

GAHC010037652023



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

**Case No. : Crl.A./65/2023**

SABDER ALI SARKAR  
SABDER ALI SARKAR,  
S/O LATE SORHAB ALI SARKAR,  
VILL.- FALIMARI,  
P.S.- FAKIRGANJ,  
DIST.- DHUBRI (ASSAM).

VERSUS

THE STATE OF ASSAM AND ANR  
REP. BY THE P.P., ASSAM.

2: SHAHANUR MONDAL  
S/O MOINUL HOQUE MONDAL

R/O FALIMARI

P.S.- FAKIRGANJ

DIST.- DHUBRI (ASSAM)  
PIN- 783330

Advocates for the appellant : Mr. L. R. Mazumder

Advocates for the respondent : Mr. B. B. Gogoi, Addl. P. P. Assam  
Mr. M. A. Sheikh, for R-2

**:::BEFORE:::**

**HON'BLE MRS. JUSTICE MITALI THAKURIA**

Date of hearing : 19.09.2023

Date of judgment & order : 13.10.2023

**JUDGMENT & ORDER (CAV)**

Heard Mr. L. R. Mazumder, learned counsel for the appellant. Also heard Mr. B. B. Gogoi, learned Additional Public Prosecutor for the State respondent No. 1 and Mr. M. A. Sheikh, learned counsel appearing on behalf of respondent No. 2.

**2.** This is an appeal under Section 374 of the Code of Criminal Procedure, 1973, against the judgment and order dated 30.01.2023, passed by the learned Additional Sessions Judge-cum-Special Judge (POCSO), Dhubri, in Special Case No. 115/2021, convicting the accused/appellant under Section 354-B of the Indian Penal Code and Section 8 of the POCSO Act, 2012, and sentenced him to undergo R.I. for 7 (seven) years and to pay a fine of Rs. 25,000/- (Rupees twenty five thousand) only and in default R.I. for another 6 (six) months.

**3.** The brief facts of the case is that the informant, i.e. the father of the victim, lodged an F.I.R. on 03.09.2019 before the Officer-In-Charge, Fakirganj Police Station, alleging *inter alia* that on 02.09.2019, at about 10.00 a.m., the

accused/appellant called his minor daughter, aged about 5 years, inside his room for plucking gray hair from his head. Thereafter, the appellant, with bad intention, removed the half pant of the victim and thereafter the victim came out from the house of the accused/ appellant and narrated the story before her mother. Accordingly, the Officer-In-Charge of the concerned Police Station registered the case vide Fakirganj P.S. Case No. 211/2019, under Section 354-B of the Indian Penal Code *read with* Section 8 of the POCSO Act and started the investigation. On completion of the investigation, Charge-Sheet was filed against the accused/ appellant under Section 354-B of the Indian Penal Code and Section 8 of the POCSO Act.

**4.** On appearance of the accused/appellant, the learned Special Judge (POCSO) framed the charge against the accused/appellant and read over and explained to him, to which he pleaded not guilty and claimed to be tried.

**5.** The prosecution examined as many as 5 (five) numbers of witnesses including the I.O. in support of their case. But the accused/appellant did not adduce any evidence in support of his case and pleaded not guilty while recording his evidence under Section 313 Cr.P.C. After completion of the evidence of the prosecution witnesses and hearing the arguments from both sides, the learned Special Judge (POCSO), Dhubri, vide impugned judgment and order dated 30.01.2023, convicted the accused/appellant under Section 354-B of the Indian Penal Code and Section 8 of the POCSO Act. On being aggrieved and dissatisfied with the judgment and order passed by the learned Special Judge (POCSO), the present appeal has been preferred by the accused/appellant.

**6.** It is submitted by the learned counsel for the appellant, Mr. Mazumder, that the learned Special Judge passed the impugned judgment and order without appreciating the evidence on record in its true perspective and arrived at a wrong finding. Further, the impugned judgment has been passed solely on the basis of the evidence of the victim, who is a 5 years old girl, and there is every probability of tutoring the girl and hence, the impugned judgment and order of conviction is bad in law and the same is liable to be set aside and quashed. The learned Special Judge (POCSO) also failed to consider the fact that there was strained relationship between the parties and the possibility of lodging the F.I.R. cannot be denied due to the previous enmity between the parties. But, without considering those facts of the case and without appreciating the evidences of the prosecution witnesses in its true perspective, the learned Special Judge (POCSO) arrived at a wrong decision and convicted the accused/appellant accordingly.

**7.** Further it is submitted by the learned counsel for the appellant that there are several contradictions in the testimonies of the prosecution witnesses. More so, there is no allegation of any attempt to rape on the victim girl, except the allegation of disrobing her. Further, as per the prosecution case, the incident occurred when the victim was about 5 years of age and accordingly, at the relevant point of time, there cannot be any capacity of understanding by the victim and therefore, the possibility of tutoring the victim cannot outrightly be rejected. Moreover, there is no eye witness to the incident and all other witnesses are the hearsay witnesses. He further submitted that the delay in lodging the F.I.R. is also not properly explained in the F.I.R. itself, which may be

fatal to the prosecution case. Accordingly, he submitted that only on the basis of the sole testimony of the victim girl/prosecutrix, who was a minor girl of around 5 ½ years at the relevant time of alleged incident, and also in absence of any corroborative piece of evidence as well as on the basis of the hearsay witnesses without any corroboration, the accused/ appellant cannot be convicted.

**8.** The learned counsel for the appellant further relied on a decision of this Court reported in **2022 1 GLT 625 (Lalbiakliama Vs. State of Mizoram & Ors.)**, wherein, it has been held that if the other testimony of the witnesses are only hearsay and if the evidence of the prosecutrix lacks consistency, their evidence do not inspire the confidence, the conviction cannot be based on the sole testimony of the prosecutrix.

**9.** The learned counsel for the appellant also relied on another decision of this Court passed in **Criminal Appeal (J)/24/2019 (Balin Chetia Vs. The State of Assam)** and further gave stressed on paragraph Nos. 34 & 35 of the said judgment, which read as under:

*“34. Keeping in mind the aforesaid position of law, the evidence of the prosecution witnesses in the present case will have to be examined. P.W.1 was the informant, being the mother of victim. The witnesses examined by the prosecution are not eyewitnesses to any of the acts attributed to the appellant in the present case. In fact, the nature of their evidence is such that it is clearly hearsay evidence. Though the victim alleged that the appellant had committed rape on her but she did not disclose the fact to her mother i.e. P.W.1 nor any other person. So the conviction against the appellant is solely based on the evidence of the victim. Being a child witness of tender age and the direct witness in support of the prosecution case, the evidence of P.W.2 i.e. the victim has to be evaluated with great care and caution.*

*35. In this context, the Hon'ble Supreme Court in the case of Radhey Shyam .vs.*

*State of Rajasthan, reported in (2014) vol. 5 SCC 389 has held as follows:*

*"In Panchhi, (1998 SCC (Cri) 1561) after reiterating the same principles, this Court observed that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and, thus, a child witness is an easy prey to tutoring. This Court further observed that the courts have held that the evidence of a child witness must find adequate corroboration before it is relied upon. But, it is more a rule of practical wisdom than of law. It is not necessary to refer to other judgments cited by learned counsel because they reiterate the same principles. The conclusion which can be deduced from the relevant pronouncements of this Court is that the evidence of a child witness must be subjected to close scrutiny to rule out the possibility of tutoring. It can be relied upon if the court finds that the child witness has sufficient intelligence and understanding of the obligation of an oath. As a matter of caution, the court must find adequate corroboration to the child witness's evidence. If found, reliable and truthful and corroborated by other evidence on record, it can be accepted without hesitation. We will scrutinize PW-2 Banwari's evidence in the light of the above principles."*

**10.** He further relied on a decision of judgment of the Hon'ble Supreme Court passed in **Lallu Manjhi & Anr. Vs. State of Jharkhand**, reported in **(2003) 2 SCC 401**, wherein, in paragraph 10 thereof, it has been held as under:

*"The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness. [Vadivelu Thevan etc. v. State of Madras, AIR 1957 SC 614]."*

**11.** The learned counsel for the appellant accordingly submitted that in the instant case also, the evidence of the prosecutrix is not reliable and there

cannot be any order for conviction without any corroboration of other witnesses. He further reiterated that all the other witnesses are the hearsay witnesses and there was no eye witness to the incident and apart from that, the only evidence of the prosecutrix cannot be relied upon to pass an order of conviction against the accused/appellant. Therefore, he submitted that it is a fit case where the accused is entitled for acquittal by setting aside and quashing the judgment and order passed by the learned Special Judge (POCSO).

**12.** In this context, the learned Additional Public Prosecutor, Mr. Gogoi, has submitted that there is no major contradiction found in the statement of the victim as recorded under Sections 161 & 164 Cr.P.C. as well as in her evidence adduced before the Court to disbelieve the prosecutrix for seeking corroboration of other witnesses. Further he submitted that it is a fact that there is no eye witness to the incident and all other witnesses are hearsay witness, but they support the prosecution case to the extent that the girl was entered into the house of the accused/appellant where she was sexually assaulted by the accused/ appellant.

**13.** He further submitted that the learned Special Judge (POCSO) passed the judgment and order of conviction after proper appreciation of evidence and considering all aspects of the case and hence, there cannot be any reason to interfere in the judgment and order passed by the learned Special Judge (POCSO) and accordingly, prayed for dismissal of the present appeal.

**14.** The learned counsel appearing on behalf of the respondent No. 2, Mr. Sheikh, also submitted that the evidence in respect of removal of panty and

touching the private part of the victim is not disputed and the entire evidence as well as the statement made by the victim under Sections 161 & 164 Cr.P.C. are consistent and there is no reason to disbelieve the prosecutrix only on the ground that she was a girl of 5/5 ½ years of age. Further he submitted that the evidences of hearsay witnesses cannot outrightly be thrown away and it is to be considered under the facts and circumstances of this case. As per the case of the prosecution, the victim girl was invited by the accused/ appellant to his house to pluck gray hairs from his head when the alleged incident had happened with the victim girl, and thus, there may not be any eye witness to the incident, but the girl immediately reported before her mother and therefore the hearsay evidence cannot outrightly be rejected. Further he submitted that though the plea of previous enmity has been taken by the defence, but surprisingly the accused did not take any such plea of previous enmity while his statement was recorded under Section 313 Cr.P.C. Accordingly, it is submitted by the learned counsel appearing on behalf of the respondent No. 2/informant that the learned Special Judge (POCSO) has rightly passed the judgment and order convicting the accused/appellant and there cannot be any reason to make any interference by this Court in the judgment and order passed by the learned Court below.

**15.** After hearing the submissions made by the learned counsels for the parties, I have perused the case record, the evidence of the prosecution witnesses and the judgment passed by the learned Special Judge. To arrive at a just decision, let us first scrutinize the evidences of the witnesses.

**16.** P.W.-1 is the informant/father of the victim and as per him, at the relevant

time of incident, the victim was about 5 years of age. On the day of incident, the accused/appellant entice his daughter by giving her some food items and took her inside the house and thereafter he removed her panty and also attempted to commit rape on her and upon her shouting, the accused released her. Thereafter she narrated the entire incident to her mother. And, coming to know about the incident, the father of the victim/informant lodged the F.I.R. From the cross-evidence of the P.W.-1, it is seen that prior to the incident, they had a good relationship with the family members of the accused/appellant and he denied when suggested that there was a boundary dispute between the parties. However, he admitted that the Morjina Bibi defeated Champa Bibi in panchayat election. But he denied about the dispute between their family members. He further denied to the suggestion that he lodged the F.I.R. only due to previous enmity with the family members of the present accused/ appellant.

**17.** P.W.-2 is the victim girl whose evidence was recorded in camera by the learned Special Judge (POCSO) and corroborating her statement made under Sections 161 & 164 Cr.P.C., she narrated the same story that on the day of incident, the accused asked her to pluck some gray hairs from his head saying that he will give her sugarcane, but when she went inside the house of the accused, he opened her panty and also touched her private parts. The defence also cross-examined the minor victim and from her cross-evidence also, it is seen that her evidence to the extent that the accused touched her private part and opened her panty cannot be rebutted nor it is disputed by the defence. As per her also, there was a good terms with the family members of the accused prior to the incident.

**18.** P.W.-3 is the mother of the victim and she also narrated the same story and stated that on the day of incident, she was present in her house when the accused called her daughter to pluck some gray hairs from his head. But, when her daughter went to the house of the accused, he closed the door, opened the panty of her daughter and also touched her private parts. However, when her daughter cried, the accused released her and gave her one rupee and sugarcane and opened the lock of the door and thereafter her daughter came to home and told her about the incident. While her daughter was narrating the story, there were several other persons who also heard about the incident and thereafter her husband lodged the F.I.R. This witness also denied the suggestion put to her that there was a boundary dispute between the parties and also denied that there is a dispute between the wife of the accused and her sister-in-law regarding the election. However, she stated that before recording her evidence, previously she has not stated about the incident that at the time of incident, she was inside her house when the accused called her daughter to pluck white hairs from his head and when her daughter went inside the house of the accused, he closed the door, opened the panty of her daughter and touched her private parts.

**19.** P.W.-4 is the neighbor of the appellant as well as the informant and she deposed that while the victim was narrating the incident to her mother, she was also there at that time and her mother also discussed the matter with her, when she also asked the victim about the incident. She reported before her that the accused called her to his house, gave her a piece of sugarcane and one rupee note and thereafter he opened her panty. From her cross-evidence, it is seen that she is not aware about any dispute between the parties, however she

admitted that the accused love the victim as his grand-daughter.

**20.** P.W.-5 is the I.O., who was entrusted in the investigation of the present case, and accordingly, he visited the place of occurrence, prepared the rough sketch map, recorded the statement of the witnesses, produced the victim before the Magistrate for recording her statement under Section 164 Cr.P.C. and thereafter he got his transfer order to Bandihana Police Out-Post and hence, he handed over the Case Diary to the Officer-In-Charge, Fakirganj Police Station. Later on, on the basis of the investigation conducted by him, the Officer-In-Charge, Fakirganj Police Station, filed the Charge-Sheet against the accused under Section 354-B of the Indian Penal Code *read with* Section 8 of the POCSO Act. From his cross-evidence, it reveals that the girl was not medically examined as her father refused to send the victim for medical examination. He also did not seize any apparel of the victim and other object in connection with this case. From his evidence, it also reveals that he did not record the statement of witnesses personally and the statements were recorded by the Officer-In-Charge of the Police Station. More so, it is seen that he did not examine some of the neighbors and the other family members of the accused as a witness. Further, he admitted that he did not enquire about any boundary dispute between the parties and also did not collect any documents regarding the date of birth of the victim.

**21.** So, from the evidences of the prosecution witnesses, it is seen that the P.W.-1 is the informant/father of the victim, P.W.-3 is the mother of the victim and the P.W.-4 is the neighbor of the victim. It is a fact that none of the witnesses, i.e. P.Ws.- 1, 3 & 4, have seen the occurrence and it is the

victim/prosecutrix who reported about the incident immediately to her mother, while the P.W.-4 was also present there, and she also made an enquiry in this regard. On the basis of the statement made by the victim and coming to know about the incident from his wife, P.W.-1 lodged the F.I.R.

**22.** Though the defence took the plea of previous enmity for boundary dispute as well as dispute between the wife of the accused and sister-in-law of the informant for panchayat election, but the defence failed to adduce any evidence to substantiate the plea of previous enmity between the parties. Rather, it is seen that the accused remain silent and did not take any plea while his statement was recorded under Section 313 Cr.P.C. P.Ws.- 1 & 3 are the parents of the victim, but their evidence cannot outrightly be rejected only on the ground that they are the interested witnesses and also did not see the occurrence. However, from the evidence of the P.Ws.- 1, 2 & 3, it also reveals that both the parties had the good relationship and a talking terms prior to the incident and thus, the plea that only for the previous enmity, the prosecution had lodged the F.I.R., cannot be accepted.

**23.** Coming to the evidence of victim, it is seen that her evidence is found to be consistent in her statement under Sections 161 & 164 Cr.P.C. as well as her evidence before the Court. There is no reason to disbelieve the prosecutrix only because of her age at the time of recording her statement. At the relevant time of incident, she was hardly about 5/6 years of age and at the time of recording her evidence, she was 8 years old. It is well settled that the conviction can be based even on the basis of a child witness and his or her testimony can be relied even in absence of oath if the victim has the capacity of understanding

and can give the rational answers. The child witness also can be considered as a competent witness under Section 118 of the Evidence Act and there is no legal principle that a child would not be able to recapitulate facts in his or her memory. However, the probability of tutoring a child witness cannot be denied, but that cannot be the only reason to disbelieve the child witness who is otherwise considered as a competent witness.

**24.** Further, regarding the acceptance of evidence of child witness, the Hon'ble Supreme Court in case of **Hemmat Sukhadeo Wahurwagh Vs State of Maharashtra**, reported in **(2009) 6 SCC 712 (FB)**, has held that "*... though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and molded, but it is also accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.*"

**25.** Here in the instant case, it is seen that the evidence of the victim is consistent and the defence could not rebut the evidence of the child witness nor there is any statement made by the child witness to disbelieve the child with whom the alleged incident of sexual assault had happened. Further it is seen that before recording the evidence as well as statement under Section 164 Cr.P.C., the learned Magistrate as well as the learned Special Judge (POCSO) put the preliminary question to judge the capacity of understanding of the victim and accordingly, it is seen that the victim girl/prosecutrix has the capacity to give the rational answers.

**26.** From the cross-evidence of the I.O., it is seen that there was no medical examination of the victim as the father of the victim refused to send his daughter for medical examination. But as per prosecution case the allegation against the accused is that he opened the panty of the victim and touched her private parts. However, there is no allegation of any penetrative sexual assault which necessitates for medical examination of the victim and thus, in absence of the medical evidence, it will not vitiate the entire case of the prosecution. In the same time, it is also seen from the evidence of the I.O. that he has not collected any documents regarding the date of birth of the victim nor he collected any school/medical documents to prove the age of the victim at the relevant time of incident. But, here in the instant case, it is seen that there is no dispute regarding minor age of the victim at the relevant time of incident and she was hardly about 5/6 years of age at the time of incident and was of 8 years old while her evidence was recorded by the learned Special Judge (POCSO).

**27.** As per provision under Section 94 of the J.J. Act, the Court should take the process of age determination by seeking evidence or by obtaining school certificate or birth certificate etc. and in absence of the documents, the Court can determine the age by ossification test only when the Court has doubt as to whether the victim is a minor or not. But, there cannot be any doubt from the Court for determination of age of the victim in the instant case, as it is undisputed that she was about 5/6 years of age at the relevant time of incident. Thus, even in absence of any medical test or in absence of any birth or school certificate etc., the Court can very well determine the age of the victim without taking any evidence under Section 94 of the J.J. Act.

**28.** So, from the entire discussions made above, it is seen that there is no reason to disbelieve the prosecutrix, whose evidence goes unrebutted and remain consistent in every stages. 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.

**29.** The Hon'ble Apex Court in the case of **Moti Lal (supra)** has held in paragraph Nos. 7 & 9 as under:

*“7. It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian women as tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim has falsely implicated the accused does not appeal to reasoning. There was no apparent reason for a married woman to falsely implicate the accused after scattering her own prestige and honour.*

*9. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge leveled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix. There is no rule of law or*

*practice incorporated in the Indian Evidence Act, 1872 (in short Evidence Act) similar to illustration (b) of Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is own to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. This position was highlighted in State of Maharashtra v. Chandraprakash kewalchand Jain (1990 91) scc 550)."*

**30.** In **State of Himachal Pradesh v. Raghubir Singh, (1993) 2 SCC 622; 1993 SCC (Cri) 674**, the Hon'ble Supreme Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. A similar view has been reiterated by the honourable Supreme Court in Wahid Khan v. State of Madhya Pradesh (2010) 2 SCC 9; AIR 2010 SC 1, placing reliance an earlier judgment in Rameshwar S/o kalia Singh v. State of Rajasthan, AIR 1952 Sc 54. Thus the law that emerges on the issue is to the effect that the statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The Court may convict the accused on the sole testimony of the prosecutrix.

**31.** 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.”*

**32.** Here in the instant case, from the discussion made above, it is seen that the prosecution has been able to prove the foundational facts of the case to discharge the burden. As per Section 29 of the POCSO Act, the burden of rebutting the presumption is upon the accused and he cannot discharge his

burden by simple denial or explanation. Section 29 of the POCSO Act mandates legal presumption against the accused for offence under Sections 3, 5, 7 & 9 of the POCSO Act, 2012. Unlike other criminal prosecution wherein it is first presumed that an accused is innocent until proven guilty under Sections 29 & 30 of the POCSO Act, 2012, there is an adverse presumption of certain offence and culpable mind against the accused and the accused has to discharge that burden. But, here in the instant case, it is seen that the accused only took the plea of denial during the entire trial of the case and even he did not take any plea of previous enmity etc. while recording his statement under Section 313 Cr.P.C. Thus, the accused/appellant could not disprove the prosecution case by adducing any evidence in his support.

**33.** Section 8 of the POCSO Act reads as under:

*“8. Punishment for sexual assault. – Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.”*

**34.** Further, Section 354-B of the Indian Penal Code deals with the assault or use of criminal force to a woman with intent to disrobe and the same is reproduced herein below:

*“354B. Assault or use of criminal force to woman with intent to disrobe. – Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.”*

**35.** 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 sexual assault on the victim/prosecutrix, who was a minor at the relevant time of incident. However, it is seen that the accused/appellant was charged under Section 354-B of the Indian Penal Code *read with* Section 8 of the POCSO Act.

**36.** Section 42 of the POCSO Act stipulates that when an act constitute an offence under POCSO Act and also under Section 354-B of the Indian Penal Code, 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 (POCSO), Dhubri, rightly held that the accused is liable to be sentenced for conviction under Section 354-B of the Indian Penal Code.

**37.** The learned Special Judge also made a detail discussion while imposing sentence on the accused/appellant relying on the decision of Hon'ble Apex Court passed in the case of **Sarbananda Vs. State of Karnataka**, reported in **(1983) 2 SCC 330**.

**38.** Thus, considering the entire facts and circumstances of this 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 30.01.2023, passed by the learned Additional Sessions Judge-cum-Special Judge (POCSO), Dhubri, in Special Case No. 115/2021, requires no interference of this Court and accordingly, the same stands upheld.

**39.** With the above observation, the criminal appeal stands disposed of.

**JUDGE**

**Comparing Assistant**