

GAHC010075322020



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

Case No. : Crl.A./138/2020

1. SRI PRANJIT BARMAN
S/O- SRI SHIBA CHARAN BARMAN, R/O- PUB- KHAMARPARA, P.O.
BAGARGAON, P.S. BIJNI, DIST.- CHIRANG, BTAD, ASSAM.

VERSUS

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

2:KHANESWAR BARMAN
S/O- LT. JAGENDRA BARMAN
R/O- VILL- NO. 1 SARAGAON
P.O. HAHCHORA
P.S. BIJNI
DIST.- CHIRANG
ASSAM
PIN- 78339

Advocate for the Petitioner : MR. K BORUAH

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT

Date : 25-04-2023

Heard Mr. A. Ahmed, learned counsel for the appellant and Mr. B. Sarma, and Mr. P.S. Lahkar, learned Addl. P.P.(s) for the State respondent.

2. This appeal is directed against the judgment and order dated 05.02.2020, passed by the learned Special Judge, Bijni in Special [P] Case No. 45[B]/2019. It is to be noted here that vide impugned judgment and order, the learned court below has convicted the appellant under section 6 of the POCSO Act and sentenced him to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 10,000/- with default stipulation.

3. The factual background leading to filing of the present appeal is briefly stated as under :-

“On 02.08.2018, one Khaneswar Barman of No. 1 Saragaon, under Bijni P.S., lodged an FIR with the Bijni PS on 02.08.2018, to the effect that since six months back Pranjit Barman of Pub-Khamarpara committing rape upon his daughter, Smti X [name withheld] aged 17 years, with a promise to marry her and also threatened to kill her if she discloses the factum of rape to anybody else. Then on 29.07.2018, at about 11.30 pm, the appellant came to his house with a Pulsar Bike, bearing registration No. AS-26-A-6701, and called his daughter to the backside of his house and attempted to lift her forcefully in his bike and then his daughter raised hue and cry and then he and his family members, with the help of the villagers, apprehended the appellant. But, somehow the appellant managed to escape. Thereafter, he was trying to settle the matter, but, the same failed to yield any result and as such there was delay in lodging of the FIR. Thereafter, he had handed over the bike, which is left behind by the accused with the police station. Upon the said FIR the O/C of Bijni PS registered a case, being Bijni PS Case No. 239/2018, under sections 376[2]

[n]/363/511 of the IPC and endorse WSI Gamanti Brahma to investigate the same. The IO then visited the place of occurrence and examined the witnesses and prepared the sketch map of the place of occurrence and got the victim examined by the Doctor and collected the report and also got her statement recorded under section 164 of the Cr.P.C. and seized the motor cycle preparing seizure list and arrested the accused and forwarded him to the court. Then on investigation and having found made a prima-facie case against the accused she laid charge sheet against the accused to stand trial in the court under section 376[2][n]/363/511 of the IPC read with section 6 of the POCSO Act. Accordingly, the appellant appeared before the learned court below and then hearing learned counsel for both the parties, the learned court below has framed charge against the appellant under section 376[2][n]/363/511 of the IPC and read with section 6 of the POCSO Act and on being read over and explained over the same to the appellant he pleaded not guilty to the same. The learned court below, thereafter, had examined as many as 10 witnesses, including the M.O. and the I.O. and thereafter, examined the appellant under section 313 of the Cr.P.C. and thereafter hearing argument learned counsel for both the parties the learned court below convicted the appellant under section 6 of the POCSO Act and sentenced him as aforesaid."

4. Being highly aggrieved, the appellant has preferred the present appeal on the following grounds:-

- [i] That, the impugned judgment and order suffers from manifest illegality and it is bad in law;
- [ii] That, no ingredients of the offence under section 6 of the POCSO

Act is made out from the materials available on record;

[iii] That, the prosecution side has failed to prove the motive and intention of the appellant and his involvement in the alleged incident and without considering the same, the learned court below has passed the impugned judgment and order;

[iv] That, there is contradiction in the version of the witnesses with their statements under section 161 of the Cr.P.C. and as such they are not reliable witnesses, but the learned court below has placed reliance upon them;

[v] That, on the alleged date of incident, i.e. on 27.08.2018, the appellant allegedly made attempt to kidnap the victim girl, but, the learned court below has convicted the appellant under section 6 of the POCSO Act on the basis of a past incident and as such the evidence of victim girl is not trustworthy;

[vi] That, the medical evidence has not supported the version of the victim and the attending Doctor [Pw-7] has not found any sign of sexual intercourse after her examination, and as such the finding, so recorded by the learned court below, is based on assumption and presumption and there is no legal evidence;

[vii] That, the prosecution side has failed to establish commission of penetrative sexual assault by the appellant and that the victim had love affairs with the appellant and her parents were desirous to solemnized her marriage with him and since his parents did not agree to the said proposal, the present case has falsely been lodged;

[viii] That, the age of the victim has not been established by producing any cogent document;

[ix] That, except the victim girl there is no eye witness to the occurrence and the appellant came to the house of the victim to collect his mobile only and without there being any material evidence the learned court below has convicted the appellant;

[xii] That, while examining the appellant under section 313 of the Cr.P.C. the incriminating materials were not put to him and therefore, it is contended to allow this appeal by setting aside the impugned judgment and order of conviction.

5. Having heard the submissions of learned counsel for both the parties, I have carefully gone through the petition and documents placed on record and also gone through the record of the learned court below and perused the case laws, referred by Mr. A. Ahmed, the learned counsel for the appellant.

6. It is to be noted here that to establish a charge under any of the penal provisions of the POCSO Act, the prosecution has to prove that victim was a 'child' on the relevant date of occurrence. It is also to be noted here that section 2[d] of the POCSO Act defines 'child' as a person below 18 years. Now let it be seen how far the prosecution side has succeeded in establishing that the victim was a 'child' at the material time of occurrence.

7. The FIR, dated 02.08.2018, reveals that at the relevant time of occurrence the age of the victim was 17 years. In his evidence also the complainant [Pw-4], the father of the victim, testified that the date of birth of his daughter was 02.02.2001, and the I.O. has seized the Birth Certificate of his daughter -Exhibit-7, vide seizure list- Exhibit-2. He is also the witness of the seizure of the said Birth Certificate. The evidence of the I.O. [Pw-10] also reveals that during

investigation she has seized the Birth Certificate of the victim girl, produced by the complainant, vide seizure list- Exhibit 2. P.W.2- Shri Ramani Kanta Barman, P.W.5 -Shri Khitish Barman, and P.W.-9 - Shri Sumir Malakar are the witness of seizure of the said Birth Certificate and they have confirmed the same in their evidence. The evidence of the PW-1 regarding the date of birth of his daughter remained undisputed in his cross-examination.

8. That, perusal of the said Birth Certificate- Exhibit-7, reveals that it was issued by the Registrar-Birth & Death of Bongaigaon District and bears his seal and signature. The prosecution side has also examined one Medical Asstt. of Vetagaon CHC as P.W.11, who testified that on the basis of birth report - Exhibit-8, submitted by Sister Nani Kalita, Birth Certificate of the victim -Exhibit-7, was issued.

9. The victim girl also, in her evidence before the court testified that her date of birth is 01.02.2001. In her statement under section 164 of the Cr.P.C. also she has stated that her age was 17 years. The same remained un-rebutted in her cross-examination. Thus, the evidence of the complainant and also the evidence of the victim and the Exhibit-7, goes a long way to establish that on the relevant date of occurrence the victim has not completed 18 years.

10. The medical evidence also reveals that the age of the victim, on the relevant date, was above 16 years, but, below 18 years. The prosecution side has examined the Dr. Dipali Bordoloi Manta as P.W. 7 and on the basis of report of Radiologist, she categorically stated that the age of the victim was above 16 years and below 18 years. Her evidence is consistent with her report-Exhibit-4 and the appellant side has not disputed her evidence and cross-examined her

on this point. Thus, the medical evidence also lends support to the prosecution version as regard the age of the victim.

11. Mr. A. Ahmed, the learned counsel for the appellant, however, submits that the age of the victim could not be established by the prosecution side beyond all reasonable doubt. Referring to the Birth Report- Exhibit-8, Mr. Ahmed submits that the same bears no signature of the staff nurse and that P.W.11, who proved the Birth Report, has testified without the authority of SDMO of Bijni Hospital, and as the date of birth was recorded in the Registrar of the Birth & Death, on the basis of which the Birth Certificate-Exhibit-7, was issued, could not be relied upon as in Exhibit 8, there is no signature of the Staff Nurse. Referring to a decision of this court in **Manirul Islam vs. The State of Assam & Ors.**, reported in **MANU/GH/0184 /2021**, Mr. Ahmed submits that content of a document has to be proved in accordance with law not by merely exhibiting it. Mr. Ahmed further submits that the medical evidence in respect of the age of the victim also could not be relied upon as the same has error of margin of two years. Mr. Ahmed referred one case law in **Vinod Katara vs. State of Uttar Pradesh** reported in **MANU/SC/1154/2022**, to bolster his submission. Mr. Ahmed further submits that there was a love affair between the victim and the appellant and the victim was a consenting party to the sexual act and therefore, Mr. Ahmed contended to allow this appeal by setting aside the impugned judgment and order of conviction and sentence.

12. The submission of Mr. Ahmed received due consideration of this court. But, the same left this court unimpressed in as much as the Exhibit-8, based on which Exhibit-7 was issued, bears the signature of the staff nurse of the concerned Hospital and also bears the official seal which leaves no scope for

any doubt about the genuineness of the same. The counterfoil of the Birth Certificate was produced and before the learned court below and exhibited as Exhibit-9. Though P.W.11, who had proved the Exhibit-8, had deposed without written authority, yet, he categorically stated that he was verbally authorized by the SDMO, Bijni, to depose in the court and he produced all the relevant documents before the court. Thus, there remains no scope for disbelieving his evidence and the documents produced and exhibited before the court. Since here in this case the content of the Birth Certificate-Exhibit- 7, has duly been proved by P.W.11, and the Counterfoil of the same and the Birth Report has duly been proved in the court as Exhibit 8 and 9, the case law **Manirul Islam** (supra) referred by Mr. Ahmed, the learned counsel for the appellant would not come into his aid. Mr. Ahmed, further submitted that in view of categorical evidence of P.W.11- that there is no signature of the staff nurse on Exhibit-8, and as such the Birth Certificate- Exhibit- 7, lost its significance, and as P.W.-11 has not been declared hostile, the prosecution side is bound by his evidence. It is fact that P.W.11 has never been declared as hostile witness by the prosecution side and as such the prosecution side is bound by it. But, it is also fact that the Birth Report i.e. in Exhibit-8 bears the signature of the Staff Nurse and the same cannot be outweighed by the oral evidence of P.W.11, because of the '*best evidence rule*', as documentary evidence will always have a precedence over the oral evidence. And as such, this court is unable to record concurrence with the submission of Mr. Ahmed.

13. As discussed in the foregoing paragraph, the evidence of the Doctor reveals that as per radiological report the age of the victim girl was above 16 years and below 18 years. The said piece of evidence of the Doctor-P.W.-7, has not been

disputed by the appellant. Though, referring to the case of **Vinod Katara** Mr. Ahmed submits that there is always a margin of error of two years, yet, I am in respectful disagreement with the submission of Mr. Ahmed, as long back, a three Judge Bench of Hon'ble Supreme Court, in the case of **State of Karnatak vs. Bantara Sudhakara & Sudha and Another**, reported in **(2008) 3 SCC (Cri) 955**, wherein, it has held that merely because the Doctor's evidence showed that the victim belongs to the age group of 14 to 16, to conclude that the two years' age has to added to the upper age limit, is without any foundation. In paragraph No. 11 and 12 Hon'ble Supreme Court has dealt with the issue as under:-

“11. It is to be noted that the teacher-PW 16 referred to the certificates which indicated that the date of birth of PW 1 was 5.3.1974 and the date of birth of PW2 was 1.2.1974. Exhibits P.16 & P.17 are the certificates. The High Court referred to the evidence of the lady doctor PW 24 with reference to the X- Ray report which indicated that the age of PWs. 1 & 2 fell between 14 to 16 years. The High Court observed that there was possibility of two years variation and therefore it was to be taken that the victims were more than 16 years of age. The High Court accepted that there was sexual intercourse and rejected the plea of false implication. Thereafter it went on to examine the question of consent.

12. So far as the reasonings of the High Court are concerned they border on absurdity. All types of surmises and conjectures have been arrived at. Strangely, it was observed that PW16 the Head Master's evidence was to be discarded on the ground that the date of birth may not have been recorded on the basis of any medical certificate or other documentary evidence to show that these two girls were born on the date as mentioned. The High Court's conclusions in this regard are not only fallacious but contrary to the evidence on record. The High Court recorded a further finding that the two certificates may not relate to the victims though it specifically recorded that there was no such challenge raised by the accused. Additionally, merely because the doctor's evidence showed that the victims belong to the age group of 14 and 16, to conclude that the two years age has to be added to the

upper age limit is without any foundation. There was no basis for coming to such a conclusion.”

14. It is worth mentioning in this context that the decision, so referred by Mr. Ahmed, the learned counsel for the appellant, was rendered by bench of two judge strength. Whereas, the decision in **Bantara Sudhakara** (supra) was rendered by a Bench of three Judges strength. That being the position, the contention Mr. Ahmed has to be repealed and accordingly, the same stands repealed. Thus, I find that the prosecution side has succeeded in establishing that at the material time of occurrence, the age of the victim was below 18 years and as such she was a 'child' as defined in section 2 (d) of the POCSO Act.

15. The issue, regarding the age of the victim was unsuccessfully raised before the learned court below also and the learned court below has dealt with the same in paragraph No.21 of the judgment as under:-

“21. This case being under POCSO Act, so, first we should decide what was the age of the victim-'X' at the time of occurrence ? The age is the main factor of this case. P.W.1 is the victim of the case. P.W.1 in her evidence clearly stated that her date of birth is 02.02.2001. During cross-examination of P.W.1 the defence side has not challenged her evidence regarding her age and date of birth. P.W.4 is the informant of this case and he is the father of the victim- 'X'. P.W.4 also in his evidence stated that the date of birth of his daughter is 02.02.2001. During investigation of P.W.10 seized one birth certificate of the victim girl. Ext.-7 is the said birth certificate. From Ext.-7, it reveals that the date of birth of the victim girl is 02.02.2001. Regarding prove of birth certificate P.W.11 was examined and from his evidence it reveals that the victim 'X' was born in

the Vetagaon Hospital on 02.02.2001, and on the basis of report of staff nurse Dr. Tarini Chaudhury issued the birth certificate. He proved the counterfoil of the birth certificate as Ext.9. From Ext.9 it reveals that the birth certificate was issued 08.06.2001 and birth certificate of the victim girl was received by informant Khaneswar Barman. From the evidence of P.W.4, it also reveals that within one month of the birth of the victim girl he applied for birth certificate but he could not say when he received the birth certificate. The birth certificate was issued within six months from the date of birth. Defence side has raised objection that birth report of the staff nurse has not been put her signature and as such the birth certificate cannot be relied upon. But, on going through the Ext.8, it reveals that N. Kalita staff nurse put her signature in Ext.8 and the Registrar signed on the top of the Ext.8. The Ext.8 and 9 are the official record which was produced from proper custody. The birth certificate was issued promptly without any delay. So I have no doubt on the birth certificate and I found that the birth certificate was duly proved. I have gone through the citation relied upon by the learned Advocate and it appears that fact of the cited case and fact of the present case are different and as such the aforesaid citation is not applicable in this case. The contents of the birth certificate also corroborated with the evidence of P.W.1 and 4 regarding the date of birth of the victim girl. During cross-examination of P.W.1 and P.W.4 the defence side has not challenged the date of birth of the victim 'X'. Rather P.W.4 during his cross-examination clearly stated that date of birth of the victim 'X' is 02.02.2001. From the entire evidence on record, it reveals that date of birth of the victim 'X' is 02.02.2001. The occurrence took place lastly on 29.07.18. Hence, on 29.07.18 the age of the victim girl was

17 years 5 months 27 days. Section 2(d) of the POCSO Act defined the child as follows:- (d) "child means any person below the age of 18 years. "From the definition of child it reveals that any person below the age of 18 years is deemed to be a child as per provision of section 2(d) of the Protection of Children from Sexual Offences Act, 2012. Hence there is no doubt that at the time of occurrence victim 'X' i.e. P.W.1 was a child."

16. The finding, so recorded by the learned court below, appears to be based on proper analysis and appreciation of the evidence on record. It is backed by sound reasoning and there is no scope for any doubt about the correctness of the same. And therefore, this court is inclined to record imprimatur to the same.

17. Now, let it be seen how far the prosecution side has been able to establish the charge under section 6 of the POCSO Act. Indisputably, there is no eye witness to the occurrence of penetrative sexual assault upon the victim, except however, the evidence of the victim. The evidence of the victim reveals that the appellant had developed love relation with her. He proposed her and she refused with vehemence at first. But, later on, on 13.10.2017, the appellant collected her phone number and started sending message to her, and also called her and since then she developed love relation with him and the same get intensified when she passed matriculation examination and more often he used to met her. Then on 21.01.2018, at about 10 pm the appellant called her came to her compound and then she opened the door and then the appellant entered into her room and lured her and committed sexual intercourse with her. Thereafter also, on several days the appellant came to her room and promising to marry her and under threat to make viral the photographs of sexual intercourse, which he had taken in his mobile, committed sexual intercourse

with her.

18. Her evidence finds support from her statement-Exhibit-1, recorded under section 164 of the Code of Criminal Procedure, wherein she had stated that the appellant had developed carnal relation with her, with the promise to marry her. It is, however, a fact that in the said statement she had not narrated the date of establishing such carnal relation. But, except this, on material point, there is consistency in her version.

19. The appellant had cross-examined the victim at length. But, it has failed to elicit anything tangible to discredit her version. No contradiction, with her previous statement, is brought on record and proved. Whatever she had deposed in her evidence-in-chief, the same remained un-rebutted in her cross-examination.

20. The FIR, Exhibit-2, is also consistent with her evidence and the complainant- P.W.4, the father of the victim, also testified that prior to six months of the occurrence on 29.07.2018, the appellant, under promise to marry the victim, committed sexual inter course with her on 4/5 occasions, and at the relevant time her age was 17 years. Nothing is elicited in his cross-examination also. It is, however, a fact that this witness had not seen the actual occurrence. But, he categorically stated that his daughter had reported the same to him.

21. The medical evidence is however, inconclusive, in as much as no sign of sexual intercourse was found on the person of the victim. And as such, medical evidence would not lend any assistance to advance the prosecution case. But, it needs to be mentioned here that the Doctor, P.W.7 found the hymen of the

victim absent. It, however, appears from the evidence of the P.W.7 that she had examined the victim on 03.08.2018. And the incident of sexual assault, took place on 21.01.2018, and thereafter. As such, it is quite natural that after elapses of so much of time, no sign of sexual assault was available on the person of a young girl. That being so, the factum of absence of mark of violence or any sign on the person of the victim, cannot be a circumstance adverse to the prosecution version. Reference in this context can be made to a decision of Hon'ble Supreme Court in **Ranjit Hazarika vs. State of Assam**, reported in **(1998) 8 SCC 636**, where it has been held that non-rupture of hymen or absence of injury on victim's private parts does not belie her testimony. It has further been held that the opinion of Doctor that no rape was committed cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. It has also been held that the evidence of the prosecutrix was amply corroborated by her mother and father whom she immediately informed about the occurrence.

22. The other prosecution witnesses, namely, Ramani Kanta Barman (P.W.2), Suvajit Talukdar (P.W.3), Hareswar Barman (P.W.5), Harbeswar Barman (P.W.6), Umakanta Barman (P.W.8) and Sumir Malakar (P.W.9) have deposed nothing about the incident of 'sexual assault' on the victim by the accused. They have deposed about the incident, which took place on the night of 29.07.2018, at about 10/11 pm, at the house of the informant. The victim (P.W.1) and the informant (P.W.4) also testified about the incident of 29.07.2018. According to the victim on that night, at about 11/11-30 pm, the appellant, under the influence of liquor, came to the backside of her house and called her over phone and when she came out of her room the appellant had snatched away her

mobile and also dragged her and then she raised hue and cry and then her family members and neighbors came there and apprehended the appellant. The informant and P.W.5, Shri Hareswar Barman also supported the version of the victim. Rest of the witnesses also arrived at the place of occurrence and found the appellant, with his family members, in front of the house of the informant. A Pulsar Bike of the appellant was found in front of the informant, which was handed over to police and the I.O., P.W.10, had seized the same vide seizure list- Exhibit-5.

23. Since the appellant was acquitted of the charge framed against him under section 363/511 IPC, on account of the second incident, and since the state has not agitated against the same by filing appropriate application, detail discussion on merit of the said finding is not warranted to dispose of the present appeal. But, notwithstanding, this second incident, though not directly related to the incidence of sexual assault, has some relevance as a post crime conduct of the appellant, as it goes to show that there was relation between victim and the appellant and that he used to visit her.

24. There being no direct evidence of the incident of 'sexual assault', now what left to be seen is how far the evidence of the victim is reliable to sustain the conviction of the appellant under section 6 of the POCSO Act. Before delving a discussion in to the same, I deemed it appropriate to discuss some of the precedents presently holding the field in respect of appreciation of evidence of the victim of 'sexual assault'.

25. In the case of **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat**, reported in **AIR 1983 Supreme Court 753**, Hon'ble Supreme Court has held that over much importance cannot be attached to minor discrepancies. The reasons are obvious:

- (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.**
- (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.**
- (3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.**
- (4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.**
- (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment 1.1 at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person.**
- (6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.**
- (7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events,**

or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him-Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

25.1. It is further held in paragraph No.6 -that :-

“Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses.”

25.2. Again in paragraph No.7 it has been held that

“It is now time to tackle the pivotal issue as regard the need for corroboration to the testimony of the prosecutrix in sex-offences. This court, in Rameshwar v. The State of Rajasthan, reported in AIR 1952 SC 54, has declared that:-

“Corroboration is not the sine que-non for a conviction in a rape case. The utterance of the Court in Rameshwar may be replayed, across the time-gap of three decades which have whistled past, in the inimitable voice of Vivian Bose, J. who spoke for the Court- -

“The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction, but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge

The only rule of law is that this rule of prudence must be present to the mind of the Judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.”

26. In the case of **State of Punjab vs. Gurmit Singh**, reported in **(1996)2**

SCC 384, it has been held that-

“The trial court over-looked that a girl, in a tradition bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. Her not informing the teachers or her friends at the examination center under the circumstances cannot detract from her reliability. In the normal course of human conduct, this unmarried minor girl, would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to her teachers and others over-powered by a feeling of shame and her natural inclination would be to avoid talking about it to any one, lest the family name and honour is brought into controversy.

The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even

more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

27. In State of Maharashtra Vs. Chandraprakash Kewalchand Jain reported in **(1990 (1) SCC 550)** Hon'ble Supreme Court has held that:-

"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 alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled 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 [Evidence Act](#) similar to illustration (b) to [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 of her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose 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."

28. As discussed herein above, the evidence of the victim finds support from the evidence of her father-P.W.4. It is true P.W.4 has not seen the occurrence of sexual assault. But, the victim has disclosed the same to him. The appellant side has failed to brought on record and prove any material contradiction in the version of the victim with her previous statements. There is also nothing on the record to suggest that the accusation of sexual assault was made out of enmity. There is also no unexplained delay in lodging the FIR. The occurrence took place on 29.07.2018. The FIR was lodged on 02.08.2018. In his evidence the informant-P.W.4 categorically stated that he was waiting to settle the dispute and when settlement could not be arrived at, he lodged the FIR. The explanation, so forthcoming, for the delay thus, stands explained and the same has not been disputed by the appellant side.

29. Thus, having analyzed and tested the evidence of the victim-P.W.1 and her father-P.W.4, on the touchstone of the principles, so laid down in the cases discussed herein above, I find no ground to disbelieve the same. Having been corroborated by her father-P.W.4, the evidence of the victim-P.W.1 has been able to inspire the confidence of this court, and accordingly, the same is accepted. And her evidence, together with the evidence of P.W.4, and other facts and circumstances on the record, goes a long way to establish beyond all reasonable doubt the ingredients of the offence under section 6 of the POCSO Act. Though

Mr. Ahmed, the learned counsel for the appellant submits that there was a love affair between the victim and the appellant and the victim was a consenting party to the sexual act and on that account contended to allow the appeal by setting aside the impugned judgment and order of conviction and sentence, yet, the consent of the victim was immaterial in as much as it has been established by the prosecution side beyond all reasonable that at the material time of occurrence, the victim was a minor.

30. The learned court below, thus, rightly arrived at the finding of guilt of the appellant under section 6 of the POCSO Act. And while arriving at such a finding, the learned court below has invoked the provision of section 29 of the POCSO Act. Since the prosecution side had discharged its burden successfully, this court is also of the view that the statutory presumption, under section 29 of the POCSO Act is very much available here in this case with all amplitude and plenitude and the learned court below has rightly invoked the same. It is to be noted here that the appellant had failed to rebut the presumption available in favour of the prosecution, by adducing any evidence or from the facts and circumstances available on the record.

31. The learned court below has sentenced the appellant to suffer rigorous imprisonment for 10 years and also to pay a fine of Rs. 10,000/- with default stipulation. The punishment, so handed down by the learned court below, appears to be commensurate with the nature and gravity of the offence and the same requires no interference of this court.

32. In the result, I find no merit in this appeal, and accordingly, the same stands dismissed. Send down the record of the learned court below forthwith.

The parties have to bear their own cost.

JUDGE

Comparing Assistant