

GAHC040005402022



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

Crl. Appl./14 (AP)/2022

- 1. Shri Nishu Jebisow,**
Aged about 32 years
S/o Gejang Jebisow of buragaon village,
PO- Dedza, PS- Trizino,
West Kameng District,
Arunachal Pradesh.

...APPELLANT

-VERSUS-

- 1. State of Arunachal Pradesh,**
Through the Public Prosecutor, Arunachal
Pradesh.
- 2. Smti Tenzin Jebisow,**
Aged about 36 years,
w/o Sahil Jebisow of Buragaon Village,
PO- Dedza, PS- Trizino,
West Kameng District,
Arunachal Pradesh.

....RESPONDENTS

Advocate for the appellant : Ms. N. Danggen
Advocate for the respondent :Mr. G. Tao, Addl. P.P.
Ms. N. Anju, for R-2

:::BEFORE:::

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 07.08.2023
Date of Judgment & Order: 29.09.2023

JUDGMENT & ORDER (CAV

Heard Ms. N. Danggen, learned Legal Aid Counsel for the appellant. Also heard Mr. G. Tado, learned Additional Public Prosecutor for the State respondent No. 1 and Ms. N. Anju, learned Legal Aid Counsel for the informant/respondent No. 2.

2. This is an appeal under Section 374(2) of the Code of Criminal Procedure against the judgment and order of conviction dated 08.10.2021, passed by the learned District and Special Judge, Bomdila, West Kameng District, Arunachal Pradesh, in SC(Bdl) POCSO Case No. 02/2021, convicting the accused/ appellant under Section 4 of the POCSO Act and sentenced him to undergo imprisonment for 7 (seven) years and out of which R.I. for 3 (three) years and a fine of Rs. 3,000/- and in default to undergo S.I. for 3 (three) months.

3. The brief facts of the prosecution case is that on 18.05.2020, at 0900 hours, an F.I.R. was lodged by the informant/respondent No. 2 before the Officer-In-Charge, Rupa Police Station, which was subsequently transferred to

Trizino Police Station, West Kameng District, Arunachal Pradesh, alleging *inter alia* that on 17.05.2020, at about 12.45 hours, the appellant had raped her daughter/victim/prosecutrix (name withheld), aged about 10 years. It is stated that on the day of incident, the respondent No. 2, along with her daughter/victim, had visited to a shop and after purchasing some goods, the prosecutrix could not be found and when she called her name, she was seen coming out of the residence of the accused/ appellant weeping and keeping her underwear in her chest inside the cloth and on enquiry, she stated that she was raped by the accused/appellant inside his house. Accordingly, after receiving the F.I.R., the case was registered as TZN P.S. Case No. 03/2020, under Section 376 of the Indian Penal Code *read with* Section 4 of the POCSO Act.

4. During the course of investigation, the investigating authority visited the place of occurrence, drawn the sketch map, recorded the statement of victim as well as the witnesses and also examined the victim by the doctor and after completion of investigation, the I.O. submitted the Charge-Sheet under Sections 376/354/354(B)/511 of the Indian Penal Code *read with* Section 18 of the POCSO Act. On appearance of the accused, the charge was framed which was read over to the accused/appellant and to which, he pleaded not guilty and claimed to be tried.

5. During the course of trial, the prosecution examined as many as 7 (seven) numbers of witnesses including the I.O. and the appellant examined himself as the defence witness. After recording the statement of the accused/appellant under Section 313 Cr.P.C. and also hearing the arguments put forwarded by the learned counsel for both sides, the learned Sessions Judge cum Special Judge,

Bomdila, vide judgment and order dated 08.10.2021, in SC(Bdl) POCSO Case No. 02/2021, convicted the accused/appellant under Section 4 of the POCSO Act and sentenced him to undergo imprisonment for 7 (seven) years and out of which R.I. for 3 (three) years and a fine of Rs. 3,000/- and in default to undergo S.I. for 3 (three) months.

6. On being highly aggrieved and dissatisfied with the judgment and order passed by the learned Special Judge, Bomdila, the present appeal has been preferred by the accused/ appellant on the following grounds, amongst others:-

- (i) That the evidence on record do not warrant conviction and sentence of the accused/appellant under Section 4 of the POCSO Act and as such, the conviction and sentence, passed against the accused/ appellant is liable to be set aside.
- (ii) That the learned Court below failed to appreciate the fact that as per the evidence of the Doctor (P.W.-6) and as per the Medical Report, there is no external injury on face, nose and body except slight pain on palpation on the private part of the prosecutrix. More so, the P.W.-6 did not find any swelling or redness on the private part of her body and there is no tear of vaginal orifice and the hymen was also found intact. There is no evidence of any penetration even in the statement made by the prosecutrix under Section 164 Cr.P.C. But the learned Court below came to a wrong finding without appreciating the evidence on record in its true perspective and had passed the judgment and order convicting the accused/appellant and hence, the

same is liable to be set aside.

- (iii) That the learned Court below arrived at conclusion of offence under Sections 376/511 of the Indian Penal Code and thus, there is no scope for conviction under Section 4 of the POCSO Act as attempt to commit rape is mutually exclusive with that of offence of sexual penetration as defined under Section 3 of the POCSO Act. Attempt to rape falls short of penetration because once penetration is proved, it is no longer an attempt to rape but the rape itself. Only if rape (or penetration) itself is proved, can a conviction under Section 4 of the POCSO Act be sustained.

7. Accordingly, it is stated that the learned Court below came to a wrong and perverse finding by convicting the accused/ appellant under Section 4 of the POCSO Act without appreciating the evidence on record and the medical report etc. and hence, the same is liable to be set aside and accordingly.

8. The learned Legal Aid Counsel for the appellant, Ms. N. Danggen, has submitted that there is material contradiction in the statement made under Section 164 Cr.P.C. and the evidence of the prosecutrix. In her statement made under Section 164 Cr.P.C., the prosecutrix has clearly stated that the accused commit no sexual assault on her except removing her underwear. She further submitted that the other witnesses also corroborated the prosecutrix in that regard that she came out of the house of the accused/appellant by inserting her panty inside her garments. But, only keeping her underwear inside her garments cannot be the sole basis of the conviction of accused/ appellant under

Section 4 of the POCSO Act. There is no evidence at all regarding the penetration on the private part of the accused to fulfill the ingredients of Section 3 of the POCSO Act to convict him under Section 4 of the said Act.

9. Further it is submitted by the learned Legal Aid Counsel for the appellant that the impugned judgment and order is based only on presumption of the learned Court below without having any evidence of penetration to warrant conviction against the present accused/appellant under Section 4 of the POCSO Act. The learned counsel further submitted that there may be some corroborating evidence that the victim girl came out of the house of the accused keeping her panty inside her garments, but only considering that evidence, the presumption cannot be taken under Section 29 of the POCSO Act to convict the accused/ appellant under Section 4 of the said Act. Accordingly, it is submitted that it is a clear case of acquittal and prayed for setting aside the judgment and order passed by the learned Special Judge.

10. In this context, the learned Additional Public Prosecutor, Mr. G. Tado, has submitted that to fulfill the ingredients of Section 3 of the POCSO Act, the penetration is not necessary and manipulation is also sufficient to convict a person under Section 4 of the said Act. Further he submitted that a girl of 9-10 years of age cannot implicate the accused/appellant falsely and there is no explanation from the defence as to why accused/ appellant will be falsely implicated in this case. From the evidence, it is also seen that there was an attempt made by the accused to commit the offence of penetration, which is sufficient to convict a person under Section 4 of the POCSO Act. Thus, it is submitted that there is no infirmity or irregularity committed by the learned

Special Judge while convicting the accused/appellant under the said Section of law.

11. The learned Legal Aid Counsel for the informant, Ms. N. Anju, also submitted in this regard that the case is well established under Section 3 (c) of the POCSO Act and the learned Special Judge rightly took the presumption under Section 29 of the POCSO Act and convict the accused accordingly.

12. In reply to the said submission, the learned Legal Aid Counsel for the appellant further submitted that even if the evidence of the P.Ws. are considered, in that case also, it may be a case at best under Section 7 of the POCSO Act to convict the accused/appellant under Section 8 of the said Act, but it is not at all a case under Section 4 of the said Act.

13. After hearing the submissions made by the learned counsels appearing for the parties, let us scrutinized the evidence on record as well the judgment passed by the learned Court below.

14. The prosecution, in support of its case, examined as many as 7 (seven) numbers of witnesses including the I.O. and the Medical Officer as well as the victim of this case.

15. P.W.-1 is the victim/prosecutrix and she could identify the accused and deposed that on the day of incident, the accused invited her by offering biscuits while she was in the shop and accordingly, she went in the house of the accused and then, the accused committed the offence saying that he also did

the same act with his own daughter. She further deposed that the accused/appellant asked her to remove her panty and to put the same under her cloths and the accused also opened his pant and underwear till knee level and then he asked her to go back keeping her panty in her chest inside the cloth and immediately she went outside of the house of the accused and narrated the entire story to her mother. She denied when suggested her in her cross-evidence that no such incident has happened with her. However, she stated that in her cross-evidence that she went to the house of the accused to collect bamboo shoots.

16. P.W.-2 is the informant/mother of the victim. As per her, on the day of incident, she came out to shop along with her daughter (victim) for shopping and as it was cold weather, she took beetle nuts and thereafter she felt unconscious and hence, she came inside the shop to take some rest. But after a few minutes, when she did not find her child, she called the name of her daughter and then she saw her daughter coming out of the house of the accused and was crying. She also noticed that the panty of her daughter was inside her cloth and then she suspected that the accused might have committed some offence with her daughter. Thereafter she took her daughter to the Doctor and as per the Doctor, there was no injury mark of sexual assault on her daughter. Thereafter, she lodged the F.I.R. and the statement of the victim/daughter was also recorded under Section 164 Cr.P.C. But, she stated in her cross-evidence that she was not aware about the contents of the F.I.R. and from her cross-evidence, it is seen that the accused is of jolly character and he used to have jokes with others.

17. P.W.-3 is the then Officer-in-Charge of Rupa Police Station and he received the F.I.R. lodged in connection with this case on 17.05.2020 and he further deposed about the contents of the F.I.R. He accordingly registered the F.I.R. as Zero F.I.R. under Section 376 of the Indian Penal Code *read with* Section 4 of the POCSO Act and accordingly recorded the statement of the victim and her father and mother and forwarded the victim for medical examination. Thereafter, he informed the Officer-In-Charge of Thrizino Police Station and on the next day, the Officer-In-Charge of the concerned Police Station reached Rupa and then he handed over all the documents, including the Supplementary Case Diary, to take up for further investigation.

18. P.W.-4 is the Judicial Magistrate, who recorded the statement of the victim, and from his evidence, it reveals that the victim was stable at the time of recording her statement. The victim also told before him that the accused removed her undergarments, but did not disclose anything in regards to penetrative sexual assault.

19. P.W.-5 is the I.O. of this case and from his evidence, it is seen that after receiving the Zero F.I.R. and registration of the case, he took up the further investigation of the case as per the instruction of Superintendent of Police, Bomdila, and accordingly, after completion of investigation and on the basis of materials collected by the previous I.O., he submitted the Charge-Sheet. He further deposed that as per the Case Diary, the blood samples and urinal swab of the victim were seized by the Officer-In-Charge, Rupa Police Station, however, no records on sending the same to FSL was found in the Case Diary. Subsequently, during his period of investigation also, he did not send the seized items to FSL for examination. From his cross-evidence, it is seen that the seized

materials were not available in the Court which were mentioned in the Charge-Sheet.

20. P.W.-6 is the Doctor who examined the victim. As per him, the child was well oriented and cooperative for examination. He accordingly exhibited the injury report along with his signature. As per the Medical Report, there was no external injury on the face, nose or body of the victim except slight pain on palpation examination on the private part of the victim. But, the Doctor did not find any swelling or redness in the private part of the victim. There was no tear of vaginal orifice and the hymen was also found intact. He also collected the vaginal swab, blood, urine of the victim as well as the accused and those were handed over to the police. He further stated in his cross-evidence that the mother of the victim told him that the accused removed the undergarments of the victim, but there was no sign of penetration and as per him, no rape was committed on the victim. Further, as per him, the pain on palpation examination on private part of the victim may be because of other reasons also and it is not necessary that there has to be any stress put on the private parts by any male organ.

21. P.W.-7 is the another Investigating Officer, who registered the case under Thrizino Police Station after receiving the same from Rupa Police Station and thereafter he took up the investigation. During investigation, he visited the PHC where the accused was admitted and he brought the accused to Bomdila Hospital as referred by the Doctors of PHC. At that moment, the accused was not in a condition to be arrested and hence, after his recovery, he was arrested on 22.05.2020, and he was produced before the Court for remand. He also

recorded the statement of the accused under Section 161 Cr.P.C., wherein he admitted that he was under the influence of alcohol and mistakenly he might have undressed the panty of the victim. But, after undressed of the panty, the victim started crying so he returned the panty and asked her to leave his room. But he denied committing any rape on the victim.

22. While recording his statement under Section 313 Cr.P.C., the accused denied the entire allegation and he took the plea that on the day of incident, the victim came to his house asking for bamboo shoot and after some time, she started crying and went out from his house. But he did not commit any offence with her. He also adduced his own evidence as D.W.-1, wherein he took the plea that on the day of incident, he was consuming alcohol along with his 2 (two) friends while the victim came to his house asking bamboo shoot and thereafter, he was beaten by public and he was admitted in the hospital and later on, he was arrested by the police. While cross-examination by the Public Prosecutor, he stated that he was beaten by the public on the suspicion that he has committed sexual assault on the victim.

23. So, from the discussions of the witnesses, it is seen that the P.W.-1 is the victim of this case, P.W.-2 is the informant/ mother of the victim and the other witnesses are the official witnesses including the I.O., M.O. and the Judicial Officer who recorded the statement of the victim under Section 164 Cr.P.C. It is a fact that there is no eye witness to the incident, but the mother of the victim saw her daughter coming out from the house of the accused and she was crying and immediately she reported about the incident to her mother. She also saw her daughter keeping her panty inside her garment and she narrated the entire

story as to how the accused sexually assaulted her while she went to the house of the accused. But, while adducing the evidence, the P.W.-2, the mother of the victim, did not disclose the sexual act committed on her daughter. However, she stated that she had a doubt on the accused and she reported the incident before the police and prior to that, she slapped the accused twice or thrice and thereafter, her daughter was sent for medical examination. Though there is an allegation of penetrative sexual assault on the accused, but at the time of evidence, P.W.-2 did not disclose anything in that regard.

24. It is the P.W.-1/victim of this case who deposed before the Court as to how she was subjected to sexual assault by the accused/appellant. As per the evidence of P.W.-1, on the day of incident, she went to the house of the accused as he invited her by offering her some biscuits while she was in shop and he told her that he used to do the same act with his own daughter. She also deposed that the accused undressed her panty and he also undressed his pant and the underwear till knee level and she saw the private part of the accused. Thereafter, she was instructed to go back and was asked to put her panty on her chest inside the cloth. Thus, though it is seen that there is an allegation of penetrative sexual assault, but from the evidence of both P.Ws.-1 & 2, it is seen that there is no allegation of any penetrative sexual assault and the victim was seen by her mother while she was coming out of the house of the accused putting her underwear inside her garments and seeing her daughter in such a situation, the P.W.-2, the informant/mother of the victim, had a doubt on the accused that he might have committed sexual assault on her daughter. But, while deposing before the Court, she did not disclose anything about the penetrative sexual assault on her daughter and as per her, she only had doubt

on the accused that he might have committed penetrative sexual assault on her daughter.

25. Coming to the medical evidence of the Doctor, it is seen that the Doctor did not find any external injury on the face, lips, thighs, genitals and body of the victim and there was no tearing or abrasion of vaginal orifice and that apart, the hymen was also found to be intact while she was examined by the Doctor and accordingly, it has been opined by the Doctor that there is no suggestive of penetrative sexual assault on the victim.

26. It is a settled law that to fulfill the ingredients of Section 3 of the POCSO Act, the penetration of penis into the vagina is not necessary and the act of manipulation with any part of the body of the child so as to cause penetration into any part of the body of child or makes the child to do so with him is an offence under Section 3 of the POCSO Act.

27. For ready reference, the relevant provision of Section 3 of the POCSO Act is reproduced hereinbelow:-

“3. Penetrative sexual assault.- a person is said to commit “penetrative sexual assault” if –

(c)he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra or anus of the child or makes the child to do so with him or any other person.”

28. More so, from the evidence of the other witnesses, including the evidence of the Magistrate, who recorded the statement of the accused, it also reveals that the victim told before him that the accused removed her undergarments,

but did not disclose anything in regards to penetrative sexual assault to the child. Thus, from the evidence of the other witnesses also, i.e. the P.W.-4 & P.W.-6, the Doctor, it is seen that there is no sign of any penetrative sexual assault on the victim nor she disclose anything in regards to penetrative sexual assault on her. However, the statement of the victim remain unshaken during her evidence as well as while recording statement under Section 164 Cr.P.C. that the accused undressed her panty and he also undressed himself and opened his underwear to knee level and the child saw the private parts of the accused. But there is no evidence at all that thereafter the accused had committed any sexual assault on her or there is a penetration of his penis into her vagina or any kind of penetration which is specified in Section 3 of the POCSO Act.

29. The learned Special Judge in its judgment had observed that undressing the pant of the accused till knee level showing his private parts reveals that the accused put his private part into the vagina of the victim and it is accordingly observed in paragraph No. 29 of the judgment as under:

“29. The evidence of PW-1 deposing that the dirty act and undressed the pant of the accused till knee level and noticing of private part reveals that the accused put her private part into the vagina of the victim. In the meantime, the mother called the victim and the process was half done, as such, no semen or fluids could be found from the vagina of the victim. In this regards, the evidence of medical is corroborating the evidence of PW-1 that on palpation examination of the vagina, the victim had fled slight pain which reveals that the vagina was rough or knock by the penis of the accused as the victim and the accused's underwear were removed. In some of the offences against the child victim, there is no penetration into the vagina but some of the accused used to knock on vagina in between the thigh of the child and get relax to pass out there sperm.”

30. Thus, the learned Special Judge made an observation only on presumption

that the accused have committed penetrative sexual assault on the victim and accordingly convicted the accused under Section 4 of the POCSO Act. With the above observation, the learned Special Judge came to a conclusion that the case is established under Sections 376/511 of the Indian Penal Code *read with* Section 3 (c) of the POCSO Act and in terms of Section 42 of the POCSO Act, the conviction and sentence was under Section 4 of the POCSO Act against the present accused/appellant.

31. But, from the above discussion of the P.Ws., it is seen that there is no mention at all in regards to the penetrative sexual assault on the victim, however it is the version of the victim as well as the P.W.-2 that the victim came out from the house of the accused putting her panty inside her garments and she was crying. More so, the evidence adduced by the victim while recording her statement under Section 164 Cr.P.C. as well as at the time of evidence that when she went to the house of the accused, he committed some dirty things with her and he undressed her panty as well as he also undressed himself and opened his pant and underwear till knee level and he showed his private parts to the victim child.

32. During the course of argument, the learned counsel for the appellant also submitted that there is no eye witness to the prosecution case and the informant/mother of the victim also did not support the prosecution case and as per her, it was only her doubt on the accused/appellant that he might have committed any sexual offence with her daughter. So, only on the basis of the statement made by the victim, wherein also there is some contradiction in her statement recorded under Section 164 Cr.P.C., the prosecution story as well as

the evidence of the victim/prosecutrix cannot be believed or the conviction cannot be based on sole testimony of the prosecutrix. But is a settled law that the victim of a sexual assault is not treated as accomplice and as such her evidence does not require corroboration from any other evidence if her sole testimony inspires confidence and trustworthy. Normally, the victim of a sexual assault, specially a minor, does not come to disclose about the offence before any of the family members or any other person. But, here in the instant case, it is seen that the girl immediately reported about the incident to her mother and she was seen by her mother also while coming out from the house of the accused keeping her panty inside her garments.

33. The Hon'ble Apex Court in the case of **Moti Lal (supra)** 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 scattering 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)."

34. 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 honourable Supreme Court in Wahid Khan v. State of Madhya Pradesh (2010) 2 SCC 9; AIR 2010 SC 1, placing reliance an earlier judgment in Rameshwar S/o kalia 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.

35. 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.

36. 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."

37. Here in the instant case, it is seen that the prosecution has been able to prove the foundational facts of the case and to discharge the burden, the accused also adduced his own evidence as D.W.-1, but by adducing his evidence as D.W.-1 also, he could not rebut the prosecution version that he committed sexual assault on the victim, who is a girl of 8-10 years of age.

38. So, from the entire discussions made above, it is seen that the prosecution could establish that the accused/appellant committed sexual assault on the victim/prosecutrix. But, from the discussion made above, it is also seen that there is no evidence of any penetrative sexual assault on the victim/ prosecutrix. Thus, the case is established under Section 7 of the POCSO Act and the accused can be convicted under Section 8 of the said Act.

39. Section 7 of the POCSO Act reads as under:

"7. Sexual Assault.- Whoever, with sexual intent touches the vagina, penis, anus or

breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

40. So, in view of the discussion made above, I find that the alteration/modification of the convicted Sections and sentence imposed on the accused/appellant is required and accordingly, the accused is hereby convicted under Section 8 of the POCSO Act by altering/modifying the order of conviction dated 08.10.2021, passed by the learned District and Special Judge, Bomdila, West Kameng District, Arunachal Pradesh, in SC(Bdl) POCSO Case No. 02/2021. Accordingly, the accused is hereby sentenced to undergo R.I. for 3 (three) years along with a fine of Rs. 5,000/- (Rupees five thousand) and in default to undergo S.I. for another 2 (two) months. However, the period of sentence shall be calculated from the date of taking him in the custody, i.e. on 08.10.2021.

41. To the extent indicated above, the appeal is partly allowed.

42. Before parting, we put on record the appreciation for the valuable assistance rendered by Ms. N. Danggen, learned Legal Aid Counsel for the appellant as well as Ms. N. Anju, learned Legal Aid Counsel for the informant/respondent No. 2, and I recommend that they are entitled to a fee, as per the notified rate, to be paid by the State Legal Services Authority.

43. 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

Comparing Assistant