statement that the occurrence took place at about 8:00 A.M. Such minor contradiction can be over looked which does not go to the root of the prosecution case.

18. In that context, Mr. B. Sarma, the learned Addl. P.P., Assam relied on the decision of the Hon'ble Supreme Court in the case of ***State of Punjab vs. Gurmit Singh and others*** reported in ***1996 SCC (2) 384,*** wherein in para 21, the Hon'ble Supreme Court has held that:

> "*Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the*

victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations".

19. Mr. B. Sarma, the learned Addl. P.P., Assam further submitted that the evidence in respect of sexual assault on the victim by the accused appellant could not be rebutted by cross-examining her or her mother who is examined by the prosection as PW.1 who is also the informant of the case. Mr. Sarma, accordingly raised objection and submitted that there is no merit in the appeal and the same is liable to be dismissed.

20. Ms. D. Ghosh, the learned Legal Aid counsel appearing for the informant/respondent No.2 submitted that all Madrassas are kept open in all Sundays except Fridays, which is a declared holiday for Madrassa and thus on 15.01.2017 though it was Sunday, the Madrass wherein the victim was studying was open when the alleged incident was stated to be committed by the accused

appellant. Ms. Ghosh further submitted that the accused was declared as an absconder in the charge sheet and he never cooperated in the investigation, rather he was avoiding arrest during the entire period of investigation. Subsequently he got arrested in connection with this case only on 03.10.2017, which otherwise establishes the conduct of the appellant. Further the learned Legal Aid Counsel submitted that the statement made by the victim/prosecutrix is found to be consistent in every stage and there is nothing to disbelieve the victim who was only 11/12 years of age, at the relevant time of incident. She further submitted that as per Section 29 of the POCSO Act creates a presumption of guilt against the accused once the foundational facts of the case stands established. It is the duty of the accused/defence to rebut those presumptions by adducing evidence. But here in the instant case, it is seen that except the plea of innocence, the defence did not adduce any evidence to rebut the presumption under Sections 29/30 of the POCSO Act, when the foundational facts could be established by the prosecution.

21. Ms. D. Ghosh, the learned Legal Aid Counsel further submitted that it is a fact that during the medical examination of the victim, the Doctor did not find any injury mark on the private parts of the victim nor there found any evidence of recent sexual intercourse. But the prosecution case is not that the victim was subjected to penetrative sexual assault. Rather she brought the allegation of sexual assault on her by the accused appellant. The learned Legal Aid counsel further submitted that the bodily injuries are not necessary to prove the sexual assault nor it is important to raise raise hue and cry at the time of incident by the prosecutrix.

22. In that context, Ms. Ghosh, the learned Legal Aid counsel relied in the

case of ***Dilip Kumar @ Dalli vs. State of Uttarakhand*** in ***Criminal Appeal No.1005 of 2023*** and specifically emphasized in para 8 & 9 of the said decision, which read as under:

> *"8. We must caution that bodily injuries are not necessary to prove sexual assault1 and neither it is important to raise a hue or cry. In this regard, the Supreme Court's Handbook on Gender stereotypes(2023) provides as under:*
>
> > *"Different people react differently to traumatic events. For example, the death of a parent may cause one person to cry publicly whereas another person in a similar situation may not exhibit any emotion in public. Similarly, a woman's reaction to being sexually assaulted or raped by a man may vary based on her individual characteristics. There is no "correct" or "appropriate" way in which a survivor or victim behaves."*
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> *9. It is a common myth that sexual assault must leave injuries. Victims respond to trauma in varied ways, influenced by factors such as fear, shock, social stigma or feelings of helplessness. It is neither realistic nor just to expect a uniform reaction. The stigma associated with sexual assault often creates significant barriers for women, making it difficult for them to disclose the incident to others. In the present case however, the prosecutrix herself had clearly indicated that she was not forcibly taken away by the appellant. The above evidence indicates that the ingredients for sustaining a charge under Section 366-A of the IPC of abductions with the intent to illicit intercourse of the prosecutrix, was totally absent in the present case. Therefore, the conviction of the appellant under Section 366-A IPC cannot be 1 State of UP v. Chotey Lal (2011) 2 SCC 550; BC Deva v State of Karnataka (2007) 12 SCC sustained".*

23. Ms. Ghosh, the learned Legal Aid counsel further submitted that while scrutinizing or appreciating the evidence, the Court is to read the entire evidence of the witnesses as a whole and it is to be seen as to whether the evidence given by the witness was shaken as to render it unworthy to believe. In that context also the learned Legal Aid counsel relied on the decision in the case of ***State of U.P. vs. M.K. Anthony*** reported in ***AIR 1985 SC 48*** and basically emphasized in para 10 of the said judgment, which reads as under:

> *"10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical*

approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the : root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer. Having examined the evidence of this witness, a friend and well-wisher of the family carefully giving due weight to the comments made by the learned Counsel for the respondent and the reasons assigned to by the High Court for rejecting his evidence simultaneously keeping in view the appreciation of the evidence of this witness by the trial court, we have no hesitation in holding that the High Court was in error in rejecting the testimony of witness Nair whose evidence appears to us trustworthy and credible.".

24. Considering the above referred judgments, Ms. Ghosh, learned Legal Aid counsel submitted that the prosecution could establish the foundational fact of the case that the accused appellant had committed sexual assault on the victim on the very fateful day at about 8:00 A.M., while she was returning home along with her sister from Madrassa. The learned Special Judge (POCSO), Marigaon had passed the judgment and order of conviction after appreciation of evidence on record and hence, the interference of thisCourt in the judgment and order passed by the learned Special Judge (POCSO), Marigaon is not necessary and prayed for dismissal of the same.

25. Before discussing further detail about the case, late us scrutinise the evidence on record.

26. PW.1 is the mother of the victim who lodged the FIR and as per her, on 15.01.2017, at about 8.30 A.M., while her daughter was returning home along with her younger sister on a bicycle from the local Madrassa and reached near the pond of their village, accused Mansur Ali restrained them on the village road and took her daughter/victim to a nearby tree, laid her on the ground, kissed

her, touched her breast and also opened her panty with an attempt to commit rape on her by touching his penis. But seeing some persons on the road, the victim made hue and cry and somehow she pushed the accused appellant and managed to return home. Coming to home, the victim informed her about the incident and accordingly she informed her husband and thereafter, an FIR has been lodged by her. Exhibit No.2 is the FIR lodged by him and Exhibit No.2(1) is her signature. From her cross-evidence, it reveals that at the time of incident, she was inside her house and she denied when suggested that the villagers were present at the place of incident and hence, there is no possibility of committing such an incident. The PW.1/informant also exhibited the birth certificate of the victim as Exhibit No.1. It was also suggested to the PW.1 that the accused only tried to save her from falling into the pond while she fell down from the bicycle and apart from that, he did nothing as alleged against him. She also denied to the suggestion that a false case is lodged against the accused appellant only to extract money from him. She also denied the suggestion that after filing of the FIR, there was a talk of compromise and she requested the police not to arrest the accused appellant.

27. PW.2 is the victim of this case and she deposed that on the date of incident, at about 8:00 A.M., while she was returning home along with her younger sister on a bicycle from local Madrassa and when they reached near to the pond of the village, the accused appellant came out of his house and asked her to stop the bicycle. Then he forcibly stopped her by restraining her bicycle on the village road and then he pulled her near to a tree, laid her on the ground and kissed on her various parts of her body. He then touched her breasts, hugged her and opened her panty and showed his penis to her. Then the accused appellant used force on her to commit misdeed to her but seeing one

person coming on the road with cows, he left her and closed his chain of the pant and then, she somehow managed to return home. In her cross-evidence, the victim denied when suggested that while giving her statement before the Magistrate, she stated that she was returning from Madrassa at about 6:00 A.M. Rather, she clarified that the incident had happened at about 8:00 A.M., while she was returning home from Madrassa. She also denied when suggested that while she was returning home, she fell down from her bicycle, when the accused approached near her only to save her from falling in the pond and did not do anything as alleged by her. She also denied the suggesting that due to previous grudge only, she implicated the accused appellant falsely in the case, as stated by her mother.

28. PW.3 and PW.4 have not supported the case of the prosecution, though they are co-villagers. PW.5 was also declared hostile by the prosecution and he simply deposed that about 2 ½ years ago, he came to know that there was an altercation between the informant and the accused appellant and that apart, he does not know anything about the incident. He was also cross-examined by the prosecution from where it is seen that he had stated before the I.O. that he saw the accused appellant while tearing the clothes of the victim in his attempt to commit rape on her.

29. PW.6 is the Doctor who examined the victim on 15.01.2017 at Morigaon Civil Hospital and on examination of the victim she did not find any sign of recent forceful sexual intercourse with the victim and there was also no violent or injury mark on her private parts. From her cross-examination, it is seen that she did not give any opinion in regards to the age of the victim.

30. PW.7 and PW.8 are the investigation officers who conducted the investigation of this case. PW.7 who was posted as ASI of Police at Morigaon

Police Station on the day of incident, the Officer-in-Charge of the Police Station had received an FIR and accordingly the case has been registered and he was entrusted with the investigation of the case. Thereafter, he visited the place of occurrence, examined the informant and victim, sent the victim for medical examination to Morigaon Civil Hospital and she was also produced before the learned Magistrate of Morigaon Court and her statement was recorded under Section 164 of the CrPC. The PW.7 also examined the other witnesses, drawn the sketch map, collected the medical report of the victim and thereafter, he handed over the case diary to the Officer-in-Charge of the Morigaon Police Station for further investigation. From his cross evidence, it is seen that the time of occurrence is reported as 8:00 A.M. and the FIR was lodged on the same day at about 11:30 A.M. The reasons for delay in lodging the FIR is not mentioned in the FIR as well as in the case diary and the PW.7 did not give any prayer for age determination of the victim in the medical requisition slip.

31. PW.8 simply filed the charge sheet on the basis of the investigation done by the PW.7 and he accordingly exhibited the charge sheet as Exhibit No.6 and Exhibit No.6(1) is his signature.

32. From the evidence on record, it is seen that the PW.3, PW.4 and PW.5 who are independent witnesses of the case did not support the case of the prosecution. The PW.6 is the Medical Officer and PW7 and PW.8 are the investigating officers. Thus the only vital witnesses of the prosecution case are the PW.1/the informant as well as the mother of the victim and PW.2/the victim herself. Admittedly, there is no eye witness to the prosecution case and it is also the fact that the younger sister of the victim who was also accompanied the victim at the time of returning from Madrassa is also not examined by the prosecution. So the entire case is based on the evidence of the prosecutrix who

was an 11 years old child at the relevant point of time.

33. The prosecutrix/the victim brought the allegation that while she was returning from Madrassa at about 8:00 A.M. on her bicycle, the accused appellant came out of his house and restrained her and pulled her under a nearby tree, laid her on the ground and kissed on her various parts of her body, touched her breasts, opened her panty and also showed his penis by opening the chain of his pant. That apart, she did not brought any allegation of penetrative sexual assault on her and she somehow managed to escape from the clutch of the accused appellant, as he left her seeing one person on the road. As per the prosecution, the said person was the PW.5 but it is seen that he was declared as a hostile witness, as he did not support the case of the prosecution. So it is to be seen as to whether the prosecution could establish the case only on the basis of the evidence of PW.1 and PW.2, the informant and the victim respectively.

34. PW.1 also came to know about the incident when the victim reported the entire incident to her after reaching home and then only she lodged the FIR in the police station, narrating the entire incident as reported by her daughter. There is nothing to disbelieve the PW.1 and she could not be rebutted by the defence in her cross-examination. It also could not be brought on the record regarding the availability of other person on the road at the time of the incident.

35. The defence took the plea that only due to previous grudge, the informant had lodged the FIR with some false and concocted allegations, only with a view to extort money from the accused appellant. But the defence failed to produce any evidence to substantiate the plea that there was a previous grudge on the accused appellant for which the FIR was lodged. Mere a suggestion at the time of cross-examination is not sufficient to substantiate the plea of previous grudge

or enmity, if it is not substantiated with evidence.

36. Coming to the evidence of the PW.2/the victim, it is seen that her evidence is consistent while she gave her statement under Section 161 and 164 of the CrPC vis-a-vis at the time of recording her evidence before the learned Trial Court. The only contradicting statement, the victim made before the learned Magistrate at the time of recording her statement under Section 164 of the CrPC that the incident took place at about 6:00 A.M. But that has been clarified by the victim while she adducing her evidence and she stated that she never said before the learned Magistrate that the incident took place at about 6:00 A.M. Rather, she clarified that the incident actually took place at about 8:00 A.M. while the victim along with her younger sister were returning home from Madrassa. So said contradiction regarding recording of time by the learned Magistrate in her statement under Section 164 of the CrPC cannot be the sole ground to discard the entire statement/evidence of the prosecutrix, which is otherwise found believable and trustworthy. Rather, the victim can be termed as sterling witness wherein she gave her evidence without any contradiction and was found to be consistent in her statement at every stages.

37. Now the question arises as to why the eleven years old victim girl will depose falsely against the accused appellant or as to why she will report the incident to her parents if nothing had happened to her as per the story of the defence. As per the story of the defence, the accused simply helped her from falling into the pond while she along with her younger sister was returning their home on a bicycle. But there is no evidence to that aspect that he simply saved the victim from falling into the pond. There also cannot be any reason as to why the victim would falsely implicate the accused appellant, if he was simply trying to save her from falling into the pond. Rather, this plea supports the case of the

prosecution to the extent that the accused appellant was very much present at the relevant point of incident near to the victim. Further, from the statement of the accused appellant recorded under Section 313 of the CrPC also it is seen that he did not take any specific plea in regards to the previous grudge or enmity nor he took the plea that he was simply trying to save the victim from falling into the pond, as cross-examined to the prosecution witnesses. He simply took the plea of denial stating that a false and concocted case is lodged against him.

38. Coming to the medical evidence, it is seen that the Doctor did not find any sign of recent sexual intercourse with the victim nor find any injury marks on her private parts. But this is not a case of any penetrative sexual assault to find any recent sign of sexual intercourse on the victim at the time of her examination by the Medical Officer and it is also not alleged by the victim that he assaulted or during that procedure she sustained any injuries on her body or private parts. The case of the prosecutrix is that she was pulled under a nearby tree, laid her on the ground, kissed her entire body, touched her breasts as well as opening her panty he tried to commit sexual assault on her. That apart, there is no any allegation of penetrative sexual assault on her to find any injury mark on her private part or to find any sign of recent penetrative assault at the time of her examination.

39. Ms. D. Ghosh, the learned Legal Aid Counsel for the informant/ respondent No.2 also relied on the decision of ***Dilip Kumar @ Dalli vs. State of Uttarakhand (Supra)*** as stated above wherein also the Hon'ble Apex Court had expressed the view that bodily injuries are not necessary to sexual assault and neither it is important to raise hue and cry and also held that "it is a common myth that sexual assault must leave injuries".

40. The learned counsel for the accused appellant also raised the issue of the age of the victim and it is stated that her age was not proved by the prosecution. During her examination of the PW.1/the informant, she exhibited the birth certificate of the victim as Exhibit No.1 though the contents of the birth certificate was not proved by bringing any person from the office of the issuing authority, which is a lapse on the part of the prosecution but being a public document, the contents of the birth certificate also cannot be disbelieved only due to non-examination of the issuing authority. However, it is a fact that the birth certificate was issued on 14.06.2005 and the date of birth of the victim is shown as 10.04.2005 and thus, it is seen that the birth certificate of the victim was issued only two months after her birth and it is not a case as submitted by the learned counsel for the accused appellant that the birth certificate of the victim was not within one year and that has been issued without observing any official formalities. So only because of non-examination of the issuing authority of the birth certificate, the entire contents of the birth certificate cannot be disbelieved which was issued more than 11 years prior from the date of incident. More so, the age of the victim was also not disputed at the time of trial, except the suggestion to the Doctor, the age of the victim was not disputed by the accused appellant.

41. Thus from the discussions made above, it is seen that the prosecution could bring home the charges against the accused appellant on the basis of the statement made by the prosecutrix/victim as well as the informant of this case. The evidence of the victim is also found to be consistent and there is no reason to disbelieve the child witness/ prosecutrix only because of her age at the time of recording her statement.

42. It is well settled that the conviction can be based on the basis of a child

witness and his/her testimony can be relied upon even in absence of oath, if the victim has the capacity of understanding and can give rational answers. The child witness also can be considered as competent witness under Section 118 of the Evidence Act and there is no legal principle that the child witness would not be able to recapitulate the facts in his/her memory. However, the probability of tutoring a child witness cannot be denied but that cannot be the only reason to disbelieve the child witness, who is otherwise considered as a competent witness.

43. In the instant case, rather it is seen that there is no such evidence that the victim was tutored by her mother/informant or she deposed falsely before the Court only as per her mother/informant due to previous grudge or enmity with the accused appellant.

44. The Hon'ble Supreme Court in the case of ***Hemmat Sukhadeo Wahurwagh Vs State of Maharashtra,*** reported in ***(2009) 6 SCC 712 (FB)***, has held that "... *though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and molded, but it is also accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."*

45. In the case of ***State of Himachal Pradesh Vs. Sanjay Kumar @ Sunny*** reported in ***(2017) 2 SCC 51,*** Hon'ble Supreme Court also had made the observation that whenever charge of rape is made, where the victim is a child, it has to be treated as a gospel truth if the deposition of the child victim is found to be trustworthy.

46. The Hon'ble Apex Court in the case of ***Moti Lal vs. State of Madhya***

Pradesh reported in ***(2008) 11 SCC 20*** has held in paragraph Nos. 7 & 9 as under:

> "*7. It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian women as tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim has falsely implicated the accused does not appeal to reasoning. There was no apparent reason for a married woman to falsely implicate the accused after scatting her own prestige and honour.*
>
> *9. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge leveled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix. There is no rule of law or practice incorporated in the Indian Evidence Act, 1872 (in short Evidence Act) similar to illustration (b) of Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is own to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. This position was highlighted in State of Maharashtra v. Chandraprakash kewalchand Jain (1990 91) scc 550)."*

47. In ***State of Himachal Pradesh v. Raghubir Singh,*** reported *in* ***(1993) 2 SCC 622***, the Hon'ble Supreme Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before

recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. A similar view has been reiterated by the honourable Supreme Court in Wahid Khan v. State of Madhya Pradesh (2010) 2 SCC 9; AIR 2010 SC 1, placing reliance an earlier judgment in Rameshwar S/o kalian Singh v. State of Rajasthan, AIR 1952 Sc 54. Thus the law that emerges on the issue is to the effect that the statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The Court may convict the accused on the sole testimony of the prosecutrix.

48. In a case under the POCSO Act, there can be presumption of guilt under Sections 29 & 30 of the POCSO Act but it is the duty of the prosecution to prove the foundational facts of the case to take such presumption of guilt under Sections 29 & 30 of the POCSO Act. As relied by the learned counsel for the accused appellant in the case of ***Manirul Islam (Supra)***, wherein it has been held that the conviction in a proceeding initiated under the POCSO Act cannot be based solely on the presumption of guilt of the accused under Sections 29 & 30 of the POCSO Act, unless the foundational fact is proved by the prosecution.

49. But here in the instant case, as discussed above, the prosecution could establish the foundational fact of the case and the defence could not rebut the said presumption neither by cross-examining the witnesses nor by producing any defence evidence to rebut the presumption of guilt under Sections 29 & 30 of the POCSO Act.

50. So from the discussions made above, the prosecution could establish that

the accused appellant had restrained the victim on the road while she was returned to her home from the Madrassa at about 8:00 A.M. and sexually assaulted her and accordingly, this Court find no reason to make any interference in the judgment and order dated 19.12.2023, passed by the learned Addl. Sessions Judge cum Special Judge (POCSO), Morigaon in POCSO Case No.59/2019 against the present accused appellant.

51. Accordingly, this appeal being devoid of any merit stands dismissed.

52. Send back the TCR along with a copy of this judgment and order forthwith.

JUDGE

Comparing Assistant

Manoranjan Barman

Digitally signed by Manoranjan Barman
DN: c=IN, o=Personal, postalCode=781353, l=Nalbari, st=Assam, street=12/190 GOPALBAZAR, Sandheli, Pachim Nalbari Assam India 781353 NEAR GOPAL THAN, title=2306, 2.5.4.20=29db4acf51a76f18a8b02da116d99d9a830067d0e1ee9ade3211eba147de7638, serialNumber=f62c6d212ff0a19bb91eb2be0de18d2d5675f8515740ee4f44960ef878267138, email=barmanm1974@gmail.com, cn=Manoranjan Barman
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