



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

Case No. : CrI.A. 34/2022

1:Aka Kalung
S/o Shri Kalung Ganku,
Presently detained at District Jail, Tezu Undergoing RI of Ten (10) years with effect
from 22/08/2022
C/o Jailor, District Jail, Tezu,
District Lohit, Arunachal Pradesh.
Permanent Address
A Resident of Kalung Village, PO/PS Ziro, District, Lower Subansiri, Arunachal
Pradesh.

VERSUS

1:THE STATE OF AP and 6 Ors.
Represented by the Public Prosecutor

2:Israel Megu
S/o Lt. C. Megu

Chairperson
CWC
Roing
District Lower Dibang Valley
Arunachal Pradesh.

3:M. Megu
Member
CWC
Roing
District Lower Dibang Valley
Arunachal Pradesh.

4:O. Megha
Member
CWC

Roing
District Lower Dibang Valley
Arunachal Pradesh.

5:A. Apum
Member
CWC
Roing
District Lower Dibang Valley
Arunachal Pradesh.

6:G. A Perying
Member Secretary
CWC
Roing
District Lower Dibang Valley
Arunachal Pradesh.

7:XXX (Victim)
XXX
Presently residing at Nani Maria Child Care Institute
Roing
Lower Dibang Valley District
Arunachal Pradesh

Advocates for the appellant : Mr. K. Tama

Advocates for the respondents : Mr. J. Tsering, P.P., A.P.
Mr. K. Saxena, A.C. for victim
Ms. T. Y. Bhutia, for informant

:::BEFORE:::

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 19.04.2023

Date of judgment & order : 09.06.2023

JUDGMENT & ORDER (CAV)

Heard Mr. K. Tama, learned counsel for the appellant. Also heard Mr. J. Tsering, learned Public Prosecutor for the State respondent; Mr. K. Saxena, learned Amicus Curiae for the victim; and Ms. T. Y. Bhutia, learned counsel for the informant.

1. This is an application filed under Section 374 (2) of the Code of Criminal Procedure against the impugned judgment and order dated 22.08.2022, passed by the learned Special Judge (POCSO), Tezu, in POSCO Case No. 05(LDV)/2021, corresponding to Roing P.S Case No. 22/2021, whereby, the appellant, namely, Aka Kalung, has been convicted under Section 376(2)(f) of the Indian Penal Code and Section 4 of the POCSO Act, 2012 and vide order dated 30.08.2022, the appellant has been sentenced to undergo Rigorous Imprisonment for a period of 10(ten) years and to pay a fine of Rs.20,000/- and in default of payment to undergo further Simple Imprisonment of 2(two) months.

2. The appellant/convict is presently undergoing sentence of Rigorous Imprisonment since 22.08.2022, in the District Jail, Tezu, in pursuant to impugned judgment and order passed by the learned Special Judge (POCSO), Tezu, in POSCO Case No. 05(LDV)/2021.

3. The brief facts of the case of the appellant is that on 01.03.2021, the appellant had filed a missing report before the Officer-in-Charge, Police Station, Roing, to the effect that the victim has been missing since 9.00 A.M. of 28.02.2021. But, subsequently on 02.03.2021, the victim was recovered and handed over to the Child Line, Roing and thereafter, she was shifted to Child

Care Institute standing under the name and style of Nani Mariya Child Care Institute, Roing and since then, victim is residing in the said Institution.

4. After recovery of the said victim child, the appellant approached the Child Care Institute, Roing, to bring back the victim along with him, but the said Institution denied to send the victim along with the appellant and for which, there was a heated argument with the Member of the CWC, Roing, and thereafter, to the utter surprise of the appellant, an F.I.R. was lodged before the Superintendent of Police, Lower Dibang Valley District, Roing, against the appellant on 22.03.2021, by the Members of the CWC, Roing, with the allegation that the appellant had committed the offence of sexual abuse and molestation against the victim during her stay with the appellant. On the basis of the said F.I.R., a case was registered before the Roing Police Station, being Roing P.S. Case No.22/2021, under Section 376(2)(f) of the Indian Penal Code *read with* Section 4 of the POCSO Act, 2012. In pursuant to the said registration of the case, the Investigating Officer conducted the investigation and filed Charge-Sheet against the present accused/appellant vide Charge-Sheet No. 23/2021, dated 27.04.2021, under Section 376(2)(f)/376(3) of the Indian Penal Code *read with* Section 4 of the POCSO Act. However, the charges under Sections 370(10)(b)/370(4) of the Indian Penal Code were dropped at the time of filing the Charge-Sheet.

5. During the course of investigation, the victim was produced before the Court of learned CJM, Roing, on 25.03.2021, for recording her statement under Section 164 Cr.P.C. But, in the said statement, the victim never disclosed or complaint about any sexual assault against her by the appellant at any point of time.

6. During the trial of the case, the prosecution examined as many as 6(six) witnesses including the Medical Officer, the victim and the I.O., though 10(ten) numbers of prosecution witnesses were cited in the Charge-Sheet. On the other hand, the defence side examined the witness, namely, Mrs. Kalum Joya, as DW-1, and one Court witness was also examined by the Court and after hearing the arguments advanced by the learned counsels for both sides, the accused/appellant was convicted under Section 376(2) (f) of the Indian Penal Code and Section 4 (1) of the POCSO Act, vide Judgment dated 26.08.2022, and vide order dated 30.08.2022, the appellant was sentenced to undergo R.I. for 10 years for the offence committed under Section 376(2)(f) of the Indian Penal Code and pay a fine of Rs.20,000/- in default to under S.I. for 2(two) months.

7. On being aggrieved and dissatisfied with the judgment and order passed by the learned Special Judge, Tezu, in POSCO Case No. 05(LDV)/2021, the present appeal has been preferred by the appellant.

9. The learned counsel, Mr. K. Tama, appeared on behalf of the appellant, has submitted that it is a case for acquittal of the convict/appellant and hence, the interference of this Court is necessary. Further it is submitted that the co-ordinate Bench of this Court, referring to Section 29 of the POCSO Act, in the case of **Bhupen kalita Vs. State of Assam**, reported in **2020 (3) GLT 403**, has held that 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. However, if the prosecution is unable to prove the foundational facts of the offence, Section 29 cannot be invoked.

10. On the other hand, the learned Public Prosecutor, Mr. J. Tsering, has submitted that the learned Special Judge had passed the judgment and order after proper appreciation of evidence on record in its true perspective and hence interference of this Court in the judgment passed by the learned Special Judge (POCSO), Tezu, is not necessary.

11. The learned Special Judge (POCSO), Tezu, while passing the judgment and order, has framed 3 (three) numbers of points for determination, which are as follows:-

1. Whether the accused being a person in position of trust and authority has committed rape on victim without her consent u/s 376 (2) (f) IPC?
2. Whether the accused has committed penetrative sexual assault on the victim u/s 4 of the POCSO Act, 2012?
3. Whether the accused has committed rape of victim below 16 years u/s 376(3) IPC?

12. Before arriving at any point of determination, let the evidence of the prosecution as well as the defence be examined, which is reproduced as follows:-

13. PW-1 (prosecutrix) deposed that she used to stay with the convict/appellant and whenever the wife of the appellant, i.e. the aunty, who used to go to office, she had to remain along with the child of the appellant when the convict/appellant (she addressed as uncle) used to hold her and touch on her breast and even he used to undress himself and asked her to hold his

penis and she narrated as "susu" and thereafter, he put his penis into her mouth and vagina and even into her asshole also. He used to do all dirty things with her in absence of her aunty (wife of the appellant) inside the kitchen. She was threatened not to disclose anything to aunty and threatened to kill her if she disclose anything to the wife of the appellant. She further stated that the appellant used to check her urine even used to provide her medicine. She further deposed that while her statement was recorded by the Magistrate, she was alone with Sir (Magistrate) and no other person was present and her statement was recorded in the chamber which was not read over to her. She narrated the same story before the learned Magistrate as she narrated before the Court. She further deposed that she also met said Sir (Magistrate) in the house of her uncle as he is the friend of her uncle. She further alleged that the appellant used to show her some pornographic videos. She does not want to come back to the house of her uncle as he did all the dirty things with her. She also described before the learned Special Judge as to how he used to had sexual intercourse with her. At the time of her cross-examination, she stated that her original place of birth is at Nepal, but she does not know as to how she came to Roing and she was brought from Nepal by the wife of the appellant. She admitted in her cross-examination that both the uncle and aunty (appellant and his wife) used to beat and scold her for not putting the mask properly. Out of fear, she ran away from the residence and her uncle and after some time, she met one aunty who took her to her house where she stayed 2 (two) nights. After some 2 (two) days, her parents came to the residence of the said aunty and she was taken to police station and thereafter she was dropped in a Child Care Institute at Roing where she is still staying. She also stated before the police that the uncle used to sexually assault her when she was small and she cannot remember the date, month or year on which dates the dirty things had happened with her. She also stated before the police that her uncle provided

some medicine only to avoid pregnancy. As per her, she also disclosed the entire story before the said lady who took her to her own house. In her cross-evidence, she further stated that she was alone while her statement was recorded by the Magistrate who was known to her, but she admitted that she stated before the Magistrate that she left the resident of uncle only because she did not put her mask properly. From her evidence, it also reveals that she did not disclose the incident to her father though she met him in Child Care Institution and before police. She also did not disclose about the incident to her mother also as her mother resides in Nepal. From her evidence, it also reveals that she does not know who lodged the F.I.R. nor she is aware about the contents of the F.I.R.

14. During her re-examination by a Special Public Prosecutor, she deposed that she narrated everything when she was given opportunity and the convict/appellant was doing dirty things with her since her childhood for many times and he also used to give her medicine for many a times.

15. PW-2, Smti Otel Perme, deposed that the victim was found by her mother and accordingly she took her to their house, but on enquiry, she could not tell anything or exact location from where she came and was crying. On the next day morning only, she narrated the incident as to how the uncle used to do dirty things with her and also told the name of her uncle (convict/appellant). This witness also stated that the victim reported to her as to how the convict/appellant used to do dirty things with her by pressing her breast and showing his private parts and used to have sex with her and also used to give her medicine. They accordingly informed police and on the third day, police came and took her away and at that time also, the victim was crying saying that

she does not want to go back to her uncle's place. From her cross-evidence, it reveals that whatever she deposed before the Court is after hearing the victim, but the victim did not disclose any date and time of the alleged incident.

16. PW-3, Miss Tokgul Badu, the counsellor of DCPU Roing and accordingly she conducted her counselling with the victim and after 3-4 counselling, she submitted the report to CWC. All the counselling were done in a room where no other persons were allowed to enter except the prosecutrix. She further deposed that during counseling, when she called her parents, one person (standing on the dock) appeared and at that time, the victim was reluctant to come out from the counseling room of CWS as she knew the persons/accused who was present along with his wife in the Office of the CWC.

17. From her cross-evidence, it reveals that she could not collect the proper address of the victim in spite of 4 (four) sessions of counseling nor the victim could say any date, month or year when the alleged incident had happened with her. However, she could not produce any certificate to prove that she was appointed as a counselor by CWC.

18. PW-4, Miss Milip Ete, is the Medical Officer who examined the victim has deposed that on the basis of her medical report, the victim was subjected to multiple sexual acts and her hymen was not intact and labia minora was also exposed. She also opined that the victim, at the time of examination, was below 15 (fifteen) years of age.

19. In her cross-examination, she deposed that she examined the victim on 23.03.2021 when one staff from CCI Roing, namely, Alisha, brought the victim

for examination and accordingly, after examination, she prepared the report and handed over to CCI Roing. She further stated in her cross-examination that it is mandatory to fill up all the columns in the report, however some of the columns in the said Form was left blank. She further stated that the consent letter from the CCI Supervisor was obtained and the same was submitted to the police officer after her examination along with the report, but she could not find the said consent letter in the Court while she was adducing her evidence. She had the radiological report with her, but she was not aware when the examination was done by the radiological team.

20. During her re-examination by the Special Public Prosecutor, she deposed that since there was no lady medical officer at Roing, she was summoned to do the examination and column No. 35 was left blank as it was not required to be filled up.

21. PW-5 is the SI Amo Pansa, who conducted the investigation, recorded the statement of victim and other witnesses, collected the medical report and after completion of investigation, she submitted the Charge-Sheet under Section 376 (2) (f)/376 (3) of the Indian Penal Code and Section 4 of the POCSO Act. It is a fact that the victim was alone in the chamber of the Magistrate when her statement was recorded on oath, but she did not make any request to the Magistrate either verbally or in written form to record the statement of the victim on oath on that day itself. During examination of the victim, she did not find that the victim to be a person making false allegation against the accused person.

22. In her cross-examination, she stated that that there were altogether 5

(five) numbers of informant as per the F.I.R., but she has not examined all the informant except Isarel Megu, the Chairperson of the CWC. She collected the vaginal swab and the blood sample of the victim, but she did not find it necessary to send it to forensic lab as the same were collected after lapse of 1 (one) month from the date of incident. She relied on the report submitted by the Medical officer and accordingly, it was held that the victim was a minor girl of 12 to 15 years of age and there was no other evidence to prove the age of the victim and hence, she had to rely on the Medical Report of the Medical Officer. She further stated that there was no any order of direction from the Court or any authority to conduct ossification examination of the victim girl. She did not take the prosecutrix to the place of occurrence because she was scared of facing the accused and his family and nothing was seized from the house of the accused. She also did not record the statement of other members of CWC Roing and CCI Roing as they refused to give any statement. The missing report, dated 01.03.2021, filed by the accused/appellant was considered and accordingly, after locating the child, police handed over her to Child Line Roing, but she did not record the statement of the informant- Mr. Aka Kalung (the present appellant) of the said missing report though the matter was enquired on the basis of the missing report. She has not Charge-Sheeted the accused under Section 370 of the Indian Penal Code due to lack of evidence.

23. PW-6, Shri Isarel Megu, is one of the informant of this case and he deposed that the victim/prosecutrix was produced by the Child Line Roing before the CWC Roing and then she was put in the custody of Nani Maria Child Care Institute for counseling. In the first and second round of counseling, the victim did not disclose what had happened to her, but thereafter she narrated the entire incident to the counselor. He was not present when the victim disclosed the incident before the counselor. After disclosure of the incident by

the prosecutrix, they decided to lodge an F.I.R. and accordingly, instructed the CCI Roing to lodge the F.I.R., but they refused and send back the matter and thereafter, they wrote an application to Superintendent of Police, who lodged the F.I.R. *suo moto* as the CWC Members are not authorized to lodge the F.I.R.

24. In her cross-examination, he stated that the accused had sexually harassed the victim though they have not personally interrogated the victim before lodging the complaint. He lodged the complaint being the Chairperson of CWC Roing and he was also interrogated by police over telephonically in connection with this case.

25. The accused/appellant denied the entire allegation brought against him while recording his statement under Section 313 Cr.P.C. and his wife- Smti Kalung Jaya deposed in favour of his case as DW-1. As per her, after lodging of F.I.R. by the CWC persons, she was asked by the I.O. about the incident of commission of rape by her husband to the prosecutrix and she denied the entire allegation brought against her husband. She further deposed that they were residing in the quarter where the incident alleged to had happened, which was a quarter with 2 (two) rooms only, i.e. one bedroom and one sitting room, and they were 7 (seven) members who used to reside in the same quarter and accordingly, she ruled out the possibility of rape in the said house. She was posted at CHC Koronu and she used to have her duty hours from 9-12 in the day time and hence, question of leaving the victim along with her husband in the night hours does not arise at all. Her husband used to drop her and also used to pick her from the office and they used to come back home together after the duty. The prosecutrix is a resident of Nepal, but she came with her mother to India and staying with them since November 2017. During her stay in

their house, the victim never made any complaint against her husband for having sexual assault on her. If she would have been sexually assaulted by her husband, she would have informed her, but she was found very comfortable in their house as she was staying with them since November 2017. On the day of alleged incident, i.e. 28.02.2021, she was found with a mask without covering her nose and mouth and for which, she got annoyed as she did not want to wear her mask properly and for that reason, she slapped her. Thereafter, her husband pulled her out from kitchen to veranda of house and only for the said incident, she ran away and from her mother, she came to know that the prosecutrix has left their premises. Immediately, after the incident, her husband lodged one missing complaint before the Officer-In-Charge, Roing Police Station, wherein, her statement was also recorded by the police. But, after a gap of 18 days, the present F.I.R. was lodged against her husband with some false and concocted allegation. The prosecutrix did not say anything before the I.O. initially, despite of repeated interrogation and during counseling also she did not disclose anything about the incident of rape and it is falsely alleged that she got scared seeing her husband outside the room and in fact, her husband/appellant was there in the hospital on 11.03.2021 in connection with her medical treatment. She, accordingly, exhibited some of the medical documents as Ext- 1, 1A and 1B. If any incident of rape would have happened to her, she would have informed her father when she met him, who came from Nepal coming to know about the incident. She further deposed that as her husband/appellant had the heated argument with the CWC Authority as the concerned authority lodged the false and concocted allegation against him. Even the victim denied sexual assault by the accused/appellant when she was asked by her father. Moreover, the police never recorded the statement of the mother of the DW-1 and also did not record the statement of her daughters who reside in the same house along with the prosecutrix. Prior to the incident also, the victim went with unknown

person on his motorcycle to a place towards Anini, which is located 6 KM far from Roing and her husband along with one friend brought her back from the said place. She further stated that her husband is innocent and without any fault, he is prosecuted on some false and concocted allegation.

26. However, in her cross-evidence, she admitted that the victim used to stay in their house as a domestic helper and during her stay in their house, she was not admitted in any school and there was no any male person staying in their house except her husband who is sexually active. The victim had already attained her menstruation when she was brought to their house and she also admitted that her place of posting is about 20 minutes far from their house and it is not possible to monitor all the movements of her husband from her office. She also admitted that she know the CJM, Roing by name only, but she never met him and she denied that the CJM Roing visited to their house. She along with her husband used to give medicine to the prosecutrix only for good health of the entire family and she denied that she caught her husband red-handed in a compromising position with the victim. Further she stated that there was no enmity between them and the members of the CWC Roing prior to the incident. However, she stated that the F.I.R. has been lodged by the CWC only after the heated argument with her husband.

27. The learned Special Judge also summoned the mother-in-law of the accused as the Court witness and she accordingly deposed that she is residing in the house of the accused/appellant since 2018. But, she went to Itanagar to stay with her daughter once in a month of November 2021 only for a day. She remained out for 3 (three) days including the journey and as per her also, the quarter of the accused/appellant has 2 (two) rooms with one bedroom and one

sitting room and the victim was made to stay in the kitchen which is an extension made of bamboo.

28. In her cross-examination, she admitted that she used to visit her other daughters at Naharlagun though she never went alone from the house. She further stated in her cross-examination that she never saw the accused doing any bad things with the victim nor the victim ever reported anything against the accused.

29. So, from the discussions made above, it is seen that the victim/prosecutrix used to stay in the house of the accused/appellant as a domestic helper since November 2017 and she originally hails from Nepal and she came to stay in the house of the appellant along with the mother of the wife of the appellant. It is also a fact that the wife of the appellant/DW-1 used to work in CHC Koronu which is about 9.00 KM far from the house of the appellant. From the evidence of both DW-1 as well as the CW-1, it appears that the mother-in-law of the accused/appellant used to visit to the house of her other daughters house at Naharlagun and Itanagar sometimes and the DW-1 also used to stay in the hospital/CHC in the day hours, though she claimed that she never had any duty in the night hours. Both the DW-1 and CW-1 denied the allegation of sexual assault to the prosecutrix by the accused/appellant. As per them, neither they saw any such incident nor the victim/prosecutrix reported about any incident to them.

30. The prosecution examined as many as 7 (seven) numbers of witnesses including the medical officer, I.O. and the informant and it is also a fact that there is no eye witnesses to the incident and it is only the prosecutrix who

brought the allegation of sexual assault on her by the accused/appellant.

31. The mother-in-law of the PW-2 met the victim when she was crying on the road and hence, she brought her to their house and initially the victim reported that she left the house as her uncle(appellant) beat her as she was not wearing her mask properly. But, subsequently, she reported that her uncle used to do dirty things with her and as per PW-2, she described as to how her uncle (accused/appellant) used to do all dirty things with her by pressing her breast, showing his private parts and also used to have sex with her. He even used to administer her some medicine after doing such sexual act with her. PW-3 also supported the prosecution case to the extent that at the time of counseling and after 2-3 counseling, she narrated the entire incident of sexual assault by the accused/appellant. This witness also deposed that after her counseling, she was refused to come out of the room of counselor when she saw the accused/appellant outside the room along with his wife. PW-4 is the doctor who examined the victim and opined that the victim was subjected to multiple sexual act and also opined that the girl is about 12 to 15 years of age. PW-5 is the I.O. who conducted the investigation of this case and accordingly filed the Charge-Sheet. PW-6 is one of the informant who belongs to CWC Roing and as per him also, the victim initially did not disclose anything before the counselor, but after 3-4 rounds of counseling, she disclosed everything before the counselor and thereafter, coming to know about the entire incident from the counselor, the authority decided to lodge the F.I.R. Thus, it is seen that except the prosecutrix, no other witness have seen the occurrence or had any personal knowledge about the same. However, the PWs-2, 3 & 5 supported the prosecution case to the extent that the accused/appellant used to sexually abuse her and committed rape on her and even he used to give her medicine to avoid pregnancy. She also narrated the entire incident before the Doctor who, accordingly, opined that the

victim is subjected to multiple sexual acts and as per the Doctor, she was a minor at the time of her examination.

32. The accused/appellant had took the defence plea that he is innocent and false and concocted case is lodged against him by the prosecutrix. On the day of incident, his wife slapped her and he also scolded her as she was not putting her mask properly during Covid time. After the said incident of scolding and slapping, the prosecutrix left their house and as tutored by the CWC people, she narrated some false and concocted story while deposing before the Court. However, she did not brought any allegation of sexual assault when she was brought for recording her statement under Section 164 Cr.P.C. She did not disclose anything before the learned Magistrate while recording her statement under Section 164 Cr.P.C. But, she claimed that she narrated the entire story before the learned Magistrate and at that time, she was alone in the chamber of the Magistrate. But the statement which she had given before the magistrate was not read over to her and in the same time, she stated that the Magistrate who recorded her statement under Section 164 Cr.P.C. was known to her as he used to come to the house of the appellant as he was the friend of her uncle (appellant). But her entire evidence in regards to sexual assault by the accused/appellant goes un rebutted and she also described the manner she was subjected to sexual assault by the accused/appellant. It is a fact that she did not disclose the incident before the learned Magistrate at the time of recording the statement under Section 164 Cr.P.C., but in the same time, is claimed by her that though she narrated the entire story before the learned Magistrate, she was alone in the chamber and it is not known to her what was recorded by the learned Magistrate. But, she stated that the learned Magistrate is the friend of her uncle (appellant).

33. Mr. K. Tama, learned counsel for the appellant, has raised the following points during the course of arguments:

- (i) There is no document to prove or ascertain the age of the victim girl though she is stated to be 12 to 14 years of age as per the Medical Report. The age of the victim girl is required to be proved and determined under Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Act, 2007.
- (ii) The I.O. recorded the statement of only one informant, i.e. Chairperson of CWC Roing, though the F.I.R. was lodged by 5 (five) numbers of informants who belong to the CWC Roing.
- (iii) Though the name of 10 (ten) numbers of prosecution witnesses were seen in the Charge-Sheet, but the prosecution examined only 6 (six) witnesses including the Medical Officer, I.O., informant and the prosecutrix.
- (iv) Except the prosecutrix, none other witnesses have seen the occurrence of sexual assault as alleged by the victim.
- (v) The statement recorded under Section 161 Cr.P.C. does not incriminate the accused for the offence charge against him.
- (vi) There is inordinate and unexplained delay in lodging the F.I.R.
- (vii) There is contradiction of the time of medical examination of the

victim and the P.W.-4 in her cross-examination had stated that the examination of the victim was started by 1.00 p.m. and concluded by 2.00 p.m., whereas in the medical report, the time of examination is recorded as 2.30 p.m. and thus, the so called Medical Report dated 23.03.2021 is without any authority of law and invalid.

- (viii) Though it is alleged that the accused/appellant used to show her porn video, but during investigation, the I.O. has not seized any mobile phone or any other gadget to prove that the video were shown to the victim by the accused/appellant.
- (ix) The learned Special Judge did not consider the fact that there is a major contradiction of the statement of the prosecutrix as recorded under Section 164 Cr.P.C. and the deposition made before the Court.
- (x) The concerned Magistrate was not summoned by any authority nor by the learned Trial Court to test the veracity and authenticity of the statement recorded by him in respect of the victim and also to find out as to whether there is any violation of Section 26(1) of the POCSO Act as it is alleged that the statement of the victim was recorded alone in the chamber of the learned Magistrate violating the provision of Section 26(1) of the POCSO Act with a further allegation that the learned Magistrate, being a friend of the accused/appellant, did not record the factual statement given by the prosecutrix.
- (xi) The father of the victim also did not brought any allegation of sexual

assault on her daughter by the convict/appellant, though he got the opportunity to meet his daughter before recording his statement.

(xii) The learned Special Judge failed to rely upon the mandate of Section 80 of the Indian Evidence Act, 1872 and failed to accept the statement recorded under Section 164 Cr.P.C. of the victim.

(xiii) It is a settled law that a person can be convicted on the basis of sole testimony of the prosecutrix. However, the testimony and the evidence of the said prosecutrix must inspire confidence trustworthy and unblemished and also should be a sterling quality.

34. The learned counsel for the appellant further relied on the decision of this Court reported in **2020 (3) GauLT 403 (Bhupen Kalita Vs. State of Assam)**, wherein, it is held that “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. However, if the prosecution is unable to prove the foundational facts of the offence, Section 29 cannot be invoked.”

35. The learned counsel also relied on another decision of this Court reported in **2021 (3) GLT 128 (Manirul Islam @Manirul Zaman Vs. The State of Assam)**, wherein also Sections 29 of the POCSO Act is discussed that mere insertion of Section 29 and 30(2) in the POCSO Act does not altogether relieve the prosecution of the burden of proof contemplated under Sections 101 and 102 of the Evidence Act but merely lessen the burden on the prosecution by shifting the onus upon the accused.

36. The learned counsel for the appellant further relied on following case laws in support of his submissions:

- (i) **2020 SCC OnLine Gau 3165 (Nanwang Rongrang Vs. State of Arunachal Pradesh)**
- (ii) **2017 SCC OnLine Mad 37658 (Murugasamy Vs. State representation by Inspector of Police, Karumathampatty Police Station Coimbatore District & Anr.)**
- (iii) **(2017) 12 SCC 699 (Ajay Kumar Choshal & Ors. Vs. State of Bihar & Anr.)**

37. On the other hand, the learned Public Prosecutor, Mr. J. Tsering, has submitted that there is no irregularity under Section 461 Cr.P.C. and the said Section talks only about the Magistrate and the instant case was disposed of by the learned Special Judge who has the authority even to try as a Magistrate. Thus, the trial cannot be vitiated on irregularities under Section 461 Cr.P.C.

38. The ossification test was also done as per the direction of this Court in PIL (Suo Moto) 05/2021 and vide order dated 30.06.2021, this Court had directed for a scientific examination of the prosecutrix and accordingly, the Directorate of Health Services, Arunachal Pradesh, was asked to depute a team of medical officer under the Doctor to conduct the medical examination only for the determination of the age of the victim. So, accordingly, as per the direction of this Court in the said PIL (Suo Moto) 05/2021, the ossification test of the victim/prosecutrix was conducted and she was found to be a minor at the time of the ossification test. The learned Public Prosecutor further submitted that in absence of the Birth Certificate or School Certificate or the Matriculation

Certificate etc. or any Certificate of Birth issued by any Corporation or Municipal Authority, the age of a child is to be determined only by ossification test or any other latest medical case determination test under Section 94 (2) (iii) of the Juvenile Justice (Care and Protection of Children) Act, 2007 and in the instant case, as the victim was working under the convict/appellant only as a domestic helper, she had no source to produce any Birth Certificate or School Certificate nor there was any opportunity for the I.O. to procure any School Certificate or Birth Certificate of the child and hence, the ossification test was the best option for determination of the age of the victim. Her ossification test was also done as per the direction of the this Court in the PIL (Suo Moto) 05/2021.

39. The prosecutrix brought the allegation of the sexual assault on the appellant/convict who happened to be her master as she was working as a domestic helper in the house of the accused/appellant and she also described the manner she was subjected to sexual assault by the accused/appellant. The learned Public Prosecutor further submitted that the specific principle of corroboration is not applicable in a case of a sexual offence and the conviction can be based on sole testimony of the prosecutrix if her testimony inspires confidence, believable and trustworthy. The learned Public Prosecutor further submitted that non-examination of the other witnesses will not affect the prosecution case in any manner as it is a fact that none of the witnesses have seen the occurrence or doing any penetrative sexual act with the prosecutrix. The F.I.R. may be lodged by 5 (five) numbers of informants, being the Member of CWC, but the examination of only 1 (one) informant will not at all vitiate the trial of the case of the prosecution and the witness, who is examined by the I.O., is the Chairman of the said CWC Roing.

40. The learned Public Prosecutor further relied on the following case laws in support of his submissions:-

- (i) **2008 0 AIR (SC) 882 (Moti Lal Vs. State of M.P.)**
- (ii) **2001 3 Supreme 28 (Gurudevdatla VKSSS Maryadit & Ors. Vs. State of Maharashtra & Ors.)**
- (iii) **2004 8 Supreme 956 (State of U.P. Vs. Pappu @ Yunua & Anr.)**
- (iv) **2013 0 AIR (SC) 1307 (State of Haryana Vs. Basti Ram)**

41. In regards to non-examination of all the witnesses, the learned Public Prosecutor further relied on the following 2 (two) decisions of the Hon'ble Apex Court:-

- (i) **2021 0 Supreme (SC) 108 (Ram Vijay Singh Vs. State of Uttar Pradesh)**
- (ii) **2015 0 Supreme (Gau) 976 (Md. Safiqur Rahman Vs. The State of Assam)**

42. I have given my anxious consideration to the rival submissions made by learned counsels appearing for the parties and also gone through the materials available on record.

43. As discussed above, it is an admitted fact that the victim was working as a domestic help while she was staying in the house of the convict/appellant and on the day of incident, when she left the residence of the convict/appellant, a

missing report was filed by the accused/appellant. But, subsequently, a F.I.R. was lodged by the Member from CWC Roing after coming to know about the entire incident, which was reported by the victim before the P.W.-2 as well as before the counselor after 3-4 round of counseling. It is also seen that the victim was not in a position to produce any Medical Certificate, Birth Certificate or School Certificate before the I.O. in support of her proof of her age and as the girl was working as a domestic help, the I.O. had got no opportunity to procure any Birth Certificate or School Document of the victim/prosecutrix, who was reported to be minor at the time of the alleged incident.

44. The learned counsel for the appellant mainly stressed on the point that there was no reasoned order of satisfaction passed by the learned Special Judge in regards to the age of the victim, who is claimed to be a minor at the time of the incident. Further, it was pointed out by the learned counsel for the appellant that whenever the issue of age is raised before the Court in respect of the victim or a juvenile in conflict with law, one has to take the resort to the provision of Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Act, 2007, which lays down the procedure for age determination and the same reads as under:

- (a) the matriculation or equivalent certificate, if available; and in the absence whereof;
- (b) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
- (c) The birth certificate given by a corporation or a municipal authority or a panchayat;
- (d) And only in absence of either (a), (b), (c) above, the medical opinion

will be sought from a duly constituted medical board, which will declare the age of juvenile or child.

45. Accordingly, the learned counsel for the appellant had submitted that it is impermissible to determine or presume the age in any other manner as contemplated under Rule 12(3) of the 2007 Rules and it is mandatory to follow the Rules chronologically and one cannot take resort to subsequent clause without exhausting prior clauses under Section 12(3) of the said Rule.

46. In this regard, the Hon'ble Supreme Court in the case of **Ram Vijay Singh (supra)** has also held that "...there is no Date of Birth Certificate from school or matriculation or equivalent certificate or a Birth Certificate given by a Corporation or Municipal Authority or Panchayat – Therefore, clause (iii) of Section 94(2) of Act to determine age by an Ossification test or any other latest medical age determination test conducted on orders of Committee or Board ..."

47. In the instant case, as discussed above, the prosecutrix was working as a domestic help in the house of the convict/appellant since the year 2017 and she originally hails from Nepal, but she was not in a position to produce any school or any birth certificate. Her parents were not staying in India and she was brought from Nepal by the mother of the wife of the appellant and hence, it is very probable of not having any Birth Certificate or Educational Certificate to prove her age and in that case, it will be the best option for the prosecution to determine her radiological age. Further, in the present case, it is also seen that there was a direction to the Directorate of Health Services, Arunachal Pradesh, to conduct ossification test and or any other scientific test for determination of the age of the victim and the said direction was passed in PIL (Suo Moto)

05/2021. So, the question of exhausting the other clauses, i.e. the Birth Certificate, Medical Certificate etc. does not arise at all and there is no any other alternative for the prosecution to determine the age of the victim through her ossification test.

48. Coming to the issue raised by the learned counsel for the appellant with regards to non-examination of all the witnesses, it is seen that except one informant, 4 (four) other informants were not examined by the I.O. and out of 10 (ten) numbers of witnesses cited by the I.O. in the Charge-Sheet, the prosecution examined only 6 (six) numbers of witnesses including one of the informant of this case. But, it is a fact that none of the witnesses have ever seen the occurrence and it is only the prosecutrix who narrated the entire incident or the manner she was subjected to sexual assault by the victim/appellant. So, only because of non-examination of the some of the witnesses, the witnesses who are already examined by the prosecution cannot be disbelieved and the entire prosecution case cannot be vitiated only due to non-examination of some of the witnesses, who as per prosecution were not vital witnesses in this case.

49. In this context, the learned Public Prosecutor had also cited the above referred judgments of Hon'ble Apex Court as well as the judgment of this Court, as mentioned above.

50. In the case of **Ram Vijay Singh (supra)**, the Hon'ble Apex Court has held that "therefore merely because a prosecution witness was not believed in respect of another accused, this testimony of the said witness cannot be disregarded qua the present appellant. Still further, it is not necessary for the

prosecution to examine all the witnesses who might have witnessed the occurrence. It is the quality of evidence which is relevant in a criminal trial and not the quantity."

51. Further, in the case of **Md. Safiqur Rahman (supra)**, as relied by the learned Public Prosecutor, it has been held as under:

"25. Again in the case of State of Orissa Vs. Thakara besra and Anr, reported in AIR 2002 SC 1963, the Hon'ble Apex Court held that rape is not mere a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence. Further, in the case of State of Himachal Pradesh Vs. Raghubir Singh, reported in (1993) 2 SCC 622, the Hon'ble Apex 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 mitigate her veracity. Thus, the law that emerges on the issue is to the effect that 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."

52. It is a fact that there is a contradiction in the statement of the victim/prosecutrix recorded under Section 164 Cr.P.C. and her deposition made before the Court at the time of recording her evidence. It is also a fact that while giving her statement before the Magistrate, the victim did not brought any allegation of sexual assault on her by the convict/appellant and it is seen that she supported the defence version that out of fear she left the house of the accused/appellant as she was scolded by the appellant for not putting her mask properly. But, at the same time, it reveals from her evidence that she was alone in the chamber of the learned Magistrate at the time of recording her statement under Section 164 Cr.P.C. and in the same time, it is also stated by

her that the statement was not read over to her by the learned Magistrate and she also stated that the Magistrate is known to her and he used to come to the resident of the convict/appellant and he is the friend of the accused/appellant. The learned Special Judge, while dealing with this issue, discussed in detail about the provision of Section 164 (5)(A)(9) Cr.P.C. *read with* Section 25 of the POCSO Act, and also discussed the mandate of Section 26(1) of the POCSO Act, where the statement should be recorded in presence of parents of the child or any other person to whom the child has trust or confidence. But, from the record, it reveals that the statement was recorded by the learned Magistrate alone in his chamber and hence the victim girl may not feel comfortable to speak about the sexual assault on her by the person who is known to her being the friend of her master, i.e. the accused/appellant. So, only because of non-explaining the detail about the incident in her statement recorded under Section 164 Cr.P.C. it cannot be stated to be unbelievable witness or her evidence cannot be considered as an untrustworthy.

53. Thus, it is seen that the learned Special Judge rightly came to a conclusion that the evidence of the prosecutrix cannot be disbelieved only for the fact that she did not narrated the entire incident of sexual before the learned Magistrate while recording her statement under Section 164 Cr.P.C. that too in the chamber of the learned Magistrate where he was alone in the chamber without in presence of her parents or any person whom the victim had any trust.

54. Coming to the medical evidence of the Doctor/P.W.-4, it is seen that the learned counsel for the appellant had raised the point during the course of argument that as per report she conducted the medical examination of the victim at 2.30 p.m. whereas while deposing before the Court, she stated that

the examination of the victim was started to be conducted at 1.00 p.m. and it was completed by 2.00 p.m. More so, it is submitted that no consent was taken from her parents while conducting her medical examination. But it is a fact that at the time of her medical examination, she was brought by a lady constable and no family members were accompanied her for her medical examination. More so, the medical report cannot be disbelieved only on the point that there is some minor contradiction regarding the timing of the examination of the victim. The fact remains same that the victim was brought before the M.O. on 23.03.2021 and she conducted her medical examination on the day when she was brought for her medical examination. On completion of her medical examination, the Doctor accordingly opined that the victim was subjected to multiple sexual act and at the time of examination, she was found to be a minor girl of 12 to 15 years of age.

55. So only due to absence of the consent of the parents or the minor contradiction in timing of examination of the victim, the evidence of the Medical Officer cannot be disbelieved. The Medical Officer was duly cross-examined by the defence. But, it cannot be disproved by the defence that the victim was not medical examined by the P.W.-4 when she was brought before her after lodging of the F.I.R. by the persons from CWC Roing. It is also alleged by the defence that there is an inordinate delay in lodging the F.I.R. and there is no proper explanation in the F.I.R. due to delay in lodging the same. But when we see the background of the case, it reveals that the girl left the house of the accused/appellant on 28.02.2021 and it is claimed by the appellant that he lodged a missing report on the very next date, i.e. on 01.03.2021. But, it is seen that subsequently on 02.03.2021, the victim was recovered and was handed over to Child Line Roing and thereafter she was shifted to Child Care Institute, Roing, where the victim was residing. Thereafter, on 22.03.2021, the Member of

CWC Roing lodged the F.I.R. before the Superintendent of Police, Lower Dibang Valley, with the allegation of sexual assault and molestation on the victim girl. Thus, it is seen that the F.I.R. was lodged after 22 days of the missing of the victim from the residence of the accused/appellant. But, from the evidence of P.Ws.- 2, 3 & 5, it reveals that initially the girl was not in a position to speak anything or she was not disclosing anything about the incident and only after 3-4 rounds of counseling, she reported the entire incident before the counselor as well as before the P.W.-2 and hence, coming to know about the incident, the counselor requested the Member of CWC Roing, to lodge the F.I.R., and therefore there was a delay in lodging the F.I.R. of 22 days from the date when she left the house of the accused/appellant. But, no specific date could be mentioned in the F.I.R. as it is alleged that she was subjected to sexual assault on many occasions and hence, no date of incident could be narrated by the victim and for which, without any specific day of alleged incident, the F.I.R. was lodged with a delay of 22 days. So, considering the entire background of the case, the delay of 22 days in lodging the F.I.R. cannot be stated to be fatal for the prosecution case.

56. As stated above that there is no eye witness to the prosecution case and all the witnesses, who have deposed before the Court, narrated the story which they have heard from the prosecutrix. But, out of 6 (six) numbers of witnesses, examined by the prosecution, 2 (two) can be considered as official witnesses, i.e. I.O. and M.O. in this case, and including the prosecutrix, 3 (three) other witnesses are being examined by the prosecution. But none of the witnesses are related to the prosecutrix nor there is any evidence to show that they have any vested interest. The mother-in-law of the P.W.-2 met the victim and accordingly, she was brought to their house and thus, the P.W.-2 is no way connected to the victim or accused and there is no reason to disbelieve her evidence who heard

about the incident from the prosecutrix. Similarly, P.W.-3 is a counselor, who is expert in the field of counseling, and she also has no connection either with the victim or with the accused/appellant and she made her deposition after hearing the entire incident narrated by the victim at the time of counseling. She described the entire incident before the counselor as to how she was subjected to sexual assault by the accused/appellant. In the same time, P.W.-4, who is a Medical Officer, conducted the medical examination of the victim and she opined the age of the victim as 12 to 15 years only on the basis of her radiological test and after examining her, she opined that there was signs suggestive of penetrative intercourse as she found that the hymen was not intact and labia minora was also exposed which generally occurs due to multiple sexual act. Accordingly, as per her medical report, the girl was subjected to multiple sexual assaults. So, there is nothing to disbelieve the P.Ws.- 2, 3 & 4 and they have nothing to lose or gain in this case to falsely implicate the accused. It was alleged by the defence that after a hot argument with the CWC Members, they lodged the F.I.R. with some false and concocted allegation. But, the defence could not substantiate the same by producing any corroborative evidence, rather it is stated by the counselor that she refused to come out of the room of the counselor when she saw the accused/appellant along with his wife outside the counselor room. Further, the evidence of the prosecutrix could not be rebutted while cross-examining by the defence and her deposition with regards to the penetrative sexual assault on her by the accused/appellant goes unrebutted and the evidence of the victim leaves no iota of doubt that the victim was subjected to penetrative sexual assault.

57. So, from the entire evidence of the prosecutrix, it is found that her testimony is trustworthy and reliable and other prosecution witnesses also corroborated and supported the testimony of the victim including her medical

examination report. Rather, it is seen from her evidence that the accused used to sexually assault her even when she was a small child. In her cross-examination also, the victim maintained her testimony intact and deposed that the accused was doing dirty things to her many a times since her childhood. The wife of the accused also adduced her evidence as D.W.-1 and the learned Special Judge also recorded the statement of the mother-in-law of the accused/appellant, who also used to stay in the same residence along with the victim/appellant and his family members. The defence brought the circumstances that the accused/appellant used to stay in a house with 2 (two) rooms along with his wife and his mother-in-law and children. As per the defence, the mother-in-law and the wife used to remain in the house, but from the cross-evidence of both D.W.-1 as well as C.W.-1, it reveals that the D.W.-1 had to remain busy with her duty in day hours and also reveals that the C.W.-1, the mother-in-law of the appellant also used to visit the house of her other daughters at Itanagar as well as Naharlagun. Thus, it cannot be said that the accused/appellant had no opportunity to sexually assault the victim/prosecutrix and it is the allegation of the prosecutrix that generally the accused used to do dirty things/sexual assault with her in absence of aunty (wife of the accused/appellant).

58. It 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. And, in the case in hand, the victim was working under the convict/appellant as a domestic help and hence, in such a situation, she was not in a position to disclose anything about the sexual assault on her either to the

wife of the appellant or to any of her family members as she was staying in India though she originally belongs to Nepal.

59. 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 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."

60. 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 on 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.

61. 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.

62. 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."

63. Here in the instant case, from the discussions made above, it is seen that the prosecution has able to prove the foundational facts of the case and to discharge the burden, the accused also adduced evidence of one D.W.-1 and the Court also examined one C.W.-1, i.e. the mother-in-law of the accused/appellant. But, as discussed above, the accused/appellant could not disprove the prosecution case by adducing evidence in his support, rather it reveals that the accused/appellant had the opportunity to sexually assault the victim/prosecutrix in absence of the D.W.-1 as well as C.W.-1.

64. Coming to the issue raised by the learned counsel for the appellant in regards to recording of statement under Section 313 Cr.P.C. of the convict/appellant, it was submitted by the learned counsel for the appellant that no question was put to the accused as to whether he wants to adduce any evidence in support of his case. Thus, the prejudice was caused to the accused/appellant as he was not given any chance to adduce evidence and no question was put to him in that regard. Accordingly, it was submitted that it is a fit case to remand the case for retrial or *de novo* trial allowing the accused to adduce evidence in support of his case. The learned counsel for the appellant also relied on a decision of this Court reported in **2020 SCC OnLine Gau 3165 (Nanwang Rongrang Vs. State of Arunachal Pradesh)**, wherein, it is held that "statement of the witness recorded under Section 313 of Cr.P.C. - Nothing to indicate that the accused was asked as to whether he would like to adduce evidence in defence or not – Statement of the accused recorded under Section 313 of Cr.P.C. of total denial – Accused ought to have been asked whether he would like to adduce evidence in his defence." In the above referred case, this Court had remanded the matter for fresh trial allowing the defence to cross-examine some of the P.Ws. and provided opportunity to the accused/appellant to adduce evidence.

65. It is an admitted position in this case that while recording the statement under Section 313 Cr.P.C., the learned Special Judge did not put any question as to whether the accused intends to adduce any evidence in support of his case. But, from the statement recorded under Section 313 Cr.P.C., it is evident that all the incriminating questions were put to the appellant and he not only denied the entire case, but also explained his entire defence. More so, in this case, though specific question was not put to the convict/appellant, but record reveals that he

adduced his wife as a defence witness as well as the Court also examined another witness, who happened to be the mother-in-law of the accused. Thus, it is seen that the accused not only took his defence while recording his statement under Section 313 Cr.P.C., but also adduced evidence in support of his case as D.W.-1.

66. In the case of **Wasim Khan Vs. The State of U.P. [AIR 1956 SC 400]** and also in the case of **Bhoor Singh & Anr. Vs. State of Punjab [AIR 1974 SC 1256]**, the Hon'ble Supreme Court expressed the view that the provision of Section 313 Cr.P.C. are to bring the substance of accusation to the accused so that he can explain every circumstance appearing against him during the course of evidence and it is mandatory provision which casts a duty on the Court to give the opportunity to the accused to explain every incriminating circumstance brought against him in the evidence. But, the question whether the trial is vitiated or not due to non-compliance of Section 313 of the Code of Criminal Procedure would depend upon the degree of error and the accused must show that such non-compliance of Section 313 of the Code of Criminal Procedure has caused prejudiced or is likely to cause prejudice to him.

67. Similar view is also expressed by the Hon'ble Apex Court in Paramjeet Singh @ Pamma's case, reported in **(2010) 10 SCC 439 (Paramjeet Singh @ Pamma Vs. State of Uttarakhand)**.

68. Here in the instant case, the appellant failed to prove that he is materially prejudiced for any omission while recording his statement under Section 313 Cr.P.C. Rather, it is seen that every incriminating materials were put to the accused/appellant and he not only took the plea of denial, but also took the

entire defence while recording his statement under Section 313 Cr.P.C. and also adduced one D.W. in support of his case. Hence, it cannot be inferred from the materials on record that any prejudice is being caused to the accused/appellant. Accordingly, I do not find any reason to remand the case for retrial or *de novo* trial.

69. So, from the entire discussions made above, it is seen that the prosecution has been able to prove that the accused/appellant had committed the offence of penetrative sexual assault on the victim/prosecutrix, who is a minor at the time of incident and in the same time, it is also proved that she was working as a domestic help under the convict/appellant during the time of incident. However, it is seen that though the accused/appellant was charged under Section 376(3) of the Indian Penal Code, yet from the medical evidence, it is seen that the victim was not found to be below 16 years of age after adding two years as margin of error on the upper side of the age of the victim and thus, the learned Special Judge rightly held that the prosecution could not establish the case under Section 376 (3) of the Indian Penal Code though he was also charged under the said Section of Indian Penal Code. However, it is seen that the prosecution has able to establish a case against the accused/appellant under Section 376(2)(f) of the Indian Penal Code and under Section 4(1) of the POCSO Act. However, Section 42 of the POCSO Act stipulates that when an act constitutes an offence under the POCSO Act and also under Section 376 IPC, then the offender shall be liable for punishment under the POCSO Act or under the Indian Penal Code, which provides greater punishment in degree. Thus, the accused has to be provided punishment which is greater in degree as per Section 42 of the POCSO Act, 2012. Accordingly, the learned Special Judge rightly held that the accused/appellant is liable to be sentenced for conviction under Section 376(2)(f) of the Indian Penal Code and not under Section 4(1) of

the POCSO Act and the learned Special Judge also discussed at length about the punishment provided under those Sections of law.

70. 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 judgment and order dated 22.08.2022, passed by the learned Special Judge (POCSO), Tezu, in POSCO Case No. 05(LDV)/2021, corresponding to Roing P.S Case No. 22/2021, requires no interference of this Court and accordingly, the same stands affirmed.

71. Resultantly, the appeal stands dismissed.

72. 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