

GAHC010029222021



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

Case No. : CRL.A(J)/5/2021

NAKUL BORO
S/O. LT. KHARGA BORO, VILL. RAHBHALA, P.S. CHANGSARI, DIST.
KAMRUP, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MS. M BARMAN, AMICUS CURIAE

Advocate for the Respondent : MR. B SARMA(ADDL.PP, ASSAM)

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT

Date : 30-05-2023

- 1.** Heard Ms. M. Barman, learned Amicus Curiae for the appellant and Mr. B. Sarma, learned Addl. P.P. for the State of Assam.
- 2.** This is a jail appeal against the judgment & order dated 27.02.2020 passed by the learned Special Judge, Kamrup, Rangia in Special (P) Case No. 18/2018 convicting the

appellant under Section 6 of Protection of Children from Sexual Offences Act (POCSO Act for short) and sentencing him to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs. 5,000/- with default stipulation.

3. The genesis of the case was that Nakul Boro (hereinafter referred to as the accused) committed penetrative sexual assault of a 7 year old victim in the absence of her parents on 02.05.2018 at about 4:15 PM. The FIR was lodged by the complainant 'Y' which was registered as Changsari P.S. Case No. 133/2018 and the Investigating Officer (IO in short) embarked upon the investigation. Charge-sheet was laid against the accused under Section 4 of the POCSO Act. At the commencement of trial, a formal charge was framed under Section 4 of the POCSO Act and the particulars of offence was read over and explained to him. The accused adjured his guilt and claimed to be tried.

4. To substantiate its stance, the prosecution adduced the evidence of 6 witnesses including the IO and the Medical Officer (MO in short). Several questions were asked regarding the incriminating materials arising in the evidence against the accused and his responses were recorded. The accused did not tender any evidence in defence.

5. The trial Court decided this case on the following points:

“(i) Whether the accused person committed penetrative sexual assault upon the victim minor girl who is less than 12 years age, daughter of the complainant as alleged u/s 4 of the POCSO Act?”

6. I have considered the submissions at the bar with circumspection.

7. It is submitted on behalf of the accused that the evidence in chief of the victim is contradictory to her cross-examination. The accused is a young lad who was only 18 years

old at the time of the incident.

8. Per contra, the learned Addl. P.P. has submitted that the accused deserves stringent punishment. This case against the accused has been proved beyond reasonable doubt. There is no scope of acquittal as the evidence is overwhelming against the accused.

9. On the backdrop of the rival submissions I proceed to dispose of the appeal. The question that falls for consideration is :-

“Whether the learned Trial Court erred while convicting the appellant under Section 6 of the POCSO Act?”

10. PW-2 is the victim. She was 8 years old when her deposition was recorded in the Court on 14.12.2018. The victim 'X' has stated that the accused who is her uncle groped her vagina and tried to insert his penis into her vagina causing pain in her vagina. Her mother saw the incident. She did not scream as she was terrified. The victim has proved her statement under Section 164 Cr.PC as Ext.-2 and Ext.-2(1) and 2(2) as her signatures. In her cross-examination she has stated that her uncle used to treat her affectionately, but he never offered her any chocolates. On the day of the incident, her uncle took her for a stroll out of affection and did not do anything as stated above.

11. The learned counsel for the accused laid stress in his argument that the cross-examination of the victim is contradictory to her evidence-in-chief and this exonerates the accused. This argument can however be ignored because the victim has denied the suggestion of the defence that her uncle did not do anything as stated above.

12. It is held that the evidence of the victim substantiates her statement under Section 164 Cr.PC. In her statement under Section 164 Cr.PC the victim has stated that on 02.03.2018 at

about 4:30 PM, her uncle (Khura) Nakul Boro called her and took her to his house to play Ludo. Thereafter her uncle grabbed her and removed her panties and placed his penis in her vagina and some white coloured substance oozed out of his penis. Her mother went there and saw the incident and rescued her from the place of occurrence. The learned counsel for the accused however submitted that the statement of the victim is contradictory to her deposition in the Court because according to her deposition in the Court, the place of occurrence appears to be the victim's house.

13. I have scrutinized the evidence of the victim. Several questions were asked to the victim by the trial Court who recorded her evidence, as well as by the Magistrate who recorded her statement under Section 164 Cr.PC. The victim's intelligence was assessed and thereafter her statement was recorded. It is thus obvious that the victim was only 7 years at the time of the incident and her deposition was recorded when she was 8 years old. She described the incident in her own terms being a young girl of 8 years of age. It is held that the victim's deposition does not at all hint that the incident occurred in her own house.

14. The victim's mother testified as PW-1. She stated that the incident occurred at about 4 PM on 02.03.2018. At that time her daughter was 7 years old. Her brother-in-law i.e. the accused resides in the house adjacent to their house. On the day of the incident her daughter went out to play and when she did not see her daughter for a while, she went out in search of her daughter. Then she went to the accused-person's house and she saw him committing rape on her daughter by laying her on his bed. As soon as the accused saw her, he fled the scene. Then she checked her daughter's genitals and noticed injury and sperm in her daughter's genitals. When her husband returned from work she informed him about the incident and then they informed the villagers about the incident. Then, on the advice of the

villagers they lodged the FIR. She proved the FIR as Ext.-1 and Ext.-1(1) as her signature. The police interrogated her and took her daughter to the GMCH for medical examination. Her daughter's statement was recorded in the Court and her daughter was handed to her custody. Thus it is apparent that the victim's evidence is corroborated and supported by the evidence of her mother. In her cross-examination she has denied that she has lodged this case against her brother-in-law as they have a land dispute with her brother-in-law.

15. The Medical Officer Dr. Reshma Talukdar has testified PW-5 that on 04.05.2018 at 2 PM while she was on duty in the Department of Forensic Medicine, GMCH, she examined the victim 'X' and found the following:

“History of the Case:-

As per the forwarding letter alleged incident of forceful sexual assultation by the victim's uncle on 2.5.18 at around 4:15 p.m. the history was given by Paresh Boro, who is the victim's father and gave victim's age as 7 years. According to the victim's father, her (victim's) paternal uncle called the victim to play Ludo alongwith him. She went to his house which on the other part of same area. After playing Ludo, they saw some illicit thing in mobile and after that accused took the attempt to sexually assault the victim. The mother not finding her daughter in place, went to search for her. She found her daughter in bed with the accused. The garments of the victim is still in the house. Hence, the case.

The following are the findings:

Findings:- Height-115 cm, Weight – 20 Kg., Chest – 66 cm, Abdomen – 65 cm. 18 Nos. of temporary teeth and 5 Nos. of permanent teeth and total 23 Nos. of teeth were present.

Scalp hair – 21 cm, black in colour, straight.

Auxiliary hair : Not erupted

Pubic hair : Not erupted

Breast : Childlike.

Menarche : Not yet attained.

Genital Organs – Healthy, Vulva – Healthy

Hymen - Intact

Vagina - "illegible" Cervix – Can't accessed, Uterus – Not palpable per abdomen.

Evidence of venereal disease:- Not detected at the time of examination.

Vaginal Swabs collected from around the walls of vagina.

Injury on the body not detected at the time of examination.

Evidence of struggle and evidence of stain – Not detected at the time of examination.

Mental condition at the time of examination – Normal.

Cooperation and behaviour – Co-operative.

Intelligence and memory – Average. Gait Normal

Result of Laboratory investigation :- vaginal smears does not show presence of gonococci or spermatozoa.

Opinion :- On the basis of physical examination, Radiological and Laboratory investigation done on the person of victim we are of the opinion that – (i) Mental condition was normal but for proper evaluation the victim is advised to attend the Psychiatric Deptt. GMCH. (ii) There was no evidence of recent sexual intercourse on her person. (iii) There is no evidence of injury on her person. (iv) No any foreign particles found on the person.

Ext.3 is the medical report consisting of 3 pages, Ext. 3(1), Ext. 3(2) and Ext. 3(3) are my signatures.”

16. The learned counsel for the appellant/accused laid stress in his argument that some injuries ought to have been detected on examination of the victim who was only 7 years at the time of the incident. No evidence of recent sexual intercourse was detected on her person. No injuries were detected nor were there any foreign particles found. On this ground alone the accused deserves acquittal.

17. At this juncture it is pertinent to mention that it is not disputed that the victim was only 7 years old. The victim was taken for medical examination on 04.05.2018 while the incident occurred on 02.05.2018. Therefore, no injuries could be detected on examination of the victim. The learned counsel for the accused has also laid stress in his argument that no reasons explaining the inexplicable delay in lodging the ejahar (FIR) were assigned. The ejahar (FIR), was lodged on 04.05.2018 while the incident occurred 02.05.2018. It is apparent from the evidence of PW-1 and PW-3 that immediately after the incident, the informant did not go to the police. Initially she informed the incident to her husband PW-3

and thereafter they informed the villagers and on the advice of the villagers they lodged the FIR. This explains the reasons of delay in lodgment of the FIR. This delay does not render the prosecution case suspect.

18. The victim's father PW-3, 'Z', has testified that the incident occurred on 02.05.2018. The accused is his younger brother. On the day of the incident he was not at home. His wife called him over phone and asked him to return home immediately. Thereafter he returned home. He saw the injuries on his daughter's body. Then he informed the villagers who advised him to lodge this case. Thereafter, this case was lodged. This witness has also denied in his cross-examination about any land dispute between him and his brother. The evidence of the witnesses have not been contradicted. The evidence of PW-1, PW-2 and PW-3 have not been contradicted as per Section 145 of the Indian Evidence Act, 1872 (the Evidence Act for short) qua Section 162 Cr.PC. No contradiction could be elicited through the cross-examination of the witnesses PW-1, PW-2 and PW-3 and the cross-examination of the IO Sri Rama Kanta Bora (PW-6) as per Section 145 of the Evidence Act vis-à-vis Section 162 Cr.PC.

19. One witness Smt. Anima Boro testified as PW-4 that her son studies in the same class with the victim. The incident occurred about 10 months ago. She heard about the incident from the villagers and the well wishers went to the house of the informant to ask about the well-being of the victim.

20. The Investigating Officer Shri Ramakanta Bora testified as PW-6 that on 04.05.2018, he was posted at Gauripur Outpost as In-charge. On that day, the OC of Changsari P.S. received an FIR lodged by the informant and registered the Changsari P.S. Case No. 133 of 2018 under Section 4 of the POCSO Act and endorsed him with the investigation. He embarked upon the

investigation and recorded the statements of the complainant and the victim (in presence of her parents). He also prepared the sketch map and recorded the statements of the other witnesses. Thereafter he forwarded the victim for medical examination and for recording her statement under Section 164 Cr.PC. The victim was under the care of a woman constable and a lady Home Guard. The accused was found evading arrest. Thereafter, he again went to the place of occurrence in search of the accused and arrested him on 05.05.2018. He collected the Medico Legal Report and thereafter filed charge-sheet against the accused under Section 4 of the POCSO Act. The victim was 7 years old at the time of the incident. He proved his signature on the FIR as Ext. 4(1). He has proved the charge-sheet as Ext.-6 and Ext.6(1) as his signature and the Sketch Map as Ext.5 and Ext.-5(1) as his signature on the Sketch Map. He has admitted in his cross-examination that the distance between the place of occurrence and police station is only 1½ kilometers. When he went to the place of occurrence, the victim was in a normal state.

21. The learned counsel for the accused has stated that a false case has been foisted against the accused to avenge the grudge of land dispute between the accused and the informant. The witnesses PW-1 and PW-3 (victim's parents) were cross-examined about the land dispute but they have vehemently denied of any land dispute. The statements of the accused recorded under Section 313 Cr.PC reflects that a false case has been slammed against him due to the prevailing land dispute between him and the victim's parents. The accused answered the questions under Section 313 Cr.PC in an evasive manner but he has mentioned about a land dispute. This statement of the accused regarding a land dispute is not found to be reliable to the extent to absolve the accused of the charges of sexual assault and give him the benefit of doubt. The victim's evidence in the Court has substantiated her statement

recorded under Section 164 Cr.PC. Her evidence is corroborated by the evidence of her parents. Although PW-4, a neighbour has not described how the incident has occurred, yet her evidence reveals that she has heard about the incident. She may not have described about the incident, but it is apparent that she has referred to the incident of rape. The victim being a girl of only 8 years could not describe why she had experienced pain, when the accused committed sexual assault on her. The Section 3 of the POCSO Act describes penetrative sexual assault, which reads:

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

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

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

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or reveals that she experienced pain when the accused tried to insert his penis into her vagina. As per Section 3 of the POCSO Act, the penetration can be to any extent. Even if the penetration is not complete, the accused is guilty of offence as described under Section 3 of the POCSO Act. If any person manipulates any part of the body of the child so as to cause penetration into the vagina, the person will be guilty of offence u/s 3 of the POCSO Act. In this case the victim, PW-2 has described how the accused touched her vagina and tried to insert his penis into her vagina. A 7 year old girl will definitely be unable to describe how she was assaulted. She was unable to comprehend the entire incident. She must have been shaken by the entire incident to comprehend the same and explain it in a Court or before a Magistrate. There is not even an iota of doubt that the accused is complicit. He was caught in the act by the victim's mother, PW-1 who went out in search of the victim who went out to play.

23. Although the accused was charged under Section 4 of the POCSO Act, the learned trial Court convicted the accused under Section 6 of the POCSO Act by virtue of Section 42 of the Act. It was held by the learned trial Court that the victim was under 12 years of age and the

accused has committed an offence described under Section 5(n) of the Act. The accused being the uncle has also committed offence under Section 5 (m) of the Act. The victim was in awe of her uncle who is of a formidable character, being the uncle and so she was also terrified by her uncle. It is true that the accused has committed an offence as described under Section 5(n) and 5(m) of the POCSO Act but charge cannot be altered at the strength of Section 42 of the POCSO Act. Section 42 provides for alternate punishment.

As per Section 464 of the Cr.PC–

“• No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charge, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

• If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may

- 1. in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge.*
- 2. in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit;*

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.”

24. It has been observed by Hon’ble Supreme Court in *Kamil v. the State of Uttar Pradesh* in Criminal Appeal No. 1568 of 2015, decided on 31.10.2018 that –

“15. In Darbara Singh v. State of Punjab (2012) 10 SCC 476, this Court considered the similar issue and came to the conclusion that the accused has to satisfy the court that there is any defect in framing the charge which has prejudiced the cause of the accused resulting in failure of justice. It is only in that eventuality the court may interfere. The Court elaborated the law as under:-

“20. The defect in framing of the charges must be so serious that it cannot be covered under Sections 464/465 Cr.P.C, which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error,

omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage during the proceedings or not. While judging the question of prejudice or guilt, the court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

21. 'Failure of justice' is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be 'failure of justice'; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be over emphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under the Indian criminal jurisprudence. 'Prejudice' is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under criminal jurisprudence, then the accused can seek benefit under the orders of the court. (Vide Rafiq Ahmad alias [Rafi v. State of U.P.](#) (2011) 8 SCC 300, SCC p. 320, para 36; [Rattiram and Others v. State of M.P. Through Inspector of Police](#) (2012) 4 SCC 516 and [Bhimanna v. State of Karnataka](#) (2012) 9 SCC 650)" (Underlining added).

25. The Hon'ble Supreme Court upheld the order of conviction and sentence passed by the trial Court although charges were not framed u/s 302 IPC against the appellant Kamil.

26. In the instant case the accused was well aware that he was being tried for an offence of penetrative sexual assault to a girl who was only 7 years old at the time of the incident. No charge was framed u/s 6 of the POCSO Act. It was clearly explained to him that he is charged of an offence of penetrative sexual assault of a 7 year old victim. Penetrative sexual assault is described u/s 3 of the POCSO Act and aggravated penetrative sexual assault is described u/s 5 of the POCSO Act. The lowest punishment prescribed is 10 years for an offence u/s 6 of the POCSO Act for aggravated sexual assault. After the amendment of 2019, the lowest

punishment prescribed u/s 6 of the POCSO Act is 20 years and u/s 4 of the POCSO Act, the punishment is not less than 10 years.

27. In the case on hand, no failure of justice is evident. There is overwhelming evidence against the petitioner. It has to be borne in mind that the victim's evidence is sufficient to bring home the charges levelled against the accused. Section 134 of the Evidence Act states that no particular number of witnesses is required to establish a case. Conviction can be based on the testimony of a single witness if he or she is wholly reliable and corroboration is necessary when he or she is only partially reliable. A 7 year old victim who has been assaulted has given consistent statement against the accused. Her statement under Section 164 Cr.PC has been substantiated by her evidence in the Court. Her evidence is fortified by the evidence of her parents as well as the evidence of her neighbour.

28. Although the learned trial Court has spelt out sound reasonings while convicting the appellant, yet the learned trial court erred by pressing into service the provision u/s 42 of the POCSO Act to convict the accused u/s 6 of the POCSO Act, without framing charge u/s 6 of the POCSO Act. I would like to reiterate that trial commenced after charge was framed u/s 4 of the POCSO Act. It has been held by the Hon'ble Supreme Court in *Kamil's case (supra)* that

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“It is also to be pointed out that in the High Court, the appellant has not raised any grievance as to non-framing of charge under [Section 302](#) read with [Section 34](#) IPC and that it has caused prejudice to him. On the other hand, the learned counsel appearing for the appellant only contended that the appellant Kamil ought not to have been convicted by invoking the principle of vicarious liability enshrined by [Section 34](#) IPC. All these aspects clearly show that the appellant clearly understood that charge under [Section 302](#) read with [Section 34](#) IPC has been framed against him and throughout he has been defending himself only for the charge under [Section 302](#) IPC. In such facts and circumstances, it cannot be said that the failure of justice has occasioned to him

and the absence of a charge under [Section 302](#) read with [Section 34](#) IPC cannot be said to have caused any prejudice to him.”

29. In the instant case it has come to the notice of this Court that the accused was convicted u/s 6 of the POCSO Act by pressing into service section 42 of the POCSO Act. All along, the accused has been defending himself of the offence of penetrative sexual assault committed on a minor who was below 12 years of age at the time of the incident.

30. The learned counsel for the accused has not raised any grievance as to non-framing of charge u/s 6 of the POCSO Act and has only contended that no injuries could be detected on medical examination of the victim. The learned counsel for the accused has also impugned the decision of the trial court on the ground that the trial court has ignored the contradictory statement of the victim in her evidence-in-chief and her cross-examination.

31. As the accused has been defending himself against the offence of committing penetrative sexual assault of the minor victim who was only 7 years of age, it is held that no prejudice has been caused to the accused which renders the decision of the trial court invalid. The incident occurred on 02.05.2018. Charge was framed u/s 4 of the POCSO Act on 17.11.2018. The incident occurred before the 2019 amendment of the POCSO Act and charge was also framed before the amendment of the POCSO Act which came into effect on 16.08.2019. The sentence was pronounced after the 2019 amendment i.e. on 27.02.2020.

32. A bare reading of Section 42 of the POCSO Act before the 2019 amendment clearly indicates that Section 42 of the Act prescribes alternate punishment to the offender under the POCSO Act or under such law but this cannot be misconstrued to press into service to punish an offender with a higher offence under which he was not initially charged. It has already been held in my foregoing discussions that the accused will not be prejudiced if the conviction

and sentence is upheld although charge was not framed u/s 6 of the POCSO Act. The earlier punishment prescribed u/s 6 of the POCSO Act was minimum 10 years of imprisonment which may extend to imprisonment for life and also fine is included. As the incident occurred on 02.05.2018 the accused was convicted u/s 6 of the POCSO Act and sentenced to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs. 5,000/- with default stipulation. The accused has been behind bars from 05.05.2018 and he has preferred an appeal from the jail. Immediately after the incident the accused was forwarded to custody and he is still in custody. The accused has no resources to appoint a Lawyer and he was represented by a Legal Aid Counsel in the lower court. He had to prefer an appeal from the jail. Remanding back this case for a retrial upon framing a charge is not required as failure of justice has not been occasioned in this case due to an error committed by the trial court in framing charge. No previous antecedents of the accused was projected by the prosecution side at the stage of trial. At the time of the incident, the accused was only 18 years of age. I have also considered the age and antecedent of the accused. The accused has been convicted to the lowest term of the sentence and the trial Court has spelt out sound reasonings while sentencing the accused to undergo imprisonment for ten years. The quantum of sentence is found to be just and proper. I have also considered the age of the accused. The accused has been in the jail during the period of investigation as well as the period of trial and he has preferred the appeal from the jail. I believe justice will be met, if the case is not remanded back for framing of charges and for recommencement of trial from the point of framing of charge. The accused knew what he was being tried for and the main fact sought to be established against him were explained to him fairly and clearly when charge was framed and read over to him and he was given a full and fair chance to defend himself.

33. I have relied on the decision of the Hon'ble Supreme Court in *Aman Kumar and Anr. V. State of Haryana*, reported in (2004) 4 SCC 379, wherein it has been observed that –

"It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would suffice."

34. I have also relied on the decision of the Hon'ble Supreme Court in *Dattu Ramrao Sakhare and Ors. v. State of Maharashtra*, reported in (1997) 5 SCC 341, wherein it has been observed that –

"It is the judgment and order passed by the High Court which is the subject matter of challenge in this appeal. (6) The entire prosecution case rested upon the evidence of Sarubai (P.W.2) a child witness aged about 10 years. It is, therefore, necessary to find out as to whetherher evidence is corroborated from other evidence on record. A child be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the evidence Act provided that such witness is able to understand the question and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record. In the light of this well settled principle, we may proceed to consider the evidence of Sarubai (P.W.2)."

35. Reverting back to this case, it is held that the evidence of the victim was found to be

consistent from the beginning to end. Her initial statement as well as her evidence in Court was consistent. She has categorically denied the suggestion of the learned defence counsel that the accused has not committed the following act as she has stated in her evidence-in-chief. Her evidence is corroborated by the evidence of her parents. By no stretch of imagination, it can be presumed that the victim has lied or given false evidence. The suggestion is also lacking that the victim has been tutored by her parents. The evidence of the 7 year old victim is found to be reliable. Defence failed to rebut her evidence. It has been observed by the Hon'ble Apex Court in *Aman Kumar's case (supra)* that –

” Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (See Joseph Lines IC & K 893). It is well-known in the medical world that the examination of smegma loses all importance after twentyfour hours of the performance of the sexual intercourse. (See Dr. S.P. Kohli, Civil Surgeon, Ferozepur v. High Court of Punjab and Haryana thr. Registrar (1979) 1 SCC 212). In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma round the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twentyfour hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive

importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC."

36. In the case at hand, the 7 year old victim has described that the accused tried to insert his penis in her vagina and she felt pain. This has been described consistently by the victim. It has already been held in my foregoing discussions that as per Section 3 of the POCSO Act penetrative sexual assault is caused when the accused *penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child*. Thus the argument of the learned counsel for the accused that no injuries were detected on examination of the victim, holds no water.

37. I would like to reiterate that the incident occurred on 02.05.2018 and the victim was examined by the doctor on 04.05.2018 which explains why no injuries could be detected on the victim by the Medical Officer.

38. It has been observed by the Hon'ble Supreme Court in *State of Punjab v. Ramdev Singh* that –

"Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in the prosecution version on account of such delay, the same would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the same cannot by itself be a

ground for disbelieving and discarding the entire prosecution version, as was done by the High Court in the present case."

39. In the instant case the father of the victim was not at home. After the incident, the victim's mother called her father. The accused happens to be the victim's uncle. After a discussion with the villagers and on the advice of the villagers, the informant decided to lodge this case against the accused. This explains the delay in lodgment of the FIR. The prosecution case cannot be doubted on a short delay of two days in the lodgment of the FIR. It has also been held in my foregoing discussions that the explanation has been properly given regarding the delay in lodgment of the FIR. It is held that the evidence of the victim and her parents is creditworthy. Therefore, it is held that the impugned sentence and order of the trial Court is not invalid and the conviction and sentence is sustainable. This appeal is devoid of merits and the appeal is hereby dismissed.

40. The period of detention of the accused is to be set off with the custodial sentence.

Appeal is hereby dismissed.

Send back the LCR.

JUDGE

Comparing Assistant