



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

Case No. : CRL.A(J)/03 (AP)/2022

1:Khadem Bhakta Singh
S/o Late Chandra Moni Chakma,
Vill Deobil, Namsai, PO and PS Namsai, District Namsai (Arunachal Pradesh),
Presently Lodging at District Jail Tezu

VERSUS

1:THE STATE OF AP
Represented by the Public Prosecutor

2:Basanti Singh
W/o Bhakta Singh

Village Longtom I
Police Station Kharsang
District Changlang
Arunachal Pradesh

Advocate for the Petitioner : Ms. J. Doji, Amicus Curiae

Advocate for the Respondent : Ms. T. Jini, Addl. P P of AP

:::BEFORE:::

HON'BLE MR. JUSTICE KALYAN RAI SURANA

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 29.11.2022

Date of Judgment & Order : 20.04.2023

JUDGMENT & ORDER (CAV)

(M. Thakuria, J)

Heard Ms. J. Doji, learned Amicus Curiae for the appellant. Also heard Ms. T. Jini, learned Additional Public Prosecutor for the State of Arunachal Pradesh.

2. This jail appeal, under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against the judgment & order dated 30.03.2021, passed by the learned Special Judge, POCSO, at Khonsa, in KSA POCSO Case No. 28/2020, in connection with Kharsang P.S. Case No. 09/2020, under Sections 341/376(2)(f) of the Indian Penal Code *read with* Section 6 of the POCSO Act, 2012, whereby, the Special Judge, POCSO, Khonsa, Tirap District, Arunachal Pradesh, has convicted the present accused/appellant under Section 6 of the POCSO Act and thereby sentenced him to undergo imprisonment for life and with a fine of Rs. 20,000/- in default to undergo S.I. for another 2 (two) months for the offence of aggravated penetrative sexual assault on his step daughter.

3. The brief facts, leading to this appeal, is that on 22.08.2020, one Mrs. Basanti Singh, mother of the victim, lodged an F.I.R. with the Officer-In-Charge, Kharsang Police Station, alleging that on the same day, at around 2.30 p.m., the present accused/appellant- Shri Bhakto Singh, took his stepdaughter, who was

about 10 years of age, inside the jungle and raped her. As per the allegation, on 22.08.2020, while the victim (name withheld) visited the resident of one neighbor- Sidananda Dihingya along with the youngest son of the appellant and were playing with the other kids, the accused/appellant went to the resident of the said neighbor and asked the victim (his stepdaughter) and his son to come back to their home and he also accompanied both of them while they were coming back to home. But, on the midway, the accused asked his son to go back home alone and took the victim, i.e. his stepdaughter, towards the jungle and inside the jungle, he forcefully raped his stepdaughter, who was about 10 years of age. When her brother came back home alone, the mother of the victim went to the road in search of her daughter and after sometime, she found her coming home and was crying. On inquiry, she discloses everything to her mother and then the mother of the victim called the neighbours, but during that time, the accused/ appellant ran away from the spot and the mother of the victim immediately took the victim to the hospital as she was profusely bleeding through her genital organ and was also suffering from stomach pain. Thereafter, the mother of the victim lodged the F.I.R. against the present accused/appellant.

4. Upon receipt of the F.I.R., the Officer-In-Charge, Kharsang Police Station, registered the case, being Kharsang P.S. Case No. 09/2020, under Sections 341/376(2)(f) IPC *read with* Section 04/06 of POCSO Act, and started investigation. During investigation, the I.O. recorded the statement of the victim and also forwarded her to PHC, Kharsang, for her medical examination and treatment and arrested the present accused/appellant and also forwarded him for medical examination to PHC. Penal and vaginal swab of the accused as well as the victim were also collected and sent for FSL examination. Thereafter, the I.O. visited the place of occurrence and drawn rough sketch map of the PO,

which was a jungle near Coke Bhatta at Longtom-I Village, where some bamboo plants and small pond were there. The Birth Certificate of the victim and her wearing apparels were also seized by the I.O. and after recording the statements of all the witnesses and collecting medical report etc., the I.O. laid Charge-Sheet against the present accused/appellant under Sections 341/376(2) (f) of the Indian Penal Code *read with* Section 4/6 of the POCSO Act. Thereafter, the learned Special Judge, POCSO, provided a copy, under Section 207 Cr.P.C., to the present accused/appellant and he expressed his inability to engage counsel and accordingly, a State defence counsel was engaged for him for his defence.

5. The prosecution examined as many as 9 (nine) numbers of prosecution witnesses including the informant, victim, Doctor and Investigating Officer. The statement of the accused/ appellant was also recorded under Section 313 Cr.P.C., wherein, all the incriminating materials were put before him, and accordingly, he pleaded not guilty and took the plea that on the day of incident, he was under the influence of alcohol and he cannot say what had happened on the day of incident. He further stated that out of fear, he tried to commit suicide by jumping at a river, but he could not do so.

6. The learned Special Judge (POCSO) framed 3 (three) numbers of points for determination while passing the judgment, which are as follows:

- (i) Whether the accused person, namely, Khadem Bhakta Singh, has restrained the victim girl while coming back to their house and thereby committed offence of wrongful restrain punishable U/S 341 IPC?

- (ii) Whether accused- Khadem Bhakta Singh, being the father, has committed rape upon his minor stepdaughter and thereby committed an offence punishable U/S 376(2)(f) IPC?
- (iii) Whether the accused- Khadem Bhakta Singh, being the father, has committed aggravate penetrative sexual assault upon her minor stepdaughter of 10 years and thereby committed an offence punishable U/S 06 of POCSO Act?

7. Coming to the point No. 1 for determination, it is seen that the allegation was brought against the present accused/ appellant that he restrained the victim while she was coming back home and then, he took the victim towards the jungle and committed rape on her. While discussing the said point for determination, the learned Special Judge (POCSO) discussed Section 359 IPC as well as Section 339 IPC and accordingly, arrived at a decision that the accused/appellant, being the lawful guardian of the victim who himself regulate or restrain the movement of the victim child, there cannot be any offence of kidnapping or wrongful restraint as defined under the law and accordingly, it is rightly held by the learned Special Judge (POCSO) that the offence under Section 341 IPC is not established against the present accused/appellant.

8. Coming to the point for determination Nos. 2 & 3, the allegation against the present accused/appellant that he committed on rape on his stepdaughter, who at the time of incident was only 10 (ten) years of age, and being the stepfather of the victim, he committed aggravated penetrative sexual assault on his minor stepdaughter.

9. Let us assess at the evidence adduced by the prosecution in the case to

bring home the charges.

10. The P.W.-1, Smti Basanti Singh, who is the mother of the victim and informant of the present case, deposed that she used to reside with the accused/appellant along with her children and normally the accused did not drink a lot, but on the day of incident, he came in an intoxicated state and asked about their children, who visited to the house of the neighbour. Her son (P.W.-7) returned back home and she found that her daughter was not with him, but after some time, her daughter (victim) returned back and explained as to how the appellant took her towards the jungle, disrobed her and committed forceful sexual intercourse with her. When the accused returned home, she asked him as to what he had done with the victim and on her inquiry, he replied that he did not commit anything. She then told him that she will call the villagers and by that time, the accused/appellant fled away from the house. She further deposed that the victim was crying from her stomach ache and hence, she was taken to the hospital, where she disclosed everything before the Doctor, who accordingly asked the P.W.-1 to report the incident before the police and accordingly, she lodged the F.I.R. Thereafter, she took the victim before the Magistrate and her statement was recorded under Section 164(5) Cr.P.C. The police arrested the accused and seized some wearing apparels of her victim/daughter and accused/husband and also the birth certificate and other documents of the victim.

11. During her cross-examination, she stated that she had not seen any occurrence and the incident was told to her by her daughter (victim) and thereafter she took the victim to the hospital due to her stomach ache.

12. P.W.-2, Shri Sidananda Dihingya, is the neighbor in whose courtyard the

victim, along with her brother and some other kinds, were playing. He met the accused/appellant when the accused came to their resident in search of their children and he accordingly, took back the children with him, but he sent his son to his house and took the victim towards the jungle. However, he does not know as to what happened inside the jungle and only when the elder sister of the victim told his wife over mobile phone and told about the incident, he immediately rushed to the house of the victim and found that the informant was scolding the accused and thereafter, to avoid arrested by the police, the accused/appellant fled away from his residence. He also put his signature in the seizure list as the items were seized by police in his presence.

13. From his cross-evidence, it reveals that he came to know about the entire incident only after receiving a call from the victim's elder sister by his wife.

14. P.W.-3, Miss Bharti Dihingya, is the daughter of the P.W.-2, who was playing with the victim and her brother. As per her evidence, on the day of incident, the accused/appellant took both the victim and her brother from their house. But she does not know as to what had happened thereafter with the victim.

15. P.W.-4, Miss Suhani Singh, is the elder daughter of the informant (P.W.-1) and she also deposed that on the day of incident, her father was in intoxicated state and inquired about the victim and her brother. The brother returned back home but the victim was not with him and after some time, the victim came back and told that she was suffering from stomach ache and as she was suffering from stomach ache, her mother took her to hospital. She further stated that her sister did not disclose anything to her as to why she was suffering from stomach ache.

16. P.W.-5, Shri Anojee Basumatary, deposed that he does know much about the incident. He only accompanied the accused/appellant to consume alcohol and after having alcohol with the accused/appellant, he returned back to his home and was not aware what had happened later on.

17. P.W.-6 is the victim of this case and from the judgment passed by the learned Special Judge (POCSO), it reveals that when she was produced for recording her evidence, she was broke down on tears. As per her evidence, on the day of incident, she was playing with her brother- Krishna Singh in the resident of P.W.-2. Along with them, the daughter of the P.W.-2, Bharti Dihigya and Mormi Dihingya, were also playing. During that time, her father came there and asked her and her brother- Krishna Singh to go back home and accordingly, they were coming back home with their father. But, while they were coming, her father asked her brother to go back home and took her to another direction and thereafter, she was taken inside the jungle and he asked her to open her pant and forcefully made her lie on the ground and then he open his wearing apparels, touched her breast and put his finger inside her vagina. Thereafter, he put his penis inside her mouth and her vagina. Her father threatened her that if she disclose about the incident to anyone, then he will kill her mother and due to fear, she could not shout. During that incident, she felt severe pain in her stomach and her private part. She also deposed that there was a bleeding from her private part and thereafter she came home crying and told everything to her mother. She was taken to hospital by her mother as she was bleeding from her vagina and suffering from severe pain on her stomach. Thereafter, she was taken to police station by her mother and lodged the F.I.R. against her father. She further deposed that when she was a student of Class –III, the accused did similar sexual assault upon her. On that day also, the accused came to receive

her from school, but instead of taking her to home, he took her to jungle where he committed rape on her. But, due to threatening and fear, she could not disclose anything to anyone. While recording her deposition, she made a prayer before the Court that her father should not be released or otherwise he may again harm them. However, she also admitted that at the time of incident, her father was under the influence of alcohol.

18. P.W.-7, Shri Krishna Singh, is the brother of the victim, who was present on the day of incident along with the victim and was playing in the residence of P.W.-2. During that time, their father came and asked them to go with him to their residence. Accordingly, he along with his sister (victim), went with their father. But, from the road, their father asked him to proceed to their residence and took the victim towards the jungle. When he returned home, his mother asked about his sister and then he told his mother that she went with the accused. About one hour later, his sister came home crying and told that their father done something with her. Later on, their father came and when his mother charged him as to what he did with the victim, the accused fled away from the residence.

19. P.W.-8, Dr. Gyati Majee, is the Medical Officer and he deposed that on 22.08.2020, he was posted at PHC, Kharsang as Emergency Medical Officer and on that day, during afternoon hours, one patient, aged about 10 years, came along with her mother, and the patient was very scared and she was not talking to him and when her mother told him that the patient is subjected to sexual assault by her father, he accordingly asked the mother of the victim to inform the matter in the police station. Accordingly, she lodged the F.I.R. and thereafter the police came with medical requisition for examination of the victim. When he asked the patient about the incident, she told him that her father touched her

on her breast, though he did not find any injury mark on her chest. Thereafter, she told that when she was playing at the residence of a neighbour, she was taken by her father towards jungle and he did sexual assault on her and on inquiry, she further told that she is having pain on her abdomen as well as on her private part (vagina) and also on her chest. She also told her that there was a bleeding from her vagina. On inquiry, she further told that after the incident, she did not take bath, but as it was bleeding, she changed her cloth and came to the hospital. As per the evidence of the doctor, during examination, he came to know that the patient has not attended her puberty and the secondary sexual characters were not developed. However, there was some blood stain and swelling over the labia and clitoris and the hymen was also torn. There was also active bleeding from the vagina. Accordingly, he collected the sample of vaginal swab, nail clip, hair sample and urine for pregnancy test. Accordingly, after examination, the Medical Officer has opined that there is a sexual penetrative assault on the victim.

20. He also examined the accused on being produced by the police and on his examination, he found that the accused is a normal person having capacity to perform sexual act.

21. From his cross-examination, it reveals that except the injury on vagina of the victim and bleeding from vagina, he found no other physical injury on the body of the victim. In his cross-examination, he further deposed that there may be bleeding during the time of puberty, but in case of a child, the bleeding can be due to forceful insert of any materials into vagina or penetrative sexual assault.

22. P.W.-9, Shri Krishna Mohan Das, is the Investigating Officer of this case.

He deposed that on receiving the written F.I.R. from the informant, the wife of the accused, alleging that the accused took his stepdaughter, aged about 10 years, inside the jungle and had sexual assault and rape her, he registered the F.I.R., being Kharsang P.S. Case No. 09/2020, under Sections 341/376(2)(f) IPC *read with* Section 04/06 of POCSO Act and started investigation. During investigation, he recorded the statement of the witnesses, sent the victim for medical examination, arrested the accused and forwarded him for medical examination. He also drawn the sketch map of the place of occurrence and also taken the photograph of the place of occurrence, on being lead by the accused. He also seized the samples collected by the M.O. and forwarded the same to FSL for expert opinion and seized the Birth Certificate of the victim and other documents, which was produced before him. He also sent the victim for recording of her statement under Section 164 (5) Cr.P.C. before the learned Magistrate and after obtaining the medical report and other relevant documents, he filed Charge-Sheet against the present accused/appellant.

23. The learned Amicus Curiae for the appellant, Ms. J. Doji, has submitted that on the day of incident, as the accused was in intoxicated condition, he does not know as to what had happened on that day and he was wrongly convicted in the instant case without any credible evidence and findings. There was no material in the evidence against the present appellant and all the witnesses are the hearsay witnesses except the victim. Moreover, there is no forensic evidence/ report and as such, this is a good case where the appellant can be given the benefit of doubt. The accused/appellant was not properly represented in the Court during his trial as he was defended by a State defence counsel having less than 10 years of experience and hence, his defence could not be properly produced before the Court during the trial. Accordingly, it is submitted that the judgment and order of conviction, dated 30.03.2021, passed by the

learned Special Judge, POCSO, Khonsa, Tirap District, Aruanchal Pradesh, in KSA POCSO Case No. 28/2020, is liable to be set aside and the present convicted appellant is entitled for benefits of reasonable doubt.

24. In this context, the learned Additional Public Prosecutor, Ms. T. Jini, has submitted that the learned Court below has rightly convicted the present accused/appellant considering all the evidences of P.Ws. and evaluating all the evidences of P.Ws. in its true perspective. The learned Court below point wise discussed the entire case and accordingly arrived at a conclusion that the present accused/appellant committed rape on his own stepdaughter and hence, there is no necessity of making any interference of this Court.

25. After hearing the submissions made by the learned counsels for both sides, we have carefully perused the case record and the judgment passed by the learned Court below.

26. It is seen that none of the prosecution witnesses have saw the occurrence while the accused committed rape on his stepdaughter, i.e. on the victim. P.W.-1, mother of the victim, lodged the F.I.R. only coming to know about the incident when her daughter reported that her father committed sexual assault on her and she was also found bleeding from her vagina and was complaining of stomach pain. As per the victim, she along with her brother (P.W.-7), were playing in the courtyard of P.W.-2, one of their neighbour, when her father came and took both of them towards home. But, on the midway, when they reached road, their father asked her brother to go home alone and thereafter, he took her inside the jungle and forcefully committed rape on her. This part of her evidence is corroborated by the evidence of P.W.-2, the neighbour, in whose courtyard the victim was playing along with her brother, and as per him also,

while both the children were playing in his courtyard, along with his daughter, the accused came there and took both the children along with him. Further, the other witnesses, i.e. P.W.-3, also supported the prosecution version to the extent that when she was playing with the victim and her brother, her uncle, i.e. the accused, came there and took the victim along with his brother towards home. In the same time, the P.W.-7, the younger brother of the victim, also supported the case of the prosecution and as per him also, while they were going home along with their father, in the midway, their father asked him to go home alone and he took his sister towards jungle. P.W.-4, the elder sister of the victim, also deposed that the accused went to the house of the P.W.-2 to bring to bring back the victim and her brother, but after some time, she found that her brother returned home alone and the victim did not return home and thereafter, she was found crying for stomach pain and for which, her mother took her to hospital.

27. Thus, it is seen that though the other witnesses have not seen the occurrence, but they supported the prosecution version to the extent that the accused visited to the house of P.W.-2, brought back the victim along with her brother (P.W.-7), and thereafter on the midway, he asked his son, i.e. P.W.-7, to go home alone and then he took the victim towards jungle. In the same time, the medical evidence also supports the prosecution case regarding sexual assault on the victim. It is specifically stated by the doctor in his evidence that the victim girl was very scared and on repeated asking, she narrated the entire incident as to how her father committed sexual assault on her. From the medical evidence, it also reveals that Doctor also found injury on her vaginal part and also observed active bleeding from her vagina. Though she came to hospital after changing her clothes but, bloodstain was there. The Medical Officer, while examination, also found bloodstains on vaginal part of the victim and further

found that the hymen was torn. It is the admitted fact that the victim girl even did not attend her puberty at the time incident or at the time of examination and it is opined by the Doctor that such bleeding can only happen if any foreign substance or anything is inserted forcibly through the vagina. At the same time, from the Exhibit-2, i.e. the statement made before the learned Judicial Magistrate First Class, Khonsa, it is seen that the victim narrated the entire story before the learned Magistrate and she had also described as to how the accused committed rape on her. As per the said statement, on the day of incident, accused took her towards the jungle, grabbed her and dragged her towards the jungle and asked her to remove her pants, she was very scared at that time, and then the accused forcefully penetrated his penis into her vagina, mouth and also into her anus forcefully. At the time of incident, he even slapped her many times when she cried and tried to resist him. She was also bleeding from her anus as well as from her vagina and the accused also warned her not to disclose anything before anyone otherwise he would kill her mother. From her evidence as well as from her statement made before the learned Magistrate, it also reveals that in one earlier occasion also, in the afternoon hours, while she was returning home from her school, she met her father in the midway and he took her in an abandoned house and forcefully penetrated his penis into her vagina and also into her mouth. She described that it was very painful and she cried a lot, but out of fear she could not share the said incident to anyone as her father had threatened to kill her mother and her sister. Thus, it is seen that though there is no eye witness to the incident, yet the statement of the victim was consistent and her statement made before the learned Magistrate under Section 164 Cr.P.C. also fully corroborates with her evidence adduced before the Court.

28. The accused/appellant took the main plea that on the day of incident, he was under the influence of alcohol and hence, he cannot say what had

happened or if he had done something with the victim. The fact that he was under the influence of alcohol is also supported by P.W.-5, who accompanied the accused to the house of one Daju, where they consumed local beer. In the same time, P.W.-1 also deposed in her evidence that on the day of incident, her husband was intoxicated when he inquired about the child. But, from the evidence of the victim herself, it is seen that when she narrated the entire story before her mother, the mother enquired about the matter to the accused and out of fear of consequences of the incident, the accused ran away from his residence and thus, it is sufficient to prove that the accused was in proper understanding regarding the offence he committed and also had the state of understanding that he committed mischief and out of fear of consequences of the same, he ran away from the resident. Further, from the evidence of P.W.-6, i.e. the victim, it also reveals that this is not the first incident when her father committed rape on her, but one other day also, she was subjected to penetrative sexual assault by her father when she was taken to an abandoned house by the accused in the afternoon hours while she was coming back from school. But, out of fear, she could share anything with anyone of her family members as the accused threatened to kill her mother and sister. Thus, it is seen that the accused repeated the offence with his minor stepdaughter and hence, it cannot be held that he was not in a proper mental state to commit such offence.

29. The learned Court below made an elaborate discussion in regards to Section 85 IPC, which provides that "*nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law; provided that the thing which intoxicated him was administered to him without his knowledge or against his will.*"

30. In the instant case, it is seen that there is no mention that any other person had administered alcohol to him without his knowledge or against his will. Rather, from the evidence of P.W.-5, it is seen that he accompanied the P.W.-5 to the house of one Daju and consumed local beer.

31. More so, Section 30 of the POCSO Act provides that *"in any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had not such mental state with respect to the act charged as an offence in that prosecution."*

32. But, here in the instant case, as discussed above, the defence could not prove that there was absence of culpable state of mind and the defence did not discharge the liability that he had no culpable state of mind to commit such offence. Rather, it is established that he had a culpable state of mind as he has repeated the offence of sexual assault on his minor stepdaughter and on the day of incident also, after commission of the offence, when he was charged by the P.W.-1, he fled away from his house, which otherwise establishes that he had a complete culpable mental state at the time of commission of the offence.

33. More so, from the discussion made above, it is seen that the prosecution has been able to establish the entire chain of circumstances of this case which directly points the finger to the present accused/appellant. It is a fact that there was no eye witness to the incident, but only due to absence of any eye witness, the victim cannot be disbelieved.

34. The Hon'ble Supreme Court in a case reported in **(1983) 3 SCC 217 (Bharwada Bhoginbhi Hirjubhai V. State of Gujarat)** has held that-
"testimony of victim of sexual assault is vital and unless there are compelling reasons which necessitates looking for corroboration of her statement, the Court should not find difficulty in acting on the testimony of the victim of sexual assault alone to convict an accused when her testimony inspires confidence and found to be reliable. Seeking corroboration of her statement before relying upon the same as rule in such cases amounts to adding insult to the injury."

35. Our Hon'ble High Court also in another case reported in **2017 (4) GLT (Shiv Charan Talukdar Vs. State of Assam)** also expressed the same view, relying on the decision of the Hon'ble Supreme Court reported in **(2017) 2 SCC 51**, and paragraph 31 of the said judgment reads as under:-

*"31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondents, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons, which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated the material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance (see **Bhupinder Sharma V State of H.P.**).*

Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed herein above."

36. Further, regarding the acceptance of evidence of child witness, a case of Hon'ble Apex Court reported in **(2008) 12 SCC 565 (Nivrutti Pandurang Kokate Vs. State of Maharashtra)** can be cited, which was relied on the case of **Hemmat Sukhadeo Wahurwagh Vs. State of Maharashtra** reported in **(2009) 6 SCC 712 (FB)**, wherein, the Hon'ble Supreme Court has held that as under:-

".....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 an 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."

37. As per Section 118 of the Indian Evidence Act, 1872, all persons shall be competent persons to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions.

38. As per Section 29 of the POCSO Act, it is provided that "*where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.*"

39. Here in the instant case, it is seen that in spite of specific allegation brought against the present accused/appellant, he could not rebut the evidence of the P.W.-6, the victim of this case, nor he could produce any defence evidence to rebut the prosecution case. Thus, he failed to discharge his burden

and accordingly, it can be presumed, under Section 29 of the POCSO Act, that the accused has committed the alleged offence. More so, from the discussion made above, it is seen that there is nothing to disbelieve the minor victim of this case and it is also seen that the prosecution has able to prove the entire chain of circumstances. It is established that both the victim and her brother visited to the residence of the P.W.-2, they were playing there, accused visited to the resident of P.W.-2, took both P.Ws. 6 and 7 and in the midway, he asked the P.W.-6 to go home, took the P.W.-7 (victim) inside the jungle and committed rape on her.

40. The charge was framed in this case under Section 376(2) (f) of the Indian Penal Code and Section 6 of the POCSO Act, which provides punishment for aggravated sexual assault.

41. Section 376(2)(f) IPC provides that *"whoever being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such women shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life."*

42. Further, Section 5 of the POCSO Act provides as under:-

"5. Aggravated penetrative sexual assault. – (a) Whoever, being a police officer, commits penetrative sexual assault on a child -

*(i) within the limits of the police station or premises at which he is appointed;
or*

(ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known as, or identified as, a police officer; or

(b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child-

(i) within the limits of the area to which the person is deployed; or

(ii) in any areas under the command of the forces or armed forces; or

(iii) in the course of his duties or otherwise; or

(iv) where the said person is known or identified as a member of the security or armed forces; or

(c) whoever being a public servant commits penetrative sexual assault on a child; or

(d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or

(e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or

(g) whoever commits gang penetrative sexual assault on a child.

Explanation.-- When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j) whoever commits penetrative sexual assault on a child, which-

*(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; ¹[***]*

(ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;

*(iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or Infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; ¹****

²[(iv) causes death of the child; or]

(k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or

(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or

(m) whoever commits penetrative sexual assault on a child below twelve years; or

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or

(o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or

(p) whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or

(q) whoever commits penetrative sexual assault on a child knowing the child is pregnant; or

(r) whoever commits penetrative sexual assault on a child and attempts to murder the child; or

(s) whoever commits penetrative sexual assault on a child in the course

of ³[communal or sectarian violence or during any natural calamity or in similar situations]; or

(t) whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or

(u) whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.”

43. Here in the instant case, it is seen that the penetrative sexual assault was committed by the accused/appellant on his stepdaughter, who at the time of incident was below twelve years of age, and in the same time, he committed the offence repeatedly with the victim and thus, Section 5 (l) (m) (n) of the POCSO Act attracts against the accused/appellant.

44. Further, from the discussion made above, it is seen that the case is also established under Section 376 (2) (f) IPC as well as Section 6 of the POCSO Act. But, the learned Magistrate elaborately discussed about the provision laid under Section 42 of the POCSO Act, which provides that “*where an act or omission constitutes an offence punishable under this Act and also under Sections 376 IPC, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.*”

45. Considering the said provision of the POCSO, the learned Court below rightly held that Section 6 of the POCSO Act provides for greater degree of punishment than Section 376 (2) (f) IPC and accordingly, the accused was held guilty under Section 6 of the POCSO Act.

46. Coming to the sentence imposed on the present accused/appellant, the learned Special Judge, POCSO, Khonsa, vide its judgment & order dated 30.03.2021, in KSA POCSO Case No. 28/2020, has rightly held that the case is established under Section 6 of the POCSO Act and accordingly, sentenced the accused/appellant to undergo life imprisonment along with a fine of Rs. 20,000/- for the offence of aggravated penetrative sexual assault and Section 6 of the POCSO Act and in default of payment of fine S.I. for another 2 (two) months.

47. The object of the sentence should be to protect the society and deter the criminal. Gravity of the offence, mitigating factors, manner in which the offence was planned and committed, prescribed punishment and the social abhorrence of the offence etc. are indicators for sentencing. Reference in this regard made to the judgment of the Hon'ble Supreme Court reported in **(2016) 16 SCC 441 (Jasbir Singh Vs. Tara Singh)**.

48. One of the prime object of the criminal law in imposition of adequate, just and proper punishment which commensurate with the gravity, nature of crime and manner in which the offence is committed. One should keep in mind social interest and consideration of the society while considering the determinative factors of sentence with the gravity of the crime.

49. In the present case, it is seen that the accused/appellant, being the stepfather of the victim, instead of protecting his minor daughter did not hesitate to commit such a heinous offence on his stepdaughter. It is also established that he committed the said offence earlier occasion also that too with his stepdaughter.

50. So, from the discussions made above and also considering the entire facts and circumstances of the case, we are of the view that the sentence imposed on the accused/appellant is justified and hence, we find that the judgment and order dated 30.03.2021, passed by the learned Special Judge, POCSO, at Khonsa, in KSA POCSO Case No. 28/2020, in connection with Kharsang P.S. Case No. 09/2020, under Sections 341/376(2)(f) of the Indian Penal Code *read with* Section 6 of the POCSO Act, 2012, requires no interference of this Court and accordingly, the same stands affirmed.

51. Resultantly, the appeal stands dismissed.

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

53. Send back the LCR along with a copy of this judgment and order. The Registry shall serve a free copy of this judgment and order to the appellant through the jailor concerned.

JUDGE

JUDGE

Comparing Assistant