
(2023) 10 GAU CK 0012
In the Gauhati High Court
Case No : Criminal Appeal No. 143 Of 2021

Joynul Hoque Barbhuiya

APPELLANT

Vs

State Of Assam And Anr.

RESPONDENT

Date of Decision : 11-10-2023

Acts Referred:

Code of Criminal Procedure Code, 1973 — Section 164, 313, 374
Protection of Children from Sexual Offences Act, 2012 — Section 3, 4, 5, 7, 9, 29, 30, 30(2), 34, 42
Indian Penal Code, 1860 — Section 313, 376, 376A, 417, 420
Juvenile Justice (Care and Protection of Children) Act, 2015 — Section 94
Evidence Act, 1872 — Section 114, 118

Citation : (2023) 10 GAU CK 0012

Hon'ble Judges : Mitali Thakuria, J

Bench : Single Bench

Advocate : L. R. Mazumder, B. Sharma, D. Saikia

Final Decision : Dismissed

Judgement

1. Heard Mr. L. R. Mazumder, learned counsel for the appellant. Also heard Mr. B. Sharma, learned Additional Public Prosecutor for the State respondent No.1 and Ms. D. Saikia, learned Amicus Curiae representing the respondent No.2.

2. This application is filed under Section 374 of the Code of Criminal Procedure Code, 1973 challenging the impugned Order dated 12.02.2021 passed by the learned Additional Sessions Judge (Special Judge), Cachar, Silchar in Spl. (POCSO) Case No.57/2017, convicting the appellant under Section 4 of the POCSO Act & 376 of IPC and sentenced him to undergo Rigorous Imprisonment for a period of 10(ten) years and to pay a fine of Rs.10,000/- in default to Simple Imprisonment of 6(six) months.

3. The brief facts of the appeal is that; on 05.09.2017 the complainant i.e. the mother of the victim lodged a written complaint before the learned Chief Judicial Magistrate, Cachar, Silchar stating that prior to the lodging of complaint, the

accused appellant used to visit in the house of the complainant and expressed his love towards her minor daughter and with false promise of marriage, he forcibly committed rape upon the minor girl of the complainant. On the pretext of marriage, the accused appellant established sexual relationship with her minor daughter and as a result of which she became pregnant. When the victim requested the accused appellant to marry her, instead of marrying her, he provided her with some medicine for termination of pregnancy and after consuming the same, the victim was hospitalized at SMCH, Silchar for severe bleeding. The complaint was accordingly forwarded to Office-in-Charge, Dholai P.S. to investigate the case and on receipt of the said complaint, the case was registered under Dholai P.S. Case No.244/2017 and started investigation.

4. During the course of investigation, the IO recorded the statement of the victim under Section 164 of Cr.P.C. and also examined the other witnesses. Upon completion of the investigation, the charge-sheet was submitted against the accused appellant under Section 376/313/417 of IPC read with Section 4 of POCSO Act, 2012. Thereafter, the case was sent before the learned Special Judge, Cachar, Silchar for trial and accordingly, the learned Special Judge framed the charge under Section 376 of IPC read with Section 4 of POCSO Act; the charges have been read over and explained to the accused appellant, to which he pleaded not guilty and claimed to be tried. The prosecution side examined as many as 6(six) witnesses including the victim. The accused appellant did not adduce any evidence, however, he pleaded not guilty while his statement was recorded under Section 313 of Cr.P.C. After recording of the evidence and hearing the arguments put forwarded by the learned counsels of both sides, the learned Special Judge passed the impugned Judgment and Order dated 12.02.2021 by convicting the accused appellant under Section 376 of Cr.P.C. read with Section 4 of POCSO Act.

5. On being highly aggrieved and dissatisfied with the impugned Judgment and Order dated 12.02.2021 passed by the learned Special Judge, Cachar, Silchar, the present appellant has preferred this appeal on the following grounds:-

5.1. The learned Trial Court committed grave error in facts as well as law in passing the impugned judgment and order by convicting the accused appellant and as such, the same is liable to be set aside and quashed.

5.2. The learned Trial Court miserably failed to appreciate the evidences on record in its true perspective and came to a perverse finding, and as such the same is liable to be set aside and quashed.

5.3. The said Court also failed to appreciate the fact that no documentary evidence is produced before the learned Trial Court to establish the age of the victim girl, whereas, the registration of birth and death was made mandatory in Assam after 1987.

5.4. The learned Trial Court failed to appreciate the evidences of prosecution witnesses which suffered from contradiction, inconsistency and as such the

conviction cannot be sustained and same is liable to be set aside and quashed.

6. With above observations, the learned counsel for the appellant has submitted that the impugned Judgment and Order dated 12.02.2021 passed by the learned Additional Sessions Judge, Cachar, Silchar in Spl. (POCSO) Case No.57/2017 under Section 376 read with Section 4 of POCSO Act is liable to be set aside and quashed.

7. Mr. L. R. Mazumder, learned counsel for the appellant has submitted that there is no eye witness to the incident and that apart, there is sufficient contradiction in the evidence of the victim herself which is not at all believable and trustworthy. Hence, on the basis of the sole testimony of the prosecutrix there cannot be any conviction. Further, it is seen that, there is long delay in lodging the FIR, and the reason of delay has not been explained by the informant/respondent. Accordingly, he also submitted that the conviction is mainly based on the sole testimony of the prosecutrix and the same is not tenable in the eye of law, as the evidence is not found believable and trustworthy. Hence, the interference of this Court is necessary in the impugned Judgment and Order passed by the learned Special Judge (POCSO).

8. In addition to his submission, he relies on the decision passed by the Hon'ble Apex Court in the case of Santosh Prasad Alias Santosh Kumar Vs. State of Bihar reported in 2020 3 SCC 443, wherein it has been stated that "alleged rape of married lady after house trespass—Conviction of accused solely relying upon deposition of prosecutrix—Sustainability—Material contradictions present in deposition of prosecutrix—Further, neither any independent witness nor even medical evidence supporting prosecution case—FSL report also not supporting prosecution case—Variation in prosecutrix's version about giving complaint, present—Prosecutrix failing to pass tests of 'sterling witness'--Delay in lodging FIR, also present—Presence of enmity/dispute between both other supporting evidence, accused entitled to benefit of doubt—Conviction reversed.

9. Citing the above reference judgment, the learned counsel for the appellant has submitted that in the instant case also there are material contradictions in regard to the evidence of the prosecutrix and hence, the conviction cannot be based on such evidence of the prosecutrix which cannot inspire the confidence of the Court and which cannot be believed.

10. He further relies on the decision passed by the Hon'ble Apex Court passed in the Case of Lallu Manjhi & Anr. Vs. State of Jharkhand reported in 2003 2 SCC 401, wherein, it has been held that, "the Court should be cautious and should seek corroboration in material particulars before placing reliance on such evidence, if the evidence of the witnesses is neither wholly reliable nor wholly unreliable".

11. The learned counsel for the appellant, Mr. L. R. Mazumder further submitted that the age of the victim has to be determined as per the Section 34 of the POCSO Act and as per Section 94 of the Juvenile Justice (Care and Protection of

Children) Act, 2015. On the basis of the settled statutory criteria, he also relies on the ratio laid down by the Hon'ble Apex Court in Criminal Appeal No.1898/2023 (P. Yuvaprakash vs. The State represented by the Inspector of Police), and mainly stressed on paragraph No.8 of the said judgment which read as under:-

"Para-8, Learned counsel next argued that the courts below fell into error in not appreciating that the prosecution failed to discharge the burden of proof, with respect to the victim's age. Reference was made to Section 34 of the POCSO Act and Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereafter "JJ Act"), to say that age determination has to be on the basis of settled statutory criteria. In the first instance, the school leaving certificate, or the matriculation certificate had to be seen; if that were not available, the birth certificate or records to that effect issued by the local or municipal authority are to be considered, and if neither of the first two classes of documents are available, then, age determination depends on the ossification test. Learned counsel highlighted that in the present case, the ossification test indicated that M's age was between 18 and 20, proving that she was not a minor. This aspect was deposed to by PW-9, who also produced the test report."

12. He further, submitted that there is margin of error in age ascertained by the radiological examination in 2(two) years on either side (AIR 1982 SCC 1297 in the Case of Jaya Mala Vs. Home Secretary, Government of J. & K). He also relies on the Judgment & Order passed by the Co-ordinate Bench in the Case of Crl.A(J)11/2018 dated 16.05.2019, wherein, it has been observed in paragraph No.-21 of the said judgment, which read as under:-

"21. Of-course the parents of the victim as well as the victim herself have stated that the victim is a school going student and her age is 14 years 8 months but despite the fact, no school certificate/age certificate has been produced by the prosecution during the course of trial to prove the age of the victim. The Medical Officer (PW.5), who has given an opinion that the age of the victim may be 14 to 16 years, but in her cross-examination she has stated that it is mere opinion and the age of the victim will be above 16 years if one go by the Modi's Jurisprudence Chart properly. It is a settled law that the evidence of the Medical Officer is mere opinion and it never conclusive as regards the age of the victim. As has been held by the Hon'ble Apex Court in Jaya Mala vs. Home Secretary, reported in AIR 1982 SC 1297, along with such opinion of the Doctor, another three years can be added to the age of the victim girl."

13. The learned counsel for the appellant further relies on another decision passed by this Court reported in 2022 1 GLT 625 (Lalbiakliana vs. State of Mizoram & Anr.), wherein, he expressed the view that the conviction cannot be given on the basis of sole evidence of the prosecutrix, if her evidence is contradictory and inconsistency.

14. He further submitted that the suspicion cannot take the place of proof and

also submitted that the motive may be immaterial, if the prosecution is able to prove the case beyond reasonable doubt, but, only if the case is based on circumstantial evidence, the motive for committing crime assumes great importance (2011 CrL.J 2177). Accordingly, the learned counsel for the appellant has submitted that the prosecution even could not prove the foundational fact of the case and hence, the accused appellant is entitled for acquittal on the benefits of doubt.

15. In this context, Mr. B. Sharma, learned Additional Public Prosecutor has submitted that the learned Trial Court had rightly passed the order of conviction after proper appreciation of evidence on record in its true perspective and hence, the interference of this Court is not required in the impugned Judgment and Order passed by the learned Special Judge, in Spl. (POCSO) Case No. 57/2017.

16. He further submitted that the evidence of the victim remains consistent and there is nothing to disbelieve the evidence of the victim/prosecutrix. He also submitted that it is a settled position of law that the conviction can be based on sole testimony of the prosecutrix, if, it is believable and inspires confidence. Admittedly, there was a delay in lodging the FIR, which occurred only due to the village bichar held to settle the matter. Also, the medical evidence of the doctor supports the oral testimony of the prosecutrix and thus, the prosecution is able to establish the case against the present accused appellant. Hence, the learned Trial Court has not committed any error or mistake while convicting the accused appellant under Section 4 of the POCSO Act and under Section 376 of IPC.

17. Mr. B. Sharma, learned Additional Public Prosecutor further relied on the case of *The State of Punjab Vs. Gurmit Singh & Ors.* (reported in 1996 2 SCC 384), wherein, it has been observed by the Hon'ble Apex Court that "the minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which was not of a fatal nature, can be thrown out, if the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. 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 should be sensitive while dealing with the cases involving sexual molestations".

18. In this regard, Ms. D. Saikia, the learned Amicus Curiae representing the respondent No.2 has submitted that the prosecution has been able to establish the foundational facts of the case and even after a long cross examination, the evidence of the prosecutrix could not be rebutted and her statement is found trustworthy and believable to convict the accused appellant. Thus, the trial Court has committed no error or mistake while passing the impugned judgment and order by convicting the present accused appellant under Section 4 of the POCSO Act and under Section 376 of IPC. She further submitted that the delay in lodging the FIR has been well explained in the complaint and there was a delay in lodging the case only because the matter was placed before the village bichar in presence of the influential people of the locality. However, the accused

appellant had not agreed to appear in the bichar and for this reason the bichar was not conducted and thereafter, only, the informant had lodged the complaint before the learned Trial Court.

19. She further relies on the decision of the Hon'ble Apex Court passed in Criminal Appeal No.08/1998 (The State of M.P. Vs. Dayal Sahu reported in 2005 8 SCC 122), wherein, she mainly stressed on paragraph-13 of the said judgment which read as under:-

"Para-13; A plethora of decisions by this Court as referred to above would show that once the statement of prosecutrix inspires confidence and accepted by the courts as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the courts for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. It is also noticed that minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. Non-examination of doctor and non-production of doctor's report would not cause fatal to the prosecution case, if the statements of the prosecutrix and other prosecution witnesses inspire confidence. It is also noticed that the Court while acquitting the accused on benefit of doubt should be cautious to see that the doubt should be a reasonable doubt and it should not reverse the findings of the guilt on the basis of irrelevant circumstances or mere technicalities."

20. She also relies on another decision rendered by the Hon'ble Apex Court in the Case of The State of U.P vs. Chhoteylal reported in 2011 2 SCC 550, wherein, in paragraph No.19 of the said judgment, it has been observed as follows:-

"Para-19; In the backdrop of the above legal position, with which we are in respectful agreement, the evidence of the prosecutrix needs to be analysed and examined carefully. But, before we do that, we state, as has been repeatedly stated by this Court, that a woman who is victim of sexual assault is not an accomplice to the crime. Her evidence cannot be tested with suspicion as that of an accomplice. As a matter of fact, the evidence of the prosecutrix is similar to the evidence of an injured complainant or witness. The testimony of prosecutrix, if found to be reliable, by itself, may be sufficient to convict the culprit and no corroboration of her evidence is necessary. In prosecutions of rape, the law does not require corroboration. The evidence of the prosecutrix may sustain a conviction. It is only by way of abundant caution that Court may look for some corroboration so as to satisfy its conscience and rule out any false accusations. In State of Maharashtra v. Chandraprakash Kewalchand Jain⁵, this Court at page 559 of the Report said:

"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 alive to and 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 Evidence Act similar to illustration (b) to 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 shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have (1990) 1 SCC 550 a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence."

21. Ms. D. Saikia, learned Amicus Curiae further submitted that the age of the victim was minor at the relevant time of the incident and it is also alleged that out of sexual intercourse with the accused appellant, she became pregnant and was given medicine for termination of her pregnancy and thereafter, she was admitted in the hospital for severe bleeding. As the prosecution could establish the foundational facts of the case, the learned Special Judge had committed no error or mistake while convicting the accused appellant. More so, the defence did not challenge or dispute in regard to the age of the victim/prosecutrix and remained silent during the entire trial of the case.

22. In addition to her above submission, she relies on the decision passed by the Hon'ble Rajasthan High Court in Criminal Appeal No.566/2015 (Jabru Ram Vs. The State of Rajasthan) wherein, paragraph No.8 of the said judgment read as under:-

"Para-8; From a perusal of the Parcha Bayan of the victim (Ex.P/4), it is clear as day light that she did not state that the accused actually penetrated/inserted his penis into any of her bodily (7 of 11) [CRLA-566/2015] orifices..... Nonetheless, we are in conformity with the finding recorded by the trial court that the defence made no effort whatsoever to dispute the deposition of the victim regarding her age. The victim clearly stated that she was 12 years of age. If at all, the defence was desirous of disputing this aspect

then, questions were required to be put to her in cross-examination to controvert this assertion made by her. Failure of the defence to put any question to the victim on this aspect, is a strong reason to presume that the defence never intended to question the prosecution case that the age of the victim was about 12 years on the date of the incident. In addition thereto, it is noteworthy that the defence did not apply to the trial court for determination of the victim's age..... Therefore, (9 of 11) [CRLA-566/2015] we confirm the findings recorded by the trial court in the impugned judgment that the victim was below 18 years of age on the date of the incident and was a child within the meaning of the POCSO Act."

23. Accordingly, she submits that the learned Trial Court had rightly passed the impugned judgment and order by convicting the accused appellant under Section 4 of POCSO Act and under Section 376 of IPC. Hence, the interference of this Court is not all necessary at this stage.

24. After hearing the submissions made by the learned counsels of both sides, I have perused the case record along with the impugned Judgment and Order passed by the learned Trial Court. To arrive at a conclusion, let me scrutinize the evidences of the prosecution witnesses which are as follows:-

I. PW-1 is the informant/mother of the victim and she deposed that during the time of the incident she was staying with her son at Mizoram and her daughter was staying with her husband i.e. father of the victim at Dholai and she heard that her daughter is facing some problem due to some unnatural/supernatural force and also came to know that her daughter went to the house of the accused and stayed with him. Thereafter, she lodged an FIR with suspicion that the accused appellant is involved in the act and done such supernatural activities to her daughter. After lodging of the FIR, the police sent her daughter for medical examination and her statement was recorded by the Magistrate. And, at the relevant time of the incident, her daughter/victim was 14 years old.

From her cross examination, it is seen that she was not aware about the statement made in the FIR and had a suspicion on the accused appellant that he might have committed some act with her daughter. But, she admitted in her cross evidence that her husband had a boundary dispute with the accused appellant.

II. PW-2 is the brother of the prosecutrix and as per his statement he was staying in Mizoram along with his mother/PW-1, two younger brothers and his wife. They came from Mizoram hearing about the illness of his sister and after her recovery, the victim girl stated that the accused appellant had committed bad act on her and thereafter, his mother/PW-1 had lodged the FIR and also the police took his sister for medical examination.

In his cross examination, he stated that when they returned from Mizoram, his sister was in semi conscious state and she was not able to speak. Thereafter, she was admitted in the SMCH, Silchar and she underwent medical treatment for

about 10 days. He further, stated that after 5/6 days returning back from the Hospital his mother lodged the FIR. He has no idea, as to when the accused committed rape on his sister, but, on being asked, his sister told him that the accused appellant had raped her. He denied when suggested that he adduced false evidence before the Court and he further denied that the false case has been lodged against the accused only due to a long boundary dispute between the accused and his father.

III. PW-3 is the victim/prosecutrix and her statement was recorded in camera and she deposed that at the relevant time of incident, her mother and her brother were staying at Mizoram. She further deposed that the accused/appellant used to perform magic and used to take her to his residence where he raped her continuously for 7(seven) days. Before committing rape on her, the accused appellant had assured the victim to marry her. Due to such sexual assault, the victim became pregnant and to terminate her pregnancy, the accused gave her some tablet to consume and as a result there was severe bleeding for which she was admitted in the hospital. And, on enquiry made by her father she narrated the story and then, only her father informed her mother and brother. When her mother and brother came home, she was not in a position to speak and was in semi conscious state and then, they took her to the hospital, where she stayed for about 7 days and after her release from the hospital, her mother lodged the complaint before the trial Court. Her statement was also recorded by the Magistrate and she was taken for medical examination.

In cross evidence, she stated that the accused appellant used to commit rape on her during the day time and out of fear she did not reported the matter to her parent's nor to the wife of the accused, as because the accused had threatened her. After 2(two) months, she informed about her pregnancy to the accused appellant; at that time she was 3(three) months of pregnant, and the accused gave her some tablet to terminate her pregnancy. After consuming the tablet in the residence of the accused appellant, she started bleeding and thereafter, she narrated the entire story to her father. However, her father did not lodge any complaint immediately, but, the matter was placed before village Panchayat for bichar and the same was held in their courtyard where she was also present. The accused was also present in the bichar and she along with her other family members did not agreed to the bichar and thereafter, her mother lodged the complaint. She also denied when suggested that because of the land dispute false case was lodged against the accused. She also denied to the defence story that on the day of occurrence she went for collection of wood where she felt unwell and took shelter in the house of the accused and wife of the accused informed her father and his father saw her in the house of the accused.

IV. The PW-4 did not supported the prosecution case and he deposed that he never stated before police that with the false promise of marriage the accused entered into a sexual relationship with the victim girl and thereafter, she aborted her pregnancy. The prosecution declared this witness as a hostile witness and

cross examined him.

V. The PW-5 is the Doctor, who examined the victim. As per case history, it has been stated that two months ago one man named, Jainul Laskar, who is a married man and having 5-7 children had physically abused the victim and also gave her some medicine to abort the child for which she felt sick and had bleeding. She then, informed about the incident to her family members. The doctor accordingly opined that at the time of the examination the victim girl was about 14-16 years of age. She did not find any recent sexual penetration. No injury marks were detected in her body and or genitals except old hymenal tears. Further, she opined that at the time of examination the individual does not carry pregnancy.

VI. The PW-6 is the IO of this case, who investigated the entire case. He deposed that on 11.09.2017 S.I Bhaskar Jyoti Das, the then O/C, Dholai P.S. received one ejahar from one Alike Begum Barbhuiya and accordingly, the case has been registered as P.S. Case No.244/2017 dated 11.09.2017 under Section 420/376(A)/313/417 of IPC read with Section 4 of POCSO Act and he was entrusted for investigation. During the investigation, he visited the place of occurrence and drew the sketch map and recorded the statement of the witnesses, statement of the prosecutrix was also recorded and she was sent for medical examination to SMCH, Silchar; she was also produced before the learned Magistrate for recording her statement under Section 164 of Cr.P.C. After, collecting the medical report etc., he arrested the accused appellant finding prima facie case and charge-sheet was filed against the accused appellant under Section 376/313/417 of IPC read with Section 4 of POCSO Act.

From his cross evidence, he submitted that the victim has submitted some photo copy of the medical document at the time of her medical treatment. As per the aforesaid document, the prescription was issued on 21.08.2017, but, he did not make any enquiry in regard to the prescription issued to her and also did not collect any original medical report. However, the photo-copy of the medical document shows that the victim was admitted on 25.08.2017 at SMCH, Silchar and discharged on 31.08.2017. But, he had not collected the original medical document in respect of admission and discharge. Further, he stated in his cross evidence that the PW-3 i.e the victim had not submitted before him that the accused appellant performed magic on her and took her to his residence and continuously raped her for about 7 days. He also stated that the victim had not stated the fact that her mother and brother found her in semi conscious state and took her to the hospital.

25. From the discussion of evidence of the PWs, it is seen that there is no eye witnesses and her family members, i.e the father, mother and brother of the victim came to know about the incident when the victim was found ill and admitted in the hospital. More so, the informant/mother of the victim had lodged the FIR, where it has not been specified as to what kind of act has been committed by the accused on her daughter. But, the PW-2, the brother of the

victim supported the prosecutrix and he came to know about the incident from her sister when she recovered from her illness. However, PW-4, neighbor of the informant did not support the prosecution case and was accordingly declared hostile by the prosecution. Thus, it is seen that the vital witness of the prosecution is the PW-3/victim. As per her, she was asked to come to the house of the accused appellant to perform some magic and by taking that advantage, she was continuously raped by the accused for 7 days and she became pregnant. However, as per the victim, she had not informed about the sexual assault committed by the accused appellant to her, as he had threatened her. The medical report of the victim also supported the prosecution case to the extent that the old tear was found in the hymen which otherwise indicates that she was subjected to penetrative sexual assault. However, at the time of examination the pregnancy was not detected as she had consumed the tablets given by the accused appellant, and for which her health was deteriorated and she was bleeding. Thereafter, she was hospitalized and then after lodging of the FIR only she was examined by the doctor i.e. after termination of her pregnancy and thus, that may be one of reason that the doctor opined that the individual does not carry any pregnancy on the date of examination.

26. So, the entire prosecution story is solely based on the evidence of the victim/prosecutrix, and other witnesses i.e. the PW-1/informant/mother of the victim & PW-2/brother of the victim supports the prosecutrix case to the extent that they heard about the incident from the victim, who stated them that she was subjected to sexual assault by the accused appellant. So, it is to be seen that, as to whether there was any material contradiction in the evidence of the victim to disbelieve the entire story of the prosecution. As per the prosecution case, the victim was pregnant because of continuous sexual assault on her for 7 days and when she was 2(two) months pregnant the matter was reported before the accused. Thereafter, at the stage of 3(three) months pregnancy the accused administered her with some medicine for which reason her child got aborted and she became ill due to severe bleeding accordingly, she was hospitalized.

27. From the evidence of the IO, it is seen that he had not collected original medical document from the hospital where she was initially admitted for severe bleeding. However, from the cross evidence of the I.O., it is seen that he has collected some photo-copy of the prescription, which was issued on 21.08.2017, but, the same was not exhibited in the documents and the IO failed to collect the original medical document. Thus, the prosecution could not establish the fact of termination of pregnancy due to fault of the IO, who failed to collect the medical document. But, from the evidence of the doctor, it is well established that she was subjected to penetrative sexual assault as old tear in the hymen was found by the doctor at the time of her examination.

28. It is also seen, that as per the evidence of the victim and her statement recorded under Section 164 Cr.P.C. are consistent and there is no material contradiction is found to disbelieve the prosecutrix. As referred above in the case

of Daya Sahu (Supra) the Hon'ble Apex Court had expressed the view that conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the courts for corroboration of her statement.

29. In case of the State of Rajasthan vs. Om Prakash, reported in (2002) 5 SCC 745, it has been held by the Hon'ble Apex Court in paragraph-19 is as follows:-

"Para-19; Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of the sexual pleasure. There cannot be anything more obscene than this. It is a crime against humanity. Many such cases are not even brought to light because of social stigma attached thereto. According to some surveys, there has been steep rise in the child rape cases. Children need special care and protection. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the natural resource of our country. They are country's future. Hope of tomorrow rests on them. In our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other mode of sexual abuse. These factors point towards a different approach required to be adopted. The overturning of a well considered and well analyzed judgment of the trial court on the grounds like non- examination of other witnesses, when the case against the respondent otherwise stood established, beyond any reasonable doubt was not called for....."

30. The Hon'ble Apex Court in the case reported in 2008 0 AIR (SC) 882 (Moti Lal Vs. State of M.P.) 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 scuttling 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.”

31. In *State of Himachal Pradesh v. Raghubir Singh*, (1993) 2 SCC 622; 1993 SCC (CrI) 674, 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 Hon’ble 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.

32. Coming to the age of the victim, it is seen that the IO failed to collect any educational document or birth certificate during the course of investigation. However, it has been stated that at the time of the incident, the prosecutrix was about 13/14 years of age and at the time of examination by the doctor through ossification test; the victim girl was found to be aged about 14/16 years of age. In absence of other educational documents or the birth certificate the age of the victim has to be based on ossification test or medical examination as provided by the doctor and accordingly, as per the said report the victim girl was found to be 14/16 years of age. Apart from that, it is seen that in the entire trial of the case, the accused appellant remained silent and did not raised any issue that the girl was major at the relevant time of the incident. While recording his statement

under Section 313 of Cr.P.C. also, the accused appellant did not raised the issue in regards to the age of the victim and except the plea of denial he did not took any defence plea while his statement was recorded under said section.

33. More so, the accused appellant did not adduced any evidence in support of his case nor there any question was put to the witnesses in regards to age of the victim.

34. In this regard, the learned Amicus Curiae also relied upon the decision passed by the Hon'ble Rajasthan High Court in Jabru Ram (supra), wherein, the said Court had expressed the view that failure of the defence to put any question to the victim on this aspect, is a strong reason to presume that the defence never intended to put any question regarding the age of the victim.

35. In the instant case also, it is seen that the defence did not raised any issue regarding the age of the victim girl and remained silent in the entire prosecution.

36. Section 34 of the POCSO Act which reads as follows:

"34. Procedure in case of commission of offence by child and determination of age by Special Court. –

(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016).

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person."

37. Provision of Section 94 of the JJ Act, 2015 is extracted below:

"94. Presumption and determination of age. –

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

38. But, here in the instant case, the Court has to take the help of the ossification test in regard to determine the age of the victim in absence of any educational document as well as the birth certificate of the victim.

39. As per Section 29 of the Act, the burden of rebutting the presumption is upon the accused and he cannot discharge this burden by simple denial or explanation. Section 29 of the POCSO Act, mandates legal presumption against the accused for offences under Sections 3, 5, 7 and 9 of the POCSO Act, 2012. Unlike other criminal prosecution wherein it is first presumed that an accused is innocent until proven guilty (presumption of innocence of accused) under Section 29 and 30 of POCSO Act, 2012, there is an adverse presumption of certain offences and culpable mind against the accused and the accused has to discharge that burden.

40. In a landmark judgment reported in 2020 (3) GLT 403 (Bhupen Kalita Vs. State of Assam), this Court had discussed the legal position concerning the provision of POCSO Act, 2012, and paragraph No. 71 of the said judgment reads as under:-

"71. In the light of the discussions above, the following legal positions emerge in any proceeding under the POCSO Act.

(A) The prosecution has to prove the foundational facts of the offence charged against the accused, not based on proof beyond reasonable doubt, but on the basis of preponderance of probability.

(B) Accordingly, if the prosecution is not able to prove the foundational facts of the offence based on preponderance of probability, the presumption under Section 29 of the Act cannot be invoked against the accused.

(C) if the prosecution is successful in establishing the foundational facts and the presumption is raised against the accused, the accused can rebut the same either by discrediting the prosecution witnesses through cross-examination or by

adducing his own evidence to demonstrate that the prosecution case is improbable based on the principle of preponderance of probability. However, if it relates to absence of culpable mental state, the accused has to prove the absence of such culpable mental state beyond reasonable doubt as provided under Section 30(2) of the Act.

(D) However, because of legal presumption against the accused, it may not suffice by merely trying to discredit the evidence of the prosecution through cross-examination, and the defence may be required to adduce evidence to dismantle the legal presumption against him and prove that he is not guilty. The accused would be expected to come forward with more positive evidence to establish his innocence to negate the presumption of guilt."

41. Here in the instant case, from the discussion made above, it is seen that the prosecution is able to proof foundational fact of the case to discharge the burden. But, the accused appellant did not adduce any evidence to disbelieve the case of the prosecution or rebut the evidences of the PWs.

42. From the entire discussion made above, it is seen that the prosecution has been able to prove that the accused appellant has committed an offence of penetrative sexual assault on the victim/prosuctrix who was minor at the relevant time of the incident. Thus, the case is established against the accused appellant under Section 376 of IPC read with Section 4 of POCSO Act beyond reasonable doubt. However, the Section 42 of POCSO has stipulated that when an act constitute an offence under the POCSO Act or under Section 376 of IPC, then, the offender shall be liable to punishment under the POCSO act or under the IPC, which is greater in degree.

43. Thus, I find that the learned Special Judge, had rightly held that the accused appellant is liable to be sentenced for conviction under Section 4 of the POCSO Act. And, coming to the sentence imposed on the accused appellant, I find that considering the gravity of the offence. The learned Trial Court had rightly sentenced the accused appellant to undergo Rigorous Imprisonment for 10(ten) years along with a fine of Rs.10,000/-(Rupees Ten thousand) only in default and SI for 6(six) months.

44. So, from the discussions made above and also considering the entire facts and circumstances of the case, I am of the opinion that the sentence imposed on the accused/appellant is justified and hence, I find that the impugned Judgment and Order dated 12.02.2021, passed by the learned Additional Sessions Judge (Special Judge) Cachar, Silchar in Spl.(POCSO) Case No.57/2017, requires no interference of this Court and accordingly, the same stands affirmed.

45. Before parting, I put on record the appreciation for the valuable assistance rendered by Ms. D. Saikia, learned Amicus Curiae, and I recommend that she is entitled to a fee, as per the notified rate, to be paid by the State Legal Services Authority.

46. Resultantly, the appeal stands dismissed.

47. Send back the LCR along with a copy of this Judgment and Order.