

GAHC010317972019



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

Case No. : CrI.A./47/2020

HOLIRAM BORA @ BORAH
S/O- LATE BHUBAN BORA, R/O- SIMALUGURI LEPHERA GAON, P.S.
SIMALUGURI, DIST.- SIVASAGAR, ASSAM.

VERSUS

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

2:SMT. DIPANJALI KONWAR
W/O- SRI PRASANTA KONWAR
R/O- LEPHERA GAON
NEAR 306 NO. BALIGARH L.P. SCHOOL
P.S. SIMALUGURI
DIST.- SIVASAGAR
ASSAM

Advocate for the Petitioner : MR. B PHUKAN

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

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT

Date : 09-06-2023

1. Heard Mr. B. Phukan, learned counsel for the appellant and Mr. B. Sharma, learned Addl. P.P. appearing for the State of Assam.

2. This appeal is directed against the judgment & order of conviction and sentence dated 25.11.2019 passed by the learned Special Judge, Sivasagar in Special (P) Case No. 28/2018 whereby and whereunder the appellant has been convicted under Section 10 of Protection of Children from Sexual Offences Act (POCSO Act for short) and sentenced to undergo Simple Imprisonment (SI) for 5 years and to pay a fine of Rs. 5,000/- with default stipulation.

3. The prosecution case in brief is that the informant 'X' is the mother of the victim and she lodged an FIR with the police at Simaluguri P.S. alleging that on 02.07.2018 Sri Holiram Borah (hereinafter referred to as the appellant) called her minor daughter say – 'Y' to his house and as the appellant was indulging in some sexual activities with 'Y', 'X' noticed the incident and apprehended the appellant with the help of the villagers. A village meeting was called and as no decision was arrived at, the FIR was lodged which was registered as Simaluguri P.S. Case No. 105/2018 u/s 294/506 of Indian Penal Code (IPC) read with Section 8 of the POCSO Act.

4. The Investigating Officer (IO in short) embarked upon the investigation and on completion of investigation, he submitted charge-sheet against the appellant under Section 294/506 IPC read with Section 8 of the POCSO Act. At the commencement of trial, a formal charge under Sections 376AB of IPC and Section 6 of the POCSO Act was framed and read over and explained to the appellant. The appellant adjured his guilt and claimed innocence.

5. To substantiate its stance, the prosecution adduced the evidence of nine [9] witnesses while the appellant did not tender any evidence in defence. On the incriminating circumstances arising against him, the appellant was examined u/s 313 of the Code of Criminal Procedure, 1973 (Cr.PC for short) and his responses were recorded.

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

“(i) *Whether on the date of occurrence the accused called the victim girl and took her with him?*

(ii) *Whether at the time of incident the victim girl was aged about 6/7 years of age?*

(iii) *Whether the accused committed the offence as alleged in the FIR?*

7. It is submitted on behalf of the appellant that as the prosecution failed to prove this case beyond reasonable doubt, presumption as per Sections 29 and 30 of the POCSO Act does not operate against him. The learned counsel for the appellant relied on the decision of the High Court of judicature at Tripura in *Sri Lalmalsom Kaipeng vs The State of Tripura in Criminal Appeal (J) 34 of 2019 decided on 01.04.2021* wherein it has been observed that if an accused is convicted only on the basis of presumption as contemplated in Sections 29 and 30 of the POCSO Act, then, it would definitely offend Articles 20(3) and 21 of the Constitution of India. The statement of the victim u/s 164 Cr.PC is contradictory to her deposition in Court. The place of occurrence described in her earlier statement is not similar to the place of occurrence described in her evidence. The place of occurrence described by PW-1 is the accused-person's house. The PW-2's evidence is not substantiated by medical evidence. Prior to this incident, the appellant's daughter-in-law lodged an FIR against the victim's father.

8. Per contra, the learned Addl. P.P. laid stress in his argument that a lenient view has been taken by the trial Court. The victim is a 7 year old minor and her evidence is not required to be corroborated. However an independent witness, PW-4 has substantiated her evidence.

9. On the anvil of these submissions, I proceed to dispose of the appeal. The question

that falls for consideration in this appeal is that :-

“Whether the learned Trial Court has erred by convicting the appellant?”

- 10.** To decide this case in its proper perspective, it is necessary to reappraise the evidence.
- 11.** It is true that PW-1 and PW-4 are the parents of the victim. The victim 'Y' has stated as PW-2 that she used to address the appellant as 'Koka'. The appellant is her neighbour. On the day of the incident, she was practising drawing in her house when the appellant came and asked her to go with him to his house. He also threatened her not to disobey him. The appellant spread a piece of cloth on the floor and he inserted his penis into her vagina. At that time her mother arrived at the place of occurrence and raised alarm. Her mother lodged an FIR with the police at Simaluguri P.S. The police took her to the hospital and she was examined by a doctor. Her statement was recorded by the Magistrate. This witness has proved her statement u/s 164 Cr.PC as Ext.-2 and Ext-2(1) and 2(2) as her signatures.
- 12.** The victim was 7 years old when she deposed in the Court. The Court examined the victim and found the victim capable to answer the questions logically, rationally and coherently. It was observed that the victim was sharp and intelligent and thereafter her evidence was recorded. While her statement was recorded by the Magistrate, the Magistrate too assessed her intelligence by asking several questions. The statement of the victim u/s 164 Cr.PC has been substantiated by her deposition in the Court. As submitted by the learned counsel for the appellant, the initial statement of the victim is not contradictory to her deposition in the Court. The victim has stated u/s 164 Cr.PC as well as through her deposition in the Court that the appellant angrily called her and he pinned her to the floor and committed sexual assault on her. In her statement u/s 164 Cr.PC she could not clearly

describe the sexual assault.

13. The learned counsel for the appellant has stated that the sexual assault has not been properly described and the appellant cannot be held guilty of committing sexual assault on basis of such vague statements.

14. It is apt to mention at this juncture that the appellant who allegedly committed penetrative sexual assault was convicted u/s 10 of the POCSO Act for a lower offence. To remove the confusion regarding the place of occurrence the sketch map has to be referred. Ext.-4 is the sketch-map proved by the IO Sri Ujjal Goswami who has testified as PW-9. The place-of occurrence is marked as A on the sketch-map, Ext.4, and the place of occurrence is the appellant's house. The initial statement of the victim u/s 164 Cr.Pc as well as her deposition in the Court clearly reveals that while the victim was in her house, the appellant came to her house and demanded that she should go with him to his house and he threatened to trample her if she would disobey him. There is no confusion regarding the place of occurrence which is the appellant's house. It is true that in her statement u/s 164 Cr.PC, the victim 'Y' has stated that while she was playing, the appellant called her to his house, whereas 'Y' deposed in the Court that she was drawing when the appellant called her to his house. This is a minor contradiction relating to the recreation described by a 7 year old victim. The evidence of sexual assault has not been rebutted.

15. The PW-2's evidence is corroborated by the evidence of the informant, PW-1 and the evidence of her father PW-3. 'X', PW-1 has testified that the appellant is her neighbour. Her daughter victim 'Y' was 7 years old at the time of the incident. On 02.07.2018 at about 4 PM, when she went to the appellant's house, she saw him straddled over her daughter 'Y', in his

room. When she charged towards the appellant, the appellant apologised. Thereafter she arranged a meeting in the village. It was decided in the meeting that an FIR ought to be lodged against the appellant. She lodged the FIR with the police at Simaluguri PS. She has proved the FIR as Ext-1 and her signature on the FIR as Ext.-1(1).

16. Both PW-1 and PW-2 were cross-examined in *extenso*. The victim, PW-2 has admitted in her cross-examination that the appellant's daughter-in-law, **Sinki Borah**, whom she addresses as "Khuri" has lodged a case against her father prior to the lodgement of this instant case. However, PW-2 has denied that her parents had tutored her to depose against the appellant.

17. The PW-1 has also admitted in her cross-examination that the appellant's daughter-in-law **Smt. Sinki Borah** had lodged an FIR against her husband prior to the lodgement of the instant FIR. The allegation against her husband was that he outraged the modesty of **Sinki Borah**. This FIR was registered as Simaluguri PS Case No. 104/2018. However, PW-1 has vehemently denied the suggestion of the defence that a false case has been foisted against the appellant as his daughter-in-law **Sinki Borah** has lodged a case of molestation against her husband. She has also denied that the narrative against the appellant is false and her daughter has been tutored by them to adduce false evidence against the appellant.

18. After scrutinising the evidence carefully it is held that no *mens rea* can be attributed to the informant to foist a case against the appellant in order to wreak vengeance. The cross-examination of PW-3, 'Z', father of the victim, clearly depicts that he has vehemently denied that he tried to molest **Sinki Bora** i.e. the daughter-in-law of the appellant on the evening of 02.07.2018 about 6 PM. It is to be borne in mind that the victim was assaulted by the

appellant on 02.07.2018 at about 4 PM and the allegation against the victim's father 'Z' is that he tried to molest **Sinki Borah** on 02.07.2018 at about 6 PM. The allegation against PW-3 that he attempted to molest **Sinki Borah** after this incident of sexual assault by the appellant on the victim, appears to be an afterthought. Thus it is discernable that a false case has been slammed against the victim's father as an after-thought to procure undue benefit of exoneration from the instant case.

19. The PW-3, 'Z' has stated that the appellant's house is located opposite to their house. At the time of the incident he was in the paddy field, when his wife 'X' called him over phone and he returned home at around 4 PM. Then his wife informed him that his daughter was sexually assaulted by the appellant in his house. A village meeting was held. It was decided in the meeting that a case has to be lodged against the appellant and his wife lodged the FIR against the appellant. His daughter was 6 years old at the time of the incident.

20. It is submitted on behalf of the appellant that PW-1 and PW-3 have not named the members present in the meeting, as no meeting was held. This argument of the appellant can be safely brushed aside. It is clear that immediately after the incident, the FIR was lodged on 02.07.2018. The argument of the learned counsel for the appellant that no injuries were detected by the Medical Officer while examining the victim holds no water.

21. The Medical Officer Dr. Mukut Ch. Deka has testified as PW-8 that on 03.07.2018 while working at K.S.H.S. Nazira Sub-Divisional Civil Hospital, Ligoripukhuri Senior Medical & Health Officer, he examined the victim 'Y' on police requisition at about 11:30 AM and found the following:

"Identification Mark:

Oblique small white mark front of lower middle portion of neck.

Menstrual History:

Puberty not attained.

General History:

According to her statement, the accused person used to call her and asked her to remove pant and lie down on the floor. Then the accused person used to contact his penis with her vagina as shown by her but no penetration into vagina, neither she felt pain during the act, no bleeding. On inspection, slight redness but non tender vagina, no injury mark is seen. Hymen present. According to her statement the accused use to pay Rs. 10/- every time & threatened not to inform anybody.

Marital status- Unmarried.

General Behaviour- Normal but little afraid, Mental State-Normal, Clothes-Changed.

General physical examination:

Built and nutrition – Thin built. Weight – 18 kg.

Height – 110 cm, teet h–

Development of hair –

Axillary & Pubic hair – Absent.

Breast development – Not developed. Findings –

Mark of violence on the body –

No marks of violence is seen.

Examination of genitalia-

Development of genitalia-under developed.

Pubic hair –Absent. Clitoris & Fourchette -No injury.

Labia, majora and minora-Partly developed.

Hymen-Present. Vagina-slight redness. Injuries-No injury.

Discharge and stains – No discharge.

Abdomonial Examination – NAD. Internal Examination-NAD.

Laboratory investigation:

Vaginal smear test-Not take,

Pregnancy Test (HCG in urine)-not done.

Ultrasonograhya – Not done

Radiological Examination-

Not done. Birth certificate produced. Date of Birth-30.09.2011.”

22. The opinion of the MO was that:-

- (i) According to the birth certificate of the victim, her age is six years seven months and 3 days on 03.07.2018,
- (ii) No evidence of sexual act seen
- (iii) No marks of violence on her body/private part,
- (iv) Her statement suggests repeated attempt of sexual act but no penetration into vagina. Ext.3 is the medico legal report and Ext.3(1) is the signature of MO.

23. The examination of the Medical Officer clearly reveals that although hymen was present, slight redness was visible in the vagina of the victim 'Y'. It cannot be ignored that the victim was examined on the following day i.e. on 03.07.2018 and redness was still present at the time of her examination which does not belie the statement of the victim.

24. The learned counsel for the appellant has submitted that the appellant cannot be held guilty solely on the statements of the interested witnesses. It is submitted that the other witnesses have not substantiated the evidence of the victim and her parents.

25. This argument holds no water. Apart from the mother of the victim, there are no eye-witnesses in this case. The other witnesses have heard about the incident from the victim and her family members. In a case of such a nature, it cannot be expected that there will be eye witnesses. The other witnesses have stated that they heard about the incident from PW-1 and PW-2. The evidence of PWs-3, 4 and 6 has not been contradicted as per Section 145 of the Indian Evidence Act, 1872 (the Evidence Act for short) qua Section 162 Cr.PC.

26. It has been observed by the Hon'ble Supreme Court in *Aman Kumar and Anr. V. State of Haryana*, reported in (2004) 4 SCC 379 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."

27. Reverting back to this case it is held that the victim was only 7 years old when the incident occurred. Her evidence has been corroborated and substantiated by the evidence of her parents as well as the evidence of other witnesses including the evidence of an independent witness. The Medical Officer also detected slight redness visible in the vagina of the victim 'Y'. The victim falls under the category of a sterling witness.

28. A sterling witness has been aptly described by the Hon'ble Supreme Court in *Rai Sandeep Deepu v. State of NCT in Delhi*, reported in (2009) 8 SCC 21 wherein it has been observed that:-

"In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness

qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

29. In the case at hand the child witness was consistent from the beginning to the end.

There was no prevarication in the version of the child witness in the Court as well as her statement u/s 164 Cr.PC. The other witnesses also withstood the test of cross-examination and thus no contradiction could be elicited during the cross-examination of the prosecution witness *vis-a-vis* the cross-examination of the IO. The contradiction of the initial statement of 'Y' *vis-a-vis* the cross-examination of the IO will be discussed at the appropriate stage.

30. It has been held by the Hon'ble Supreme Court in *Dattu Ramrao Sakhare and Ors. v. State of Maharashtra*, reported in (1997) 5 SCC 341 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 whether her 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. 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).

The learned trial judge recorded his reasons and found that Sarubai was a competent witness and her evidence is unblemished. The High Court also accepted the evidence of Sarubai as reliable one. We, therefore, do not see any reason to disagree with the observations of the learned courts below as regards the evidence of Sarubai. "

31. In this case the victim has candidly and consistently stated that the appellant took her to his house and laid her over a sheet on the floor and thereafter he tried to touch the victim's genitals with his genitals. It would be worthwhile to reiterate that the victim's mother saw the appellant straddled over her daughter. This is a sordid incident, but the appellant was not held guilty of penetrative sexual assault and he was held guilty of aggravated sexual assault. In her initial statements u/s 164 Cr.PC, the victim has stated that the appellant assaulted her in a similar manner on earlier occasions, but the victim failed to depose in Court about the earlier incidents. It is not necessary to look for corroboration. The evidence of the victim was found to be reliable. It is beyond my understanding why will a false case be slammed against an elderly neighbour. The 6/7 year old victim has described the sexual assault to the extent she could comprehend with her intelligence.

32. After scrutinising the evidence, it is held that the statement of the victim who was only 7 years old at the time of the incident was found to be consistent. Her evidence-in-chief has substantiated her statement u/s 164 Cr.PC. Her evidence is corroborated by her mother's evidence and *vice versa*. Victim's mother's evidence is similar to victim's evidence. The evidence of PWs 1 and 2 is also corroborated and substantiated by the evidence of PW-3. It is true that except PW-5, all the witnesses are related witnesses, but they cannot be termed as interested witnesses. When we describe interested witnesses we are aware that witnesses who are keen to see the accused behind bars are interested witnesses. The witnesses in this case cannot be termed as interested witnesses. The unfortunate incident occurred with a girl

who was only 7 years old. The statement of the victim u/s 164 Cr.PC depicts that she was also earlier sexually assaulted by a man who was 63 years old at that time. The statement of the victim u/s 164 Cr.PC has been substantiated by the evidence of the victim. It is apt to reiterate that the victim was examined by the Medical Officer on the following day of the incident i.e. on 03.07.2018 and redness was present on her genitals which clearly depicts that the injury sustained by the victim on the previous day was slowly healing. The PW-1 found the appellant straddled on top of her daughter and much harm could not be caused by the appellant as he was caught in the act by PW-1.

33. The learned trial Court took a serious note on the contradictions elicited through the cross-examination of the IO regarding the statement of the victim u/s 161 Cr.PC because the victim omitted to mention before the IO that "*on the day of the incident, she was practising drawing in her house when the appellant came and demanded that she should go with him to his house and threatened to trample over her if she disobeyed him and then he spread a piece of cloth on the floor and he laid her and inserted his penis into her vagina and then her mother arrived at the place of occurrence and raised alarm.*"

34. The IO in this case is Sri Ujjal Goswami and he has affirmed this omission u/s 161 Cr.PC by the victim, PW-2. This omission cannot be considered as a major contradiction because the victim has categorically stated in her statement u/s 164 Cr.PC that the appellant called her to the place of occurrence and inserted his penis into her vagina. The evidence of 'Y', PW-2 is consistent to her statement u/s 164 Cr.PC.

35. The PW-1 was cross-examined at length but she was not asked about her previous statement u/s 161 Cr.PC before the IO that she saw the appellant straddled over her

daughter in a room and then she confronted him and then the appellant apologised. Only a part of her initial statement u/s 161 Cr.PC has been contradicted by the IO because her attention was drawn to her initial statement that her daughter occasionally used to stay in the appellant's house and on the day of the incident i.e. on 02.07.2018 her daughter 'Y', was in the appellant's house. This omission has been affirmed by the IO, but it cannot be held that any contradiction regarding the sexual assault described by the PW-1 was elicited by the IO as PW-1's attention was not drawn towards the omission of such an initial statement before the IO. The nuances of cross-examination has to be placed on the anvil and grain has to be separated from the chaff.

36. The cross-examination of PW-3 does not at all rebut the fact that he was informed by his wife PW-1 that the appellant has committed rape on his daughter. PW-4, PW-6 and PW-7 were cross-examined at length and they too withstood the test of cross-examination. No contradictions as per Section 145 of the Evidence Act qua Section 162 of Cr.PC could be elicited through their cross-examination vis-a-vis the cross-examination of the IO, PW-9. They have heard about the incident from the informant, PW-1 and they have candidly described the sexual assault committed by the appellant to the victim as it was described by PW-1 to them. The evidence of PW-4 that the victim, PW-2, 'Y', told her that the appellant gave her chips and laid her over a bed sheet and then the appellant climbed atop her body and he inserted his penis into her vagina by removing her garments has remained un-contradicted. The evidence of PW-6 that PW-1 told her that the appellant removed her daughter's panties and thereafter removed his clothes and committed misdeed with her daughter 'Y' has remained un-contradicted and un-rebutted. The evidence of Biren Konwar, PW-7, that his wife informed him that PW-1 told his wife that the appellant and the victim were found in a naked

condition in his house, has remained un-contradicted and uncontroverted. The learned trial Court has discussed at length how the cross-examination of the IO was misleading. The statement of the victim u/s 161 Cr.PC was also discussed at length but this is not required to be discussed in connection with this case.

37. Smt. Abha Konwar has testified as PW-4 that the appellant is her neighbour and his house is opposite to her house and the informant's house is abutting to her house. The victim is her niece. She learnt about the incident from the informant. The incident occurred on 02.07.2018 at about 4:20 PM. The victim's mother informed her that she saw the appellant straddled atop the victim and the victim's underwear was pulled down to her knees. She (PW-4) then asked the victim about the incident and the victim informed her that the appellant gave her chips and laid her on a bed sheet on the floor of the room and thereafter the appellant climbed atop her and inserted his penis into her vagina by removing her clothes. A village meeting was held and subsequently the FIR was lodged. No contradiction could be elicited through the cross-examination of PW-4 as well as through the cross-examination of the IO.

38. Thus the evidence of PW-4 has substantiated the evidence of PWs-1, 2 and 3. Smt. Hiranya Bora is related to the appellant. She has testified as PW-5 that after the incident PW-1 called her to her house and informed her that the appellant (Dodo) laid the victim on the ground, offered her chips and he was atop the victim. Although PW-5 was hesitant, yet her evidence substantiates the evidence of PWs-1, 2, 3 and 4.

39. Shri Jyoti Konwar has testified as PW-6 that the victim is her niece and the informant is her sister-in-law. Her house is a kilometre away from the informant's house. On the date of

the incident at about 4 PM her sister-in-law had called her over phone and informed her that the appellant was seen straddled atop the victim, with his clothes removed and the panties of the victim girl were also removed. Informant told her that the appellant committed misdeed with the victim and she had witnessed the appellant committing misdeed with her victim daughter (Y). At about 4:15 /4:20 PM, she (PW-5) reached the informant's house and saw the villagers assembled and as decided by the villagers this case was lodged. No effective cross-examination was carried out.

40. Sri Biren Konwar has testified as PW-7 that the informant is his sister-in-law. At the time of the incident he was in Numaligarh. After 2 days he returned home and his wife told him that the appellant and the victim girl were found in a naked condition in the house. A village meeting was also held and he was not present in the meeting.

41. Now, that the case has been proved beyond a reasonable doubt against the appellant, the statutory presumption u/s 29 and 30 of the POCSO Act certainly places a persuasive burden on the appellant to show that he does not possess the requisite culpable mental state for the offence for which he is prosecuted. The evidence on record does not indicate that the appellant was able to rebut the presumption to demonstrate that a prosecution case was not made out. Through the cross-examination of the witnesses and through his statement u/s 313 Cr.PC the appellant has failed to rebut the evidence and establish the improbability of the incident.

42. As submitted by the learned counsel for the appellant, this is not a case where the appellant was held guilty of offence based on presumption. The foundational facts have been established by the prosecution and the appellant failed to discharge the persuasive burden of

presumption u/s 29 and 30 of the POCSO Act. The appellant answered the questions u/s 313 Cr.PC in an evasive manner. The only plea taken by the appellant in his statement u/s 313 Cr.PC was that the victim's father outraged the modesty of his daughter-in-law. This plea was found to be too farfetched, as the case against the victim's father was lodged immediately after the present case against the appellant was registered. The cross-examination of PWs-1, 2 and 3 also reflects this plea taken by the appellant which was not found to be believable.

43. Learned trial Court has spelt out sound reasonings while deciding the case. The appellant was not held guilty of offence of penetrative sexual assault on a minor victim but he is held guilty of offence of aggravated sexual assault on a minor victim. A lenient view was taken by the learned trial Court. I record my concurrence to the findings of the learned trial Court.

It is thereby held that the appeal is devoid of any merits.

Appeal is hereby dismissed.

JUDGE

Comparing Assistant