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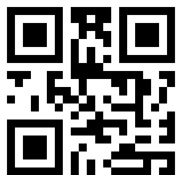

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THE GAUHATI HIGH COURT

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

Case No. : Crl.A./342/2023

PULAK DEKA
S/O LATE KHAGEN DEKA,
R/O DHUPGURI, P.S.- KHETRI,
DIST.- KAMRUP (M), ASSAM. ….Appellant

VERSUS

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

2:JINA DEVI
W/O SANTOSH CHETRI
R/O DHOPGURI
P.S.- KHETRI
DIST.- KAMRUP (M)
ASSAM …..Respondents.

:::BEFORE:::

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MR. JUSTICE RAJESH MAZUMDAR

Advocates for the appellant : Mr. S. Borthakur ..Sr. Advocate.
Mr. S. Dey ..Advocate.

Advocate for the respondent No.1: Mr. R.R. Kaushik, A.P.P, Assam

Advocate for the respondent No.2: Ms. S. Sharma,
….Legal Aid Counsel.

Date on which judgment is reserved : **15.06.2026**

Date of pronouncement of judgment : **19.06.2026**

Whether the pronouncement is of the : N/A

operative part of the judgment ?

Whether the full judgment has been : Yes

pronounced?

JUDGMENT & ORDER (CAV)

(M. Zothankhuma, J)

1. Heard Mr. S. Borthakur, learned Senior Counsel assisted by Mr. S. Dey, learned counsel for the appellant. Also heard Mr. R.R. Kaushik, Additional Public Prosecutor, Assam for the State and Ms. S. Sharma, learned Legal Aid Counsel for the respondent no.2.

2. This appeal has put to challenge the conviction of the appellant under Section 4 of the POCSO Act, 2012, vide the impugned judgment dated 05/07/2023 passed by the Court of the learned Additional Sessions Judge, POCSO, Kamrup (M), Guwahati, in Sessions Case No. 207/2018, arising out of Khetri P.S Case No. 53/2008.

3. The appellant's counsel submits that the conviction of the appellant by the learned Trial Court, on the ground of having committed penetrative sexual assault on the victim girl, age 6 years, is liable to be set aside, inasmuch as, the GDE 1044 dated 29/03/2018 had been registered on the basis of a mobile call, made by the informant (PW-1), who is the mother of the victim. However, the Police and the Prosecution had taken the written FIR submitted by PW-1 on the same date, i.e. 29/03/2018 to be the FIR, which cannot be done in terms of

the Division Bench judgment of this Court in the case of ***Lal Kalandi and Another vs. State of Assam***, reported in ***(1997) 1 GLR 311***. He submits that the GDE 1044 should be treated as the FIR and the contents of the subsequent written FIR submitted by the informant should be treated as a statement made under Section 161 Cr.P.C.

4. The appellant has also taken the stand that though the victim's statement under Section 164, Cr.P.C corroborates the victim's testimony made before the learned Trial Court, the learned Trial Court did not take into consideration the evidence of the three Defence Witnesses (DWs), which proved that the child could not have been raped. The learned Counsel for the appellant submits that the entire allegation of rape made against the appellant had been fabricated, which was a result of the appellant and other villagers having asked the informant to stop the business of selling local liquor in the village.

5. The appellant's counsel submits that the evidence tendered by the Defence Witnesses, cannot always be termed as a tainted one and that the Defence Witnesses are entitled to equal treatment and equal respect as that given to Prosecution Witnesses. In support of the above submission, the learned counsel has relied upon the judgment of the Supreme Court in the case of ***The State of Uttar Pradesh vs. Raghuvir Singh***, which was decided on 23.01.2025 in Criminal Appeal No. 1588/2015 and in the case of ***State of U.P vs Babu Ram***, reported in ***(2000) 4 SCC 515.***

6. The learned counsel for the appellant further submits that the victim has been tutored to make a fabricated case against the appellant, due to the appellant and the other villagers having asked the informant to stop the business of selling local liquor. He submits that when the mother of the

appellant (DW-1), has categorically stated in her testimony that the victim had been sleeping with her, during the time the child (victim) was in their house, there was no opportunity for the appellant to have slept with the child and committed any illegal act on the child.

7. The learned counsel for the appellant further submits that the informant (PW-1) in her evidence, had only stated that her daughter (victim) had told her that the appellant had grabbed her breast. On the other hand, the evidence of the victim went way beyond what PW-1 had stated in her testimony before the Trial Court. The victim in her evidence had made an allegation that the appellant had not only grabbed her breast, but that the appellant had also inserted his private parts into her private parts, besides sucking her breast and private parts. Further, the appellant had made her fondle his penis. The learned counsel submits that the victim would have in all probability told her mother everything. As such, when the mother (PW-1) had only made a statement that the breast of the victim had been fondled by the appellant in her testimony, the other acts mentioned by the victim were only an afterthought and could only have come about due to tutoring, for the reasons stated in the preceding paragraphs. He accordingly submits that the impugned judgment should be set aside.

8. Mr. R R. Kaushik, the learned Additional Public Prosecutor submits that a mobile call had first been made by the informant to the Police, informing them that an incident of rape had occurred. The mobile call had been made by the informant to the Police emergency call number 100 at 12:45 a.m of 29/03/2018. It was on the basis of the said mobile call, the GDE No. 1044 dated 29/03/2018 was registered by the Khetri Police Station. The police thereafter, on the basis of the said GDE No.1044, recorded the statement of PW-1 (informant), PW-3 (who

is the neighbour of the appellant), DW-2 (who is the wife of the appellant) and DW-3 (who is the sister of the appellant).

9. The learned Additional Public Prosecutor submits that the statement made by DW-2 under Section 161 Cr.P.C is to the effect that when DW-2 reached her house, she saw the appellant quarreling with the informant, whereupon DW-2 also started quarreling with the appellant. He submits that nothing was stated by DW-1, regarding the issue of selling of illegal local liquor by the informant. Further, when DW-2 questioned the appellant about the alleged allegation made against him regarding rape, the appellant ran away.

10. The learned Additional Public Prosecutor also submits that as per the statement given by DW-3 (sister of the appellant) under Section 161 Cr.P.C, a fight had occurred between DW-2 and the appellant, due to which the appellant ran away. DW-3 did not make any statement in her Section 161 Cr.P.C statement, with regard to the appellant allegedly selling liquor or the villagers asking the appellant to stop selling local liquor in the village.

11. The learned Additional Public Prosecutor further submits that the statement of DW-1 (mother of the appellant) which was recorded under Section 161 Cr.P.C, after filing of the written FIR on 29/03/2018 itself, was to the effect that DW-1 was not at home when the alleged incident occurred. Further, on hearing the said allegation, DW-1 was saddened by the said act. DW-1, in her Section 161 Cr.P.C statement, also did not say anything about the informant and the villagers requesting the appellant to stop selling local liquor in the village.

12. The learned Additional Public Prosecutor further submits that the statement made by the victim under Section 164 Cr.P.C corroborates her

testimony given before the learned Trial Court. The evidence of the Doctor (PW-6) also corroborates the evidence of the victim, which is to effect that the victim had been subjected to penetrative sexual assault, inasmuch as, the Doctor stated that the injuries sustained by the victim could have arisen due to (i) attempt of penetration of penis or of similar size of object (ii) fingering". Further, the genital organs, vulva, hymen and vagina of the victim were reddened and there was positive tenderness. There was also congestion present, while the hymen was intact. Learned Additional Public Prosecutor submits that there is nothing to doubt the veracity of the evidence of the victim and as such, the impugned judgment should be upheld.

13. Ms. S. Sharma, learned Legal Aid Counsel for the respondent no.2 reiterates the submission made by the learned Additional Public Prosecutor. She submits that even though the hymen was intact, the medical evidence showed that there was some kind of penetration into the private parts of the victim by the private parts of the appellant. She submits that penetrative sexual assault in terms of Section 3 of the POCSO Act is proved, as per the evidence of the victim. It does not have to be a full penetration of the private parts and even a small penetration would suffice, to attract the provisions of Section 3 & 4 of the POCSO Act. She also submits that just because the hymen was intact, does not mean that there has been no penetrative sexual assault committed on the victim by the appellant. In support of her submission, learned Legal Aid Counsel has relied upon the decision of the Supreme Court in the case of (i) ***Tarkeshwar Sahu vs. State of Bihar (Now Jharkhand)***, reported in ***(2006) 8 SCC 560,*** (ii) ***Wahid Khan vs. State of Madhya Pradesh***, reported in ***(2010) 2 SCC 9*** and the decision of the Single Bench of this Court in the case of ***State of Mizoram vs. Lalramliana & Another***, reported in ***2024 SCC OnLine Gau***

403. The learned Legal Aid Counsel for the respondent no.2 further submits that no prejudice has been caused to the appellant just because the written FIR dated 29/03/2018 has been taken to be the FIR by the Prosecution and the same has been acted upon during investigation. The learned Additional Public Prosecutor accordingly submits that the judgment of the learned Trial Court should be upheld.

14. We have heard the learned counsels for the parties.

15. In the present case, the written FIR submitted by the informant on 29/03/2018 has been taken to be the FIR, even though the GDE No.1044 had been made on the basis of the mobile call made by the informant at 12:45 a.m on 29/03/2018. Further, the statements of PW-1, PW-3, DW-2 and DW-3 under Section 161 Cr.P.C had been recorded on the basis of the information received through mobile.

16. In the case of ***Lal Kalandi (supra)*** the Division Bench of this Court has held that when investigation had commenced in pursuance to a G.D. Entry prior to a written FIR being submitted, the written FIR would have to be considered to be a statement made to the Police during course of investigation as per Section 161 Cr.P.C. The subsequent written FIR could not have been admitted in evidence and must be held to be inadmissible, as it could not be treated as an FIR within the meaning of Section 154 Cr.P.C. It further held that if the prosecutor had failed to produce the initial G.D Entry before the learned Trial Court, it was the duty of the Court to direct it’s production. A fair trial required that the accused was informed the basis for the G.D Entry that had been registered. The object of the FIR, that is the basis for the G.D Entry, is to obtain early information of the alleged criminal activity and to record the circumstances

before there is time for it to be embellished or affected. Further, the learned Trial Court could use the Case Diary statements of the witnesses, in terms of Section 162 Cr.P.C, to contradict the testimony of the witnesses under Section 145 of the Evidence Act.

17. Section 154 Cr.P.C provides that every information relating to the commission of a cognizable offence, if given orally to an Officer-in-Charge of a Police Station, shall be reduced to writing by him or under his direction and shall be read over to the informant, every such information, whether given in writing or reduced in writing, shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept by such Officer in such form as the State Government may prescribe in this behalf. In the present case, the information given to the Police through mobile call and which had been registered as GDE No.1044 was to the effect that someone called no. 100 and said that a rape had been committed in Dhupguri. The person who gave the information through mobile was not known initially and as such, the information which had been taken down in writing and is a part of the case diary, had not been signed by the person who made the call.

18. Though in terms of the information received through mobile phone, three witnesses have been examined by the Police to verify the truthfulness of the information received through mobile phone, there does not appear to be any prejudice caused to any party, just because a subsequent written FIR had been submitted by the informant (PW-1). Further, in terms of Section 157 Cr.P.C, an Officer-in-Charge of a Police Station, who has reason to suspect the commission of an offence, which he is empowered to investigate under Section 156 Cr.P.C, can on the basis of information received, send a report of the same to a Magistrate empowered to take cognizance of such offence and proceed in

person or depute one of his subordinate Officers to investigate the facts and circumstances of the case and to take necessary measures.

19. In the present case, though information that rape had taken place in Dhupguri had been informed to the Police by way of a mobile phone call, a written FIR had subsequently been submitted. There is nothing in the mobile call which is not reflected in the written FIR. In the case of ***Krishna Mochi and others vs. State of Bihar*** reported in ***(2002) 06 SCC 81***, the Supreme Court has held that even if a FIR is not proved, it would not be a ground for acquittal, but the case would depend upon the evidence led by the Prosecution. Therefore, non-examination of the informant cannot, in any manner, affect the prosecution case. In the case of ***Harendra Rai vs. State of Bihar and others*** reported in ***(2023) 13 SCC 563***, the Supreme Court has held that the aspect of non-marking of the FIR as an exhibit and non-production of the formal witnesses to prove the lodging of the FIR in the trial proceedings, do not vitiate the genuineness of the FIR. The Supreme Court further refused to give any discount to the accused persons for non-exhibiting the FIR.

20. As stated in the preceding paragraph, the message in the mobile call, on the basis of which GDE No.1044 was registered only stated that rape had taken place in Dhupguri. No other information was provided and the name of the caller was initially not known. In the case of ***Lalita Kumari vs. Government of U.P.***, reported in ***2013 14 SCR 713***, the Supreme Court has held that a GD Entry can also be treated as an FIR in an appropriate case. In the case of ***Anand Mohan Vs. State of Bihar***, reported in ***(2012) 7 SCC 225*** and ***Sk. Ishaque & Others vs. State of Bihar***, reported in ***(1995) 3 SCC 392***, the Supreme Court held that every cryptic information cannot be treated as FIR.

The information should sufficiently disclose the nature of the offence and the manner in which the offence was committed. In any event, when an FIR and the mobile call was to set the criminal law in motion and the written FIR has been treated as the FIR, as the information given through mobile was cryptic, we fail to understand as to how the same has caused prejudice to the appellant. The preliminary enquiry made on the basis of the GDE No.1044 and the subsequent registration of the written FIR giving details of the crime does not invalidate the Prosecution case.

21. Thus, though the appellant has taken a plea that the Trial Court was bound to give him the contents of mobile call, which was the basis for registering the GDE No.1044, the non-disclosure of the contents to the appellant does not in any manner prejudice the appellant. In any event, the written FIR contains the contents/basis for registering the GDE No. 1044. Secondly, even if the basis for registering the GDE No.1044 is not allegedly known to the appellant, the judgments of the Supreme Court in ***Krishna Mochi (Supra)*** and ***Harendra Rai (Supra)*** make it amply clear that even if the FIR is not proved, it would not be a ground for acquittal, but the case would depend upon the evidence led by the Prosecution. However in the present case, the learned Trial Court has examined the person who had made the mobile call to the Police, i.e. the informant (PW-1), who is also the mother of the victim.

22. After investigation of the case, the Investigating Officer (PW-5) submitted a charge-sheet against the appellant under Section 4 of the POCSO Act. The learned Trial Court thereafter framed charge against the appellant under Section 4 of the POCSO Act, to which the appellant pleaded not guilty and claimed to be tried.

23. The evidence of the witnesses are to the following effect:-

24. PW-1, who is the mother of the victim girl aged 7 years and also the informant, stated in her evidence that as she had taken her mother to hospital with the appellant's wife, she kept her son and victim daughter in the house of the appellant. After returning from the hospital, she prepared a meal at home and at about 11.30 pm, she went to the appellant's house to bring her children back. While returning from the appellant's house, her victim daughter told her in tears that the appellant had committed a bad act with her and that the appellant had also grabbed her breasts. Her daughter cried a lot due to which PW-1 dialed emergency number 100 and the Police arrived thereafter. The Police, after questioning the victim, took her to hospital, as she was crying and complaining of pain in her breasts. The Doctor gave her medicines. PW-1 then lodged an FIR. The Police had the medical examination of the victim conducted at Guwahati Medical College and Hospital (GMCH) and her (victim) statement recorded before the Magistrate.

25. In her cross-examination, PW-1 stated that her father was suffering from paralysis and staying in their house and that the house of the appellant was near their house.PW-1 also stated that her two children used to visit the appellant's house and PW-1 used to address the appellant's wife as sister-in-law. On the said date, PW-1 had taken the wife of the appellant along with her to hospital. At the time of taking back her son and daughter from the appellant's house, the appellant had opened the door. She said that when the appellant opened his house door, she found the victim crying.

26. The evidence of PW-2 is to the effect that prior to the victim (PW-2) giving her testimony, the learned Trial Court put preliminary questions to the child

victim. On being satisfied by the rational capacity of the victim child to understand and reply to questions put to her, the learned Trial Court recorded the victim's statement, which is to the effect that she doesn't visit the house of the appellant anymore. The victim further stated that one day when her grandmother fell ill, her mother took her grandmother to the hospital. The appellant’s wife also went to the hospital along with her mother. She and Babu were kept in the appellant's house. When Babu, her younger brother fell asleep, the appellant removed his pants and inserted his private parts into her private parts. Though the victim cried, the appellant sucked her breast and vagina. After being taken home by her mother, the victim told her mother about the incident. She was crying as she felt pain in her vagina and breast. Her mother called the Police and the Police took her to a Doctor. The victim also stated that the appellant asked her to fondle his penis. She also stated that the appellant’s wife came, the appellant asked her to put on her clothes. She also stated that when the appellant showed her some bad videos in his mobile phone and after removing her dress, he committed a bad act on her. The appellant had also pressed her mouth when she cried. The victim also stated that the appellant committed the bad act in a separate room, while Babu slept in a separate room.

27. In her cross-examination, PW-2 stated that her mother does not visit the appellant's house nowadays and that when the appellant was committing the bad act with her, the grandmother was sleeping in her room. She also stated that she told her mother that the appellant had committed a bad act with her. She also denied the suggestion that she had been tutored.

28. The evidence of PW-3 who is a neighbour, is to the effect that at about 12 midnight, she heard a commotion outside her house. The following day she

learnt that the victim had been raped by the appellant.

29. The evidence of PW-4 is to the effect that his house is near the appellant's house and he heard that a quarrel had taken place in the appellant's house.

30. The evidence of PW-5, who is the Investigating Officer, is to the effect that prior to registering the written FIR submitted by PW-1, preliminary steps had been undertaken by SI B Dekavide on the basis of GDE No.1044 dated 29/03/2018, by recording the statement of the victim and two independent witnesses. Thereafter, PW-5 carried out further investigation. On finding sufficient materials against the appellant, charge sheet was submitted against the appellant under section 4 of the POCSO Act by him. In his cross-examination, PW-5 stated that he did not collect any medical document in respect to the treatment given to the victim at Khetri PHC.

31. The evidence of PW-6, who was posted as Senior Resident Doctor, Department of Forensic Medicine, Guwahati Medical College and Hospital, is to the effect that he medically examined the victim girl on 29/03/2018 and found that she was disturbed, crying and depressed. Further, her genital organs were reddened and there was positive tenderness. There was congestion in her vulva with positive tenderness. The victim's hymen was intact with positive tenderness and there was congestion present in the vagina with positive tenderness. The opinion of PW-6 on the basis of the physical examination and laboratory investigations, was that there was no recent sexual intercourse on her person at the time of examination. He however stated that the injuries mentioned in his medical examination report could arise due to (i)attempt of penetration of penis or of similar size object and (ii) fingering.

32. The evidence of DW-1, who is the mother of the appellant, is to the effect that the appellant and other villagers had asked the informant to stop her business of selling local liquor or else she would be handed over to the Police.She also stated that the informant had come to their house requesting her daughter-in-law to take her to the hospital. She also insisted to keep her children in their house. Though DW-1 initially objected to the idea, she gave in due to the insistence of the informant. Thereafter, the children of the informant slept with her in her room. Later, when the informant came to take her children back, DW-1 saw the informant fighting with the appellant and making a false allegation against him. Further, the neighbours also came and asked the informant to take back the false allegation levelled against her son. The next day, she came to learn that the informant had lodged a false case against her son in conspiracy with others. In her cross-examination, DW-1 denied the suggestion that on the day of occurrence, when the children of the informant were in her house, she did not sleep with them.

33. The evidence of DW-2, who is the wife of the appellant, is to the effect that her husband (appellant) along with other villagers, had asked the informant to stop her business of selling local liquor or else she would be handed over to the Police. On 28/03/2018 at about 8 pm, the informant came to their house along with her two children and requested DW-2 to go with her as she was taking her mother to the hospital. She also insisted in keeping her children in their house. DW-2 then asked her husband (appellant) to look after their small baby. Though her mother-in-law (DW-1) initially objected, DW-1 eventually agreed upon the proposal of the informant. The informant and DW-2 then returned back at about 10 pm from Khetri PHC. DW-2 first went to the house of the informant. Thereafter, both the informant and DW-2 came to their house

and the informant took away her daughter. She again returned back to take her son and at that time, the informant raised a false allegation against her husband, alleging that he had committed an indecent act with the victim. As a result, a dispute arose and hearing a hue and cry, their neighbours also turned up. The neighbours and the family members of DW-2 then asked the informant to take back the allegations made against her husband. On the next day, DW-2 came to learn that the informant had lodged a false case against her husband.

34. The evidence of DW-3, who is the younger sister of the appellant, is to the effect that the appellant and the other villagers had asked the informant to stop her business of selling local liquor or else she would be handed over to the Police. On 28/03/2018 at about 8 p.m., the informant came to their house along with her two children and asked DW-2 to go with her, as she was taking her mother to the Hospital. DW-3's mother initially objected to the proposal/request made by the informant. However, her mother agreed to the proposal subsequently. The wife of the appellant then kept her infant child with the appellant and asked him to look after the child. After some time, DW-3 came to her brother's house and stayed there till 9.30 pm, looking after the children. She returned home around 10.30pm. On hearing a hue and cry from her brother's house, she immediately went there and noticed neighbours gathering there. The neighbours were asking the informant to withdraw the false allegation made by her against her brother (appellant). Then she came to know that a false allegation had been made against her brother, i.e. he had committed an indecent act with the daughter of the informant.

35. The appellant was thereafter examined under section 313 Cr.P.C., wherein he denied the evidence adduced against him.

36. In the case of ***Raghuvir Singh (Supra)*** and in the case of ***Babu Ram (Supra)***, the Supreme Court held that the evidence of Prosecution/Defence/Court Witnesses are to be examined without predilection or bias. No witness is entitled to get better treatment. The issue of credibility and trustworthiness should be attributed to the Defence Witness at par with that of the Prosecution Witnesses. Paragraph-39 of the judgment of the Supreme Court in the case of ***Raghuvir Singh (Supra)*** is reproduced herein below as follows:-

> "*39. It is well settled that the evidence tendered by the defence witnesses cannot always be termed as a tainted one - the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses at par with that of the prosecution. The rejection of the defence case on the basis of the evidence tendered by the defence witnesses has been effected rather casually by the trial Court [See State of Haryana v. Ram Singh, 2002 Criminal Law Journal 987)..*"

37. With regard to the evidence of a child witness, the Supreme Court in the case of ***K. Venkateshwarlu vs. State of Andhra Pradesh***, reported in***(2012) 8 SCC 73***, has held that the evidence of a child witness has to be subjected to the closest scrutiny and can be accepted only if the Court comes to the conclusion that the child understands the question put to him and he is capable of giving rational answers. A child witness, by reason of his tender age, is a pliable witness and can be tutored easily either by threat, coercion or inducement. Therefore, the Court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat of coercion. Evidence of a child witness can be relied upon if the Court comes to the conclusion that the child was not tutored

and his evidence has a ring of truth.

The above observation has been made by the Supreme Court in relation to child witnesses, who saw the victim being raped. The above observation does not fit into the four corners of the present case, inasmuch as, the child in this case is the victim herself, whose evidence is to be considered to be at par with an injured witness, if not higher.

38. The Supreme Court in the case of ***State of Maharashtra vs. Chandraprakash Kewalchand Jain***, reported in ***(1990) 1 SCC 550*** has held that a victim of sexual offence is a competent witness under Section 118 of Indian Evidence Act and her testimony holds intrinsic value similar to that of any injured party.

39. In the case of ***Narender Kumar v. State (NCT of Delhi)***, reported in ***(2012) 7 SCC 171,*** the Supreme Court has held that conviction can be based on the sole evidence of a prosecutrix, provided the same is truthful and inspires the confidence of the Court. It further held that minor contradictions or discrepancies cannot be a ground for throwing out an otherwise reliable prosecution case.

40. In the present case, one of the issues raised by the appellant's counsel is that the mother of the victim (PW-1) had stated in her evidence that the child told her that her breast had been touched by the appellant, while the victim in her evidence had stated that she had been subjected to rape and other illegal acts by the appellant. In this respect, the evidence of PW-1 is to the effect that her daughter told her that the appellant had committed a 'bad act' upon her and

had also touched her breast. The victim in her evidence has also used the word 'bad act' and has clarified the same by stating that the appellant had inserted his private parts into her private parts, besides sucking her breast and vagina. Further, the appellant had asked her to fondle her penis. This clarification of the word 'bad act' by the victim leaves us with no doubt that the appellant had committed aggravated sexual assault on the victim, keeping in view the medical report, which is to the effect that there was tenderness and redness on the private parts of the victim which could be due to the appellant's attempt at penetration of the penis or fingering. This statement of the victim, who was around 6 years at the relevant point of time leaves us with no doubt that the appellant was guilty of having committed an offence under Section 4(2) of the POCSO Act.

41. It is also settled law that the penetration of the private parts of the victim by the private parts of the appellant, to any extent, amounts to penetrative sexual assault and an intact hymen does not mean that there was no penetration, as held by the Supreme Court in the case of ***The State of Himachal Pradesh vs. Manga Singh***, reported in ***(2019) 16 SCC 759.***

42. In the case of ***Md. Jabbar Ali & Others vs. State of Assam***, reported in ***(2023) 19 SCC 672***, the Supreme Court held that the evidence of related witnesses have to be considered by applying discerning scrutiny and circumspection, though their testimonies cannot be disregarded, only because they are related witnesses.

43. In the case of ***Nirmal Kumar v. State of Haryana***, reported in ***2002 Cri LJ 3352 (P&H)*** , the High Court held in paragraph 39 as follows:-

"*Even slightest degree of penetration of the vulva by the penis with or without emission of semen is sufficient to constitute the offence of rape. The accused in this case had committed rape upon a minor girl aged 4 years and he could not explain the reasons regarding congestion of labia majora, labia minora and redness of inner side of labia minor and vaginal mucosa of victim. Stains of semen were also found on the underwear worn by the accused. The conviction of accused held proper.*"

44. In the case of ***Tarkeshwar Sahu (supra),*** the Supreme Court held that slightest degree of penetration of the penis in the vagina is sufficient to hold an accused guilty of the offence of rape. In the case of ***Wahid Khan (supra)*** the Supreme Court has held in a case of rape, the testimony of a prosecutrix stands on a par with that of an injured witness. It also held in paragraph-20 as follows :

"*20. It is appropriate in this context to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (22nd Edn.) at p.495 which reads thus:*

"Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to

the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

(emphasis supplied)

45. In the case of ***Lalramliana (supra)*** this Court had held that to bring home charge on penetrative sexual assault, full penetration of the penis into the vagina is not required and even part penetration is sufficient of the purpose of rape to constitute penetrative sexual assault.

46. In the case of ***State of Orissa vs. Thakara Besara,*** reported in ***(2002) 9 SCC 86***, the Supreme Court held that rape is not merely physical assault, but it destroys the whole personality of the victim. The rapist degrades the very soul of the helpless female and therefore the testimony of the victim must be appreciated in the background of the entire case.

47. In the case of ***State of Punjab vs. Gurmit Singh***, reported in ***(1996) 2 SCC 384,*** the Supreme Court held that in cases involving sexual harassment, molestation etc. the Court is duty bound to deal with such cases with utmost sensitivity. The minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice.

48. Though it is true that the evidence of Prosecution and Defence Witnesses are to be examined without predilection or bias and that no evidence is entitled to get better treatment, the evidence of the Defence Witnesses, who are the mother and sisters of the appellant does not prove that the appellant was not guilty of the offence that he was charged with. DW-1, DW-2 & DW-3 have

stated that the neighbours had come to the appellant's house and had asked the informant to take back her false allegation made against the appellant. Interestingly, no neighbour has been made a Defence Witness to corroborate the evidence of the Defence Witnesses. In any event we do not find any reason to doubt the truthfulness of the testimony of the victim girl who used to go to the house of the appellant with her brother on earlier occasions and who has apparently stopped going after the incident. There is no reason for a 6 year old girl to have made up a false story of rape.

49. On considering the evidence of the victim who was 6 years old at the time of being subjected to aggravated penetrative sexual assault, we do not find any reason to doubt the authenticity of her testimony, especially when her statement under Section 164 Cr.P.C corroborates her testimony. We find the testimony of the 6 year old victim to be truthful and inspires our confidence. The evidence of the Doctor corroborates the testimony of the victim, inasmuch as, the medical examination on the victim's genitals states as follows :

"*a. Genital organs :* ***Reddened***

b. Vulva : ***Congestion present***

c. Hymen : ***Intact*** | ***Tenderness (+)"***

d. Vagina : ***Congestion present***

Further, the Doctor had stated in the medical examination report that the victim's mental condition at the time of examination was "**Disturbed, crying (illegible)**"

50. The evidence shows that the victim and her brother used to occasionally go

to the appellant's house and the very fact that the appellant's wife had gone with the informant to the hospital at night shows that there was no enmity between the two families. The alleged request made by the appellant to the informant to stop her business of selling local liquor, in our view, cannot be reason enough for making a false case of rape against the appellant. If there was some enmity or bad blood between the family of the victim and the appellant, the appellant's wife would not have, in all probability, gone with the victim's mother to the hospital at night. Further, when the Trial Court had examined the victim and had been satisfied with the fact that the victim had been able to understand and give rational answers to the preliminary questions put to her, there is nothing to suggest that a false case had been foisted upon the appellant.

51. In view of the reasons stated above, we do not find any ground to interfere with the impugned judgment passed by the learned Trial Court. The appeal is accordingly dismissed.

52. Send back the TCR.

53. In appreciation of the assistance provided by learned Legal Aid Counsel, her fees should be paid by the Gauhati High Court Legal Service Committee.

JUDGE **JUDGE**

Comparing Assistant