

GAHC020004832022



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

Case No. : CRL.A(J)/3/2022

Shri Mhonbemo Yanthan
S/O Opvunyimo Yanthan,
R/O Lakhuti Village,
Wokha, Nagaland

VERSUS

The State of Nagaland
Represented by the Public Prosecutor, Nagaland, Kohima

Before

Hon'ble Mr. Justice Mridul Kumar kalita

For Appellant	:	Mr. P Pius Lotha, Advocate
For respondent(s)	:	Mr. K. Angami, Public Prosecutor, Nagaland
Date of hearing	:	25.05.2023
Date of judgment	:	30.05.2023

JUDGMENT AND ORDER (CAV)

(Mridul Kumar Kalita, J)

1. Heard Mr. P Pius Lotha, learned counsel for the appellant.

Also heard Mr. K. Angami, learned Public Prosecutor, Nagaland.

2. This Criminal Appeal has been registered on filing of an appeal by the present appellant, namely, Shri Mhonbemo Yanthan, impugning the judgment dated 28.06.2022 passed by the Court of learned Special Judge, POCSO, Wokha, Nagaland, in Wokha P. S. Case No. 24/2017 (G. R. Case No. 39/2017), whereby the present appellant was convicted under Section 6 of the POCSO Act, 2012 and also under Section 376 (1) and Section 354 A (1) (i) of the Indian Penal Code and was sentenced as follows:

(i) To undergo rigorous imprisonment for ten years with a fine of Rs. 1,000/- only and in default of payment of fine to undergo simple imprisonment for one month under Section 6 of the POCSO Act' 2012.

(ii) To undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,000/- only and in default of payment of fine to undergo simple imprisonment of one month under Section 376 (1) of the Indian Penal Code.

(iii) To undergo rigorous imprisonment for one year and to pay a fine of Rs.500/- only and in default of payment of fine to undergo simple imprisonment of one month under Section 354 A (1) (i) of the Indian Penal Code.

It was directed that all the sentences shall run concurrently.

Learned trial court also directed payment of compensation of Rs. 4,00,000/- to the victim under victim compensation scheme formulated by the State Government.

3. The facts, relevant for adjudication of this appeal, in brief, are as follows-

a) That on 27.07.2017, the victim, who is the daughter of the appellant, lodged an FIR before the Officer-in-Charge of Women Police Station, Dimapur, Nagaland, *inter-alia*, alleging that her biological father (*the present appellant*) had molested her since she was in class-III. It is also alleged that he forcefully raped her when she was in class-VI and has continued the same till date. It is further stated that at the time of lodging the FIR, the victim was 19 years of age and as she could not tolerate any more, so she approached the police.

b) On receipt of the said FIR, the Officer-in-Charge of Women Police Station, Dimapur, Nagaland registered a zero FIR under Section 354/376(f) of the Indian Penal Code and forwarded the same to the Officer-in-Charge of the Wokha Police Station, Dimapur, Nagaland as the alleged incident happened within the jurisdiction of Wokha Police Station. On receipt of the said FIR, the Officer-in-Charge of Wokha Police Station registered Wokha P.S. Case No. 24/2017 under Section 6 of the POCSO Act, 2012 read with Section 376 2 (i) of the Indian Penal Code and entrusted Ms. R. Lochumbeni, UBSI to investigate the case. The accused (*present appellant*) was arrested on 16.08.2017. During the course of investigation, the Investigating Officer recorded the statement of witnesses

including the victim and her mother. He also got the confessional statement of the appellant recorded under Section 164 Cr.P.C. The statement of victim was also recorded under Section 164 Cr.P.C. Ultimately on completion of investigation, charge-sheet was laid under Section 6 of the POCSO Act, 2012 read with Section 376 2(i) and 354 A (1) (i) of the Indian Penal Code against the present appellant.

c) The present appellant faced the trial remaining in custody. After hearing both the parties, and after going through the materials available on record, learned Special Judge, POCSO, Wokha framed charges under Section 6 of the POCSO Act, 2012, Section 376 (1) and Section 354 A (1) (i) of the Indian Penal Code against the present appellant. When the charges were read over and explained to the present appellant, he pleaded not guilty to the said charges and claimed to be tried. During the course of the trial, the prosecution side examined eight prosecution witnesses including the victim. The present appellant was examined under Section 313 Cr.P.C. during which he denied the allegations leveled against him and pleaded his innocence. He also examined himself as sole defense witness.

d) Ultimately, on completion of the trial, learned Special Judge, POCSO, Wokha convicted the present appellant and sentenced him in the manner as stated in paragraph No. 2 herein above.

4. Before considering the rival submission of the learned counsel for both the sides, let me go through the relevant evidence, which is available on record.

5. PW-1, the victim, who has deposed before the learned trial court on 26.03.2021, has stated that the appellant is her father and she was born on 10.04.1997 and she had three younger siblings. She has stated that when she was in class VI her parents were divorced and after the divorce of her parents, she and her younger brother stayed with her father and her two sisters stayed with her mother. She has stated that when she was in class-III, her father used to touch her breast from time to time, however, at that time she had no idea that her father was molesting her. She has deposed that her father kept molesting her from time to time. She has also deposed that she and her younger brother were not allowed to visit her mother's home, so she could not disclose the act committed by her father to her mother out of fear and shame, she also could not disclose her grievance to her relatives and kept on tolerating all this. She has further deposed that on 21.07.2017, at night her father came to her room and forcefully raped her. She has further deposed that as she could not bear it any more, she told about the fact to her cousins who were staying at Dimapur who advised her to come to Dimapur immediately. Accordingly, the victim came to Dimapur and went to her aunt's residence which was located at Borlingri, however, her aunty and her children were discussing to solve the matter within family Circle and as the victim did not like this approach, she went to women Police Station, Dimapur and verbally lodged the FIR against the present appellant. She has further deposed that she was thoroughly interrogated at the Women's Police Station by the Officer-in-Charge of the said police station and thereafter one of the lady police officer wrote the FIR and the victim signed on it. Thereafter, she was taken back to her aunt's house at

Nagaland gate. She has further deposed that on the next day, she was taken to District Hospital, Dimapur for medical examination.

She has further stated that as due to registration of this case, her family, especially her siblings, is facing lot of hardship and harassment and therefore she has decided and had forgiven her father for all the acts committed by him upon her. She has further deposed that she is presently married and settled and doing a job in hotel management sector at Delhi.

During cross-examination, she has deposed that she was 19 years old when her father committed the offence. She has also deposed that she never shared about all the sexual assault to her mother. She also deposed that she did not share about the sexual assault with her uncle and aunty for fear of untoward consequences. She has also deposed that just two to three months prior to incident of rape, she was having relationship with a boy and that boy was staying in Dimapur, however, she did not have any physical relationship with any person. She has also deposed that she was not aware whether her father was under influence of alcohol, at that time she was in deep sleep. She has also stated that she tried to seek help by screaming however, her father closed her mouth with his hands.

6. PW-2, who is the mother of the victim, has deposed that the appellant is her ex-husband and the victim is her eldest daughter. She has stated that she had divorced her husband in the year 2011 and since then, the victim and her younger son stayed with the appellant and other two daughters stayed with her. She has deposed that in the month of July 2017, she was informed by her relative that they got information that her daughter had lodged an FIR

against her father. On hearing this, PW-2 came to Dimapur and brought the victim to Wokha. She has further stated that when she came from Dimapur, the victim narrated that while she was staying with her father, he molested her and also raped her. PW-2 has further stated that she did not ask her daughter about the incident in detail as she was depressed. She has further stated that she came to know about the incident only after lodging of the FIR. However, she has deposed that as her husband (*appellant*) has the responsibility of looking after her children, she request the court to forgive him.

During cross-examination, PW-2 has stated that before the incident of alleged rape, she was seriously in a relationship with a boy. PW-2 has also stated that the victim never share with her about the incident which she has alleged in the FIR. She has also stated that she believes that the accused have not committed the alleged offence.

7. PW-3, Ezanthung Yanthung, who is the uncle of the victim, has deposed that the appellant is his younger brother. He has deposed that in the year 2017, he was informed by his brother from Wokha Police Station that he has been arrested. Later on, he came to know that the victim has lodged an FIR against her father for raping her. He has further deposed that the mother of the victim has informed him that the matter should be compromised for the sake of the children. He has also stated that thereafter he went to the victim who had also stated that she had forgiven her father.

During cross-examination, he has stated that he assumes that the appellant did not commit the alleged offence. He has also stated that Lakhuti Village Council has ex-communicated the present

appellant for a period of ten years. He has also stated that "Wokha Town Lakhuti Ekhung" has also ex-communicated the appellant for a period of ten years. PW-3 has further stated that the victim, the mother and family members have forgiven the appellant and a compromise deed has also been executed between the members.

8. PW-4, Dr. Thenlo Kent, has deposed that he was working as Medical Officer in the District Hospital Dimapur on 28.07.2017, when a young girl was brought by Police personnel to the hospital for medical examination. He was informed by the Police personnel that the girl was a rape victim. He examined the victim at about 2.25 PM with the assistance of one nurse, namely, Ms. Chuba.

During examination of the victim, he did not find any physical injury, strain etc. However, during the examination on genitals, he observed some sort of discharge from the vulva. The hymen was torn which appears to be old, her vagina admits one finger, rugae of vaginal wall distinct. He exhibited the medical report as Ext.6.

During cross-examination, he has stated that he cannot say that the victim was raped as single finger only be admitted in her vagina. During his re-examination, PW-4 has stated that before medical examination, the police informed him that the victim is a rape victim who has been molested and raped by her own biological father. The victim also stated same to him and the said information has been recorded in the proforma for examination.

9. PW-5, Mr. K. Chopathung Ngullie, Inspector, PHQ, State Crime Branch has deposed that in the year 2017 when he was posted at Wokha Police Station he received an FIR from Superintendent of Police Office, Wokha which was forwarded from the Commissioner Office, Dimapur, the said FIR was accompanied by

forwarding of zero FIR by the Officer-in-Charge, Women Police Station, Dimapur, original FIR by the victim, inquiry report, statement of victim and medical report. He has deposed that after perusal of the said documents, he registered the case as Wokha P.S. Case No. 24/2017 under Section 6 of the POCSO Act, 2012 read with section 376 (2) (i) of the Indian Penal Code and endorsed the case for investigation to UBSI Lochumbeni. He has exhibited all the aforementioned documents. PW-5 was not cross-examined by the defence side.

10. PW-6, Ms. R. Lochumbeni, UBSI has deposed that in the year 2017 she was posted at Wokha Police Station and she is the Investigating Officer of the present case. She has stated that on 16.08.2017, a zero FIR was received with a forwarding letter from Additional Deputy Commissioner of Police (Crime) stating that the complainant has been molested by her biological father. On receipt of the said FIR, Wokha P.S. Case No. 24/2017 under Section 6 of the POCSO Act, 2012 read with Section 376 2 (i) of the Indian Penal Code was registered and on 16.08.2017, the accused was arrested from his residence at Orchid Colony of Wokha Town. PW-6 has further stated that during investigation, she recorded the statement of the present appellant. She also recorded the statement of victim. She has exhibited the confessional statement of the accused (*appellant*) recorded under Section 164 of the Code of Criminal Procedure, 1973 as Ext. P/9 and the statement of the victim recorded under Section 164 of the Code of Criminal Procedure, 1973 as Ext. P/10. She has also stated that after completion of the investigation, she submitted the charge-sheet, which is exhibited as Ext. P/11, against the present appellant, under Section 6 of POCSO

Act, 2012 read with Section 376 (2) (i) and Section 354 A (1) (i) of the Indian Penal Code. During cross-examination, she deposed that she did not use any force during the course of the investigation on the accused (*present appellant*). She has also deposed that as during the investigation she found that the victim was minor when the offence was committed, hence, the provisions of POCSO Act, 2012 are attracted in this case.

11. Additional Witness No. 1, Ms. Yansutula, UBSI has deposed that on 27.07.2017, when she was posted at Dimapur Police Station, the victim came to the police station and stated that she want to lodge an FIR against her father (*present appellant*). She has stated that her father had molested her since she was in class-III and raped her when she was in class-VI and continue till date. Additional Witness No. 1 has further deposed that she and her colleague interrogated the victim regarding her allegations and when they were satisfied that her complaint was genuine, she helped her in typing out the FIR in their Office. Thereafter, the victim read the FIR and put her signature thereon. Additional Witness No. 1 has further deposed that a GD Entry bearing Women P.S. Dimapur No. 7/17 dated 07.07.2017 at 7.00 PM was also made. Additional Witness No. 1 has further deposed that she was entrusted to conduct the preliminary enquiry regarding the complaint lodged by the victim and accordingly on the next date she again interrogated the victim and recorded her statement and took her to district hospital, Dimapur for medical examination. After completion of the preliminary enquiry the Additional Witness No. 1 submitted the enquiry report to the Officer-in-Charge of Women Police Station, Dimapur and the same is exhibited as Ext. P/2.

During cross-examination, she has stated that victim mentioned her age to be 19 years at the time of lodging FIR at Dimapur Police Station. During re-examination, Additional Witness No. 1 has stated that during preliminary enquiry, she had ascertained that the alleged offence was committed by her father against the victim when she was in class-III and when she came to lodge the FIR, the victim had already attained her maturity.

12. Additional Witness No. 2, Ms. Tingben Thonson, has deposed that in the year 2017 she was posted as Officer-in-Charge of Women Police Station, Dimapur and she received an FIR from the victim wherein she had alleged that her father had molested her since she was in class-III and raped her when she was in class-VI which was continuing till date. She has also stated that on receipt of the FIR, which was recorded as GD Entry bearing Women P.S. Dimapur GD Entry No. 7/17 dated 07.07.2017, she assigned SI, Yansutula to take the victim for medical examination and to conduct the preliminary enquiry. After receipt of the enquiry report, it was found that the alleged incident occurred at Orchid Colony, Wokha which is not within their jurisdiction, hence the case was transferred to Wokha Police Station through proper channel. Additional Witness No. 2 has also deposed that the victim had stated to her that her father had molested her since she was in class-III and raped her when she was in class-VI and continued till date. She exhibited the FIR as Ext. P/1, Preliminary Enquiry Report as Ext. P/2, Forwarding Letter to Commissioner of Police, Dimapur as Ext. P/3.

13. During his examination under Section 313 Cr.P.C., the accused (*present appellant*) denied the truthfulness of the testimony of prosecution witnesses and have stated that he has not committed

penetrative sexual assault against his own daughter and has pleaded his innocence.

14. Though, names of two defence witnesses were submitted, on 15.03.2022, before learned trial Court by the defence side, namely, Sri Nchumbemo Lotha and the appellant Mhonbemo Yangtham, however, the defence did not examine Sri Nchumbemo Lotha as defence witness and only the present appellant was examined as defence witness. During his testimony as defence witness, the appellant had stated that he had not committed the offences alleged against him. He has stated that he had divorced his wife as his relationship with his wife was not cordial. He has further deposed that he was ex-communicated from his native village Lakhuti and Wokha Town on 02.09.2017 for ten years without ascertaining the facts of this case. He has also stated that his daughter eloped with one guy named Nzanbemo even before the present case came out.

15. Mr. P. Pius Lotha, learned counsel for the appellant has submitted that learned trial court has convicted the present appellant solely on the testimony of the victim girl without ascertaining the truthfulness of her testimony and without any corroborating evidence to support her testimony. He has submitted that learned trial court has ignored the fact that the mother of the victim who deposed as PW-2 has stated that the victim never informed her about the alleged incidents and she came to know about it for the first time only after lodging of the FIR. Learned counsel for the appellant has submitted that as the alleged offence is reported to have been continuing since long period for about nine years, it would have been natural for a daughter, under such circumstances to confide to at least her mother, which was not done

in this case and it makes her testimony unreliable. Mr. P. Pius Lotha, learned counsel for the appellant has also submitted that PW-2, mother of the victim, and PW-3, the uncle of the victim have also stated in their testimony that the present appellant has not committed the alleged offence, however, learned trial court has ignored the said testimony of PW-2 and PW-3. Mr. P. Pius Lotha, learned counsel for the appellant has further submitted that learned trial court also ignored the testimony of PW-4 i.e., the doctor who examined the victim on 28.02.2017, and found no physical injury on the person of the victim. Learned counsel has submitted that had there been any forceful sexual intercourse on the victim she would certainly had some injuries on her person. He has also submitted that learned trial court ignored the evidence on record that the victim was having serious relationship with another boy named Nzanbemo, and her father was against this relationship. It is further submitted that the PW-4 also found that the hymen was also torn and which appear to be old, which only shows that if she had any physical relationship, it was consensual. It is also submitted that the trial court ignored the fact that the victim was major and of nineteen years of age when she was examined by PW-4. Learned counsel for the appellant has also submitted that as it is apparent from the testimony of the PW-4 that during medical examination, the vagina of victim admitted only single finger, it may not be a case of rape as alleged by the victim and PW-4 also opined for the said reason that he cannot say that the victim was raped, however, learned trial court ignored this fact. To buttress his submission, Mr. P. Pius Lotha, learned counsel for the appellant cited ruling of Hon'ble Rajasthan High Court in "***Vinay Krishna Ghatak -Vs- State of***

Rajasthan” reported in <http://indiankanoon.org/doc/1329571/> emphasizing the need of corroboration by medical evidence in case of allegation of sexual offence. Learned counsel for the appellant specifically pointed out to the observations made by Hon’ble Rajasthan High Court in paragraph No. 34 wherein it was observed as follows:-

“34. If the victim is unwilling to yield to sexual intercourse, she is expected to receive injuries on her person. The absence of injuries on the body of the prosecutrix, generally, gives rise to an inference that she was consenting party to coitus. Where the prosecutrix had received multiple injuries on the various parts of her body it indicated that she offered resistance when she was subjected to sexual intercourse. It would be too much to hold that whenever a prosecutrix is found to have sustained no visible injury in a case of rape, consent on her part should be presumed. It would amount to leaving the unprotected girls at the mercy of the wolves of the society. The absence of injuries either on the accused or on the prosecutrix shows the prosecutrix did not resist but absence of injuries is not by itself sufficient to hold that the prosecutrix was a consenting party”.

Learned counsel for the appellant also pointed out to the observations made in paragraph No. 38 of the aforesaid judgment wherein it was observed as follows:-

“38. Where the prosecutrix had sufficient opportunity not only to run away from the house but she could have also taken the help of the neighbours and the medical evidence also indicated the there were no injuries on the person of the prosecutrix including her private parts, it

can be said that she was a consenting party”.

By relying on the above mentioned ruling, learned counsel for the appellant has submitted that in the instant case also no injuries were found in the private parts of the victim, hence, her testimony against her own father is not reliable and learned trial court erred in arriving at the conclusion of guilt of the present appellant solely on the basis of uncorroborated testimony of the victim.

16. Mr. P. Pius Lotha, learned counsel for the appellant has also cited a ruling of this Court in “***Sri Jintu Phukan -Vs- State of Assam and Anr.***” reported in “***2020 Legal Eagle(Gau) 424***” wherein this Court set aside the conviction of the appellant in the said case on the ground that the solitary version of the prosecutrix, on which his conviction was based, was not of sterling quality to inspire confidence and in absence of any corroborative evidence, her testimony was not relied upon and the finding of the conviction of the said appellant was set aside. Learned counsel for the appellant has submitted that, in the instant case also, the mother and the uncle of the victim have not corroborated the testimony of the victim, neither the medical evidence has corroborated the same, hence, he has submitted that the uncorroborated testimony of prosecutrix ought not to have been relied upon and any conviction based on such testimony is liable to be set aside.

17. Mr. P. Pius Lotha, learned counsel for the appellant has also submitted that as per Naga Lotha Customary Law and the rights given under Article 371A (1)(ii) & (iii) of the Constitution of India, the Lakhuti Village Council by order dated 02.09.2017 had excommunicated the appellant for ten years and for the same offence he is again punished as sentenced by learned trial court, amounting

to double jeopardy against the present appellant.

18. Mr. P. Pius Lotha, learned counsel for the appellant has also submitted that during the pendency of this criminal appeal, an agreement was arrived at between the victim and the appellant and they have agreed to compromise the case and to this effect a settlement declaration was also executed between the appellant and her daughter. The said settlement declaration which was executed on 07th November, 2022 has been filed in this appeal by the appellant on 13.12.2022 as an additional document. Mr. P. Pius Lotha, learned counsel for the appellant cited ruling of Hon'ble Karnataka High Court in "***Sri Satish K and Ors. -Vs- State of Karnataka***" (Criminal Petition No. 4172/2022) wherein the Karnataka High Court after discussing various judgments rendered by the Apex Court and Delhi High Court, taking into account the settlement arrived at between the parties and taking into consideration, peculiar facts of the case quashed a proceeding under section 376 IPC where the accused and the prosecutrix were the member of same family. Learned counsel also cited a ruling of Hon'ble Apex Court in "***K. Dhandha Pani -Vs- The State of Tamil Nadu***" (*Criminal Appeal No. 796/2022 decided on 9th May, 2022*) wherein Hon'ble Supreme Court of India, in exercise of powers under article 142 of the Constitution of India, set aside conviction of the appellant under section 6 of the POCSO Act, 2012 taking into consideration the compromise reached between the appellant and the prosecutrix who were member of the same family. Learned counsel for the appellant submitted that as in the instant case also a settlement has been reached between the parties, the conviction and the sentence imposed on the present appellant should be set aside and quashed

for the interest of justice.

19. On the other hand, Mr. K. Angami, learned Public Prosecutor, Nagaland has submitted that Hon'ble Supreme Court of India in "***State of Madhya Pradesh -Vs- Laxmi Narayan and Ors.***" reported in "***(2019) 5 SCC 688***" has observed as follows:-

"15. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

15.1. That the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;

15.2. Such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

15.3. Similarly, such power is not to be exercised for the offences under the special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender".

Mr. K. Angami, learned Public Prosecutor, Nagaland relying on above ruling of the Hon'ble Supreme Court has submitted that the offence involved in the instant case is a serious offence of mental

depravity where even a daughter was not spared by her own father and such kind of case does not fall in the category of cases where the inherent power of the Court should be exercised to give relief to the appellant merely on the ground that a compromise has been reached between the appellant and her daughter.

20. Mr. K. Angami, learned Public Prosecutor, Nagaland has further submitted that the testimony of victim would reveal that her parents were divorced when she was in class-VI and she and brother had to stay with her father and her father did not allowed them to go and meet her mother. Mr. K. Angami, learned Public Prosecutor, Nagaland further submitted that the victim also stated that she could not reveal about the incident to anyone out of fear and shame and the circumstances in which the victim was placed, it was not something unnatural that she did not disclose her ordeal to anyone and approached the Police Station only when she could not bear it anymore and the same should not be a ground to disbelieve her testimony. In support of his contention, Mr. K. Angami, learned Public Prosecutor, Nagaland cited a ruling of Hon'ble Supreme Court of India in “***State of Himachal Pradesh -Vs- Sanjay Kumar @ Sunny***” reported in“(2017) 2 SCC 51” wherein it was observed as follows:-

“29. Likewise, delay of three days in lodging the FIR by PW 1, after eliciting the information from her daughter PW 2, is inconsequential in the facts of this case. It is not to be forgotten that the person accused by the prosecutrix was none else than her uncle. It is not easy to lodge a complaint of this nature exposing the prosecutrix to the risk of social stigma which unfortunately still prevails in our society. A decision to lodge FIR becomes more difficult and hard when accused

happens to be a family member. In fact, incestuous abuse is still regarded as a taboo to be discussed in public. This reticence hurts the victims or other family members who struggle to report. After all, in such a situation, not only the honour of the family is at stake, it may antagonise other relations as well, as in the first blush, such other members of family would not take charge of this nature very kindly. We also find that the so-called dispute between the parties was so trivial in nature that it would not have prompted PW 1 to lodge a false complaint, putting her minor daughter of impressionable age to risks of serious kinds, as pointed out above.

30. By no means, it is suggested that whenever such charge of rape is made, where the victim is a child, it has to be treated as a gospel truth and the accused person has to be convicted. We have already discussed above the manner in which the testimony of the prosecutrix is to be examined and analysed in order to find out the truth therein and to ensure that deposition of the victim is trustworthy. At the same time, after taking all due precautions which are necessary, when it is found that the prosecution version is worth believing, the case is to be dealt with all sensitivity that is needed in such cases. In such a situation one has to take stock of the realities of life as well. Various studies show that in more than 80% cases of such abuses, perpetrators have acquaintance with the victims who are not strangers. The danger is more within than outside. Most of the time, acquaintance rapes, when the culprit is a family member, are not even reported for various reasons, not difficult to fathom. The strongest among those is the fear of attracting social stigma. Another deterring factor

which many times prevents such victims or their families to lodge a complaint is that they find whole process of criminal justice system extremely intimidating coupled with absence of victim protection mechanism. Therefore, time is ripe to bring about significant reforms in the criminal justice system as well. Equally, there is also a dire need to have a survivor-centric approach towards victims of sexual violence, particularly, the children, keeping in view the traumatic long-lasting effects on such victims”.

Mr. K. Angami, learned Public Prosecutor, Nagaland has submitted that in the instant case also, the victim lodged a belated FIR only due to fear of social stigma.

21. To counter the submissions made by learned counsel for the appellant regarding the plea of double jeopardy on the ground of applicability of Article 371 A (1) (ii) and (iii) of the Constitution of India as the appellant has already been communicated by Lakhuti Village Council, Mr. K. Angami, learned Public Prosecutor, Nagaland has cited a ruling of this court in “***Registrar General of Gauhati High Court v. Union of India***”, reported in “***2013 SCC OnLine Gau 558***” wherein it was held as follows:

“37. We further hold that CPC and Cr.PC are applicable to the regularly constituted civil and criminal courts without in any manner affecting operation of Article 371A or the functioning of village, customary or any other courts other than the regularly constituted civil and criminal courts in the State of Nagaland manned by members of judicial service.”

Mr. K. Angami, learned Public Prosecutor, Nagaland has further submitted that ex-communication of the present appellant from

Lakhuti Village as well as Wokha town by the Lakhuti Village Council is not a punishment imposed by a court of competent jurisdiction after a trial within the meaning of either Article 20 (2) of the Constitution of India or under Section 300 of the Code of Criminal Procedure, 1973 so as to bring in the principle of double jeopardy in this case. He has cited a ruling of Hon'ble Supreme Court of India in "**Maqbool Hussain v. State of Bombay**" reported in "**1953 SCR 730**" wherein it was observed as follows:

"7. The fundamental right which is guaranteed in Article 20(2) enunciates the principle of "autrefois convict" or "double jeopardy". The roots of that principle are to be found in the well established rule of the common law of England "that where a person has been convicted of an offence by a court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence". (Per Charles, J. in Reg v. Miles [24 QBD 423]). To the same effect is the ancient maxim "Nemo Bis Debet Puniri pro Uno Delicto", that is to say that no one ought to be twice punished for one offence or as it is sometimes written "Pro Eadem Causa", that is, for the same cause.

8. This is the principle on which the party pursued has available to him the plea of "autrefois convict" or "autrefois acquit". "The plea of 'autrefois convict' or 'autrefois acquit' avers that the defendant has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned.... The question for the jury on the issue is whether the defendant has previously been in jeopardy in respect of the charge on which he is arraigned, for the rule of law is that a person must not be put in peril twice for the same offence. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts

constituting the one are sufficient to justify a conviction of the other, not that the facts relied on by the Crown are the same in the two trials. A plea of 'autrefois acquit' is not proved unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter." (Vide Halsbury's Laws of England, Hailsham Edition, Vol. 9, pp. 152 and 153, para 212).

9. This principle found recognition in Section 26 of the General Clauses Act, 1897,—

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence,"

and also in Section 403(1) of the Criminal Procedure Code, 1898,—

"A person who has been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237."

10. The Fifth Amendment of the American Constitution enunciated this principle in the manner following:

"...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be witness against himself...."

Willis in his Constitutional Law, at p. 528, observes that the phrase "jeopardy of life or limb" indicates that the immunity is restricted to crimes of the highest grade, and this is the way Blackstone states the rule: "Yet, by a gradual process of liberal construction the courts have extended the scope of the clause to make it applicable to all indictable offences, including misdemeanours."... "Under the United States rule, to be put in jeopardy there must be a valid indictment or information duly presented to a court of competent jurisdiction, there must be an arraignment and plea, and a lawful jury must be impaneled and sworn. It is not necessary to have a verdict. The protection is not against a second punishment but against the peril in which he is placed by the jeopardy mentioned."

11. These were the materials which formed the background of the guarantee of fundamental right given in Article 20(2). It incorporated within its scope the plea of "autrefois convict" as known to the British jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribed it by providing that there should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence.

12. The words "before a court of law or judicial tribunal" are not to be found in Article 20(2). But if regard be had to the whole background indicated above it is clear that in order that the protection of Article 20(2) be invoked by a citizen there must have been a prosecution and punishment in respect of the same offence before a court of law or a tribunal, required by law to decide the matters in controversy judicially on evidence on oath

which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath. The very wording of Article 20 and the words used therein:— "convicted", "commission of the act charged as an offence", "be subjected to a penalty", "commission of the offence", "prosecuted, and punished, accused of any offence, would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.

13. The tests of a judicial tribunal were laid down by this Court in Bharat Bank Ltd., Delhi v. Employees of the Bharat Bank Ltd., Delhi [1950 SCC 470 : 1950 SCR 459] in the following passage quoted with approval by Mahajan and Mukherjea, JJ. from Cooper v. Wilson [(1937) 2 KB 309]) at p. 340:

"A true judicial decision presupposes an existing dispute between two or more parties and then involves four requisites : (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) If the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) If the dispute between them is a question of law, the submission of legal argument by the parties; and (4) A decision which disposes of the whole

matter by a finding upon the facts in dispute and application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law."

Mr. K. Angami, learned Public Prosecutor, Nagaland has submitted that in the instant case the appellant was expelled from Lakhuti Village only for defaming the village name by his acts of immoral activities. Learned Public Prosecutor, Nagaland has further submitted that the appellant was neither prosecuted nor convicted and punished for the offence alleged against him by the victim, hence, the plea of double jeopardy is not applicable in the instant case.

22. Mr. K. Angami, learned Public Prosecutor, Nagaland has also submitted that the presence of injury on the private parts of the prosecutrix may not be there, in a case if such prosecutrix was subjected to penetrative sexual offence since long time back as in the instant case. To support his contention Mr. K. Angami, learned Public Prosecutor, Nagaland, has cited a ruling of Hon'ble Supreme Court of India in "***Aman Kumar and Another vs. State of Haryana***" reported in "***(2004) 4 SSC 379***", wherein it was observed as follows:

"7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see Joseph Lines, IC&K 893). It is well known in the medical world that the examination of smegma loses all importance after twenty-four hours of the performance of the sexual intercourse. [See S.P. Kohli (Dr) v. High Court of Punjab and Haryana [(1979) 1 SCC 212 : 1979

SCC (Cri) 252] .] In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma around the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty-four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the

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

23. I have considered the rival submissions made by Mr. P. Pius Lotha, learned counsel for the appellant as well as Mr. K. Angami, learned Public Prosecutor, Nagaland. I have also gone through the materials available on record thoroughly.

24. If we consider the testimonies of the prosecution witnesses, it would appear that except PW-1, who is the victim herself, other prosecution witnesses came to know about the offences alleged by her only after she approached the Women Police Station, Dimapur to lodge the FIR on 27.07.2021, which was exhibited as Ext.P/1 by her. Though, in her testimony she has stated that she informed some of her cousins who were staying at Dimapur after the incident on 21.07.2017, none of the said cousins were examined as prosecution witnesses. As except PW-1 all the other prosecution witnesses, who have deposed before the trial court, came to know

about the alleged offence only after lodging of the FIR by the victim and all of them appears to have deposed, before the trial court, on the basis of information, which they received by the victim herself, that too after lodging of the FIR on 27.07.2021, hence, what becomes very important, in this case, is the testimony of the victim herself. The testimony of the victim before the trial court, which she deposed as PW-1, is therefore, of prime importance to find out as to whether impugned judgment of the learned trial court is to be sustained or whether same is liable to be set aside.

25. If we examine the impugned judgment, it will appear that learned trial court relied upon the testimony of the victim (PW-1), her statement recorded under Section 164 Cr.P.C, which is exhibited as Ext. P-10, confessional statement of the appellant recorded under Section 164 Cr.P.C. which is exhibited as Ext. P-9, testimony of PW-6 (Investigating Officer), testimony of Additional Witness No. 1 and testimony of Additional Witness No.2 to arrive at following findings:

(a) That the offence of sexual assault against the victim was committed, by the appellant, by touching her breast and private parts when she was a minor studying class-III

(b) That the offence of rape was committed by the appellant on the victim when she was studying in class-VI and continued till July 2017 when she was 19 years old.

In a criminal trial, a witness, including the victim, may have to state about the facts relating to commission of alleged offence for which an accused faces trial during different stages of the criminal investigation, enquiry and trial. These stages may be at the stage of

lodging of the FIR, i.e., the FIR itself, thereafter, the statement given before the investigating authority under Section 161 of Code of Criminal Procedure, 1973, thereafter, statement given under Section 164 of Code of Criminal Procedure, 1973, before a Judicial Magistrate and finally during the trial before the trial court, on oath, as a prosecution witness. The finding of the trial court as regards the charges framed by it against the accused is mainly based on the statement of witnesses given before it on oath during trial. The veracity of the statement of the witness given before the court, on oath, during trial, may be tested by contradicting the same by referring to the statement made by such a witness before the police officer in the course of an investigation under Section 161 of the Code of Criminal Procedure, 1973. Thus, the statement given by witness before police, during investigation, under Section 161 of the Code of Criminal Procedure, 1973 has a very limited use during trial. Similarly, the statement of a witness, recorded under Section 164 of the Code of Criminal Procedure, 1973, during the course of investigation has a limited purpose of corroborating the testimony of such a witness given on oath, before the court, during trial. Thus, the FIR or for that matter the statement of a witness recorded under Section 161 of the Code of Criminal Procedure, 1973 or his statement recorded under Section 164 of the Code of Criminal Procedure, 1973, though, may be used for different purposes of contradicting or corroborating the testimony of a witness given in the court during trial, these statements, in themselves, never become substantive piece of evidence on which the trial court may come to its finding in a criminal trial. What is most important and substantive piece of evidence is the statement (testimony) of the

witness, given on oath, during trial before the court.

26. Keeping the above distinctions in view, let me now see as to what statement the victim (PW-1) has given, on oath, before the learned trial court in the present case. If we carefully peruse the testimony of victim which she gave, on oath before the trial court, during the trial, it appears that she has only stated that her father used to touch her breast from time to time when she was in class-III and at that time, she had no idea that her father was molesting her. She has further stated that her father kept on molesting her from time to time to satisfy his sexual desire. However, while deposing before the court as PW-1, nowhere she has stated that her father raped her when she was in class-VI and continued the same till date, though she had stated so in her FIR as well as during her statement made under Section 164 of the Code of Criminal Procedure, 1973. As stated herein above, the contents of FIR as well as the statement made during investigating under Section 164 of the Code of Criminal Procedure, 1973 may only be used for corroborating the statement of a witness which he or she has made, on oath, during trial. The FIR or the statement made under Section 164 of the Code of Criminal Procedure, 1973 do not become substantive piece of evidence on which the findings of trial court may be based, they may be used for the purpose of corroboration only.

Though, the victim had stated in the FIR (Ext. P-1) and in her statement recorded under Section 164 of the Code of Criminal Procedure, 1973 that the appellant had committed rape on her on several occasions, however, in her statement as a witness (PW-1) before the trial court, she mentioned about rape by her father only

on one occasion i.e., on 21.07.2017 (when she was no longer a minor). In the instant case, the findings of learned trial court is mainly based on testimony of the victim as PW-1 and as she has only stated, in her deposition before learned trial court, that her father used to touch her breast from time to time when she was in class-III and there is nothing in her testimony to come to a finding that the appellant committed aggravated penetrative sexual assault on her when she was a minor, in the considered opinion of this Court, the learned trial court erred in coming to a finding that the appellant have committed offence under Section 6 of the POCSO Act, 2012 mainly on the basis of statement of victim under Section 164 of the Code of Criminal Procedure, 1973 and on what the other witnesses, namely, PW-6, Additional Witness Nos. 1 and 2 have stated before it, as their testimony was mere hearsay and as PW-1 herself has not stated so before the court. As regards reliability of the confessional statement made by the appellant, which was exhibited as Ext. P-9, this court is of the considered opinion that the same could not have been relied upon by the learned trial court and reasons for same shall be discussed in the following paragraph.

27. Apart from what has been discussed herein above, the other material which was relied upon by the learned trial court for arriving at the finding of guilt of the present appellant is the confessional statement made by the appellant under section 164 of the Code of Criminal Procedure, 1973 which was exhibited as Ext. P-9 by PW-6 i.e. the Investigating Officer of the case. If we peruse the confessional statement which is exhibited as Ext.P-9, it appears that the form for recording of confessional statement has not been meticulously filled up by the concerned Judicial Magistrate, 1st class,

Wokha. On perusal of the form for recording of confession, which is exhibited as Ext. P-9, wherein the confession of the present appellant was recorded, it appears that the name of the learned Judicial Magistrate who recorded the confessional statement of the appellant has not been mentioned in the said form. It also appears that the accused was first produced before the Judicial Magistrate, 1st class, Wokha for recording his confessional statement on 23.08.2017 and on that date the accused was remanded back to judicial custody till 30.08.2017. However, nothing is mentioned in the order-sheet maintained in the case record or in the confessional form which is exhibited as Ext. P-9 that on 23.08.2017 when the appellant was produced before the learned Judicial Magistrate, 1st class, Wokha he explained to the appellant that (i) he is not bound to make such a confession, (ii) if he does so, it may be used against him as required under clause (2) of Section 164 of the Code of Criminal Procedure, 1973. Thus the period spent by the appellant from 23.08.2017, when he was first produced before the Judicial Magistrate, 1st class, Wokha till 30.08.2017, when his confessional statement was actually recorded, may not be treated as a period for reflection which according to a catena of rulings of the Hon'ble Apex Court should be granted before recording confessional statement. Similarly, on perusal of the column No. 3 of the form for recording confessional statement, it appears that same has been left blank by the learned Judicial Magistrate, 1st class, Wokha. It appears that no enquiry was made from the accused (*appellant*) as to the custody from which he was produced and to the custody to which he was to be consigned and the treatment he had been receiving in such

custody in order to ensure that there is no scope for any sort of extraneous influence proceeding from any source interested in the prosecution still lurking in the mind of the appellant. It also appears that in the printed format, against column No. 4, where the accused/appellant ought to have been cautioned that he is not bound to make a confession and that such a confession may be used in evidence against him and further he ought to have been questioned so as to ascertain whether he has understood the warning and whether the confession is voluntary, it appears that no such questions were put to the appellant and no answer from the appellant has been recorded therein. In fact, what appears is that the Page No. 4 of the printed form for recording confessional statement where such questions and answers should have been recorded is left totally blank. It also appears when the appellant was produced before the learned Judicial Magistrate at 3.00 PM on 30.08.2017, he was placed in charge of a constable of the office of Prosecuting Inspector of the Court, who is normally a police personnel. Lastly, though at Page No. 7 of the form for recording confessional statement, the concerned Judicial Magistrate has signed the printed prescribed memorandum wherein it is printed that the Magistrate has explained to the appellant that he is not bound to make confession and that if he does so any confession he makes may be used as evidence against him, however, there is nothing in the confessional form or in the order-sheet maintained in the case record from where it may be ascertained that the statutory warning, under Section 164(2) of the Code of Criminal Procedure, 1973, which is required to be given to the accused who is brought before the Magistrate for recording his confessional statement was

actually given to the appellant before his confessional statement was recorded. The manner in which the confessional statement was recorded leaves room for doubt as to whether the confessional statement which is exhibited as Ext. P-9 by the Investigating Officer of this case was voluntarily made by the appellant or not and considering the fact the Judicial Magistrate who recorded the confessional statement was also not examined as prosecution witness by the prosecution side, the cloud of doubt could not be dispelled. Under such circumstances, this Court is of considered opinion that it may not be safe to rely upon such confessional statement, to convict the appellant.

28. In view of what has been discussed above, there remains no credible evidence on record to suggest that the appellant committed penetrative sexual assault on the victim when she was minor so as to find him guilty of offence punishable under Section 6 of the POCSO Act, 2012. However, the testimony of PW-1 to the effect that the appellant use to molest her by touching her breast from time to time since she was in class-III is sufficient to find him guilty for offence of sexual assault under Section 8 of the POCSO Act, 2012. The reasons for relying upon the sole testimony of the victim (PW-1) are discussed in following paragraphs in this judgment. For what has been discussed herein above, the conviction of accused under Section 6 of the POCSO Act, 2012 is accordingly converted into conviction under Section 8 of the POCSO Act, 2012 for committing sexual assault against his own daughter when she was a minor.

29. As regards the question as to whether the testimony of the victim PW-1 is reliable or not, there appears to be no reason as to why she would depose falsely against her own father if nothing of

the sort, as alleged, had happened. As observed by Hon'ble Supreme Court of India in "***State of Himachal Pradesh vs. Sanjay Kumar @ Sunny (Supra)***" that when the perpetrator of offence of sexual assault is a family member, a decision to lodge FIR becomes more difficult and hard. It was observed that incestuous abuse is still regarded as a taboo to be discussed in public. This reticence hurts the victim or other family members who struggle to report. In the instant case also considering the fact that the parents of the victim got separated when the victim was in class-VI and she and her younger brother had to be dependent on her father for their survival and under such circumstances, when her own father subjected her to sexual assault since she was a small child, it may not be easy for her to report such an act of her own father by exposing herself to the risk of social stigma. There is no reason to disbelieve her testimony that she was reluctant to report about the incident to anyone including her mother out of fear and shame. The submission of learned counsel for the appellant that the victim falsely implicated her father as he was opposed to her relationship with a boy does not inspire confidence as while deposing as DW-1, the appellant has never alleged that her daughter had lodged false allegation against him as he was opposed to her relationship with a guy. There is no material on record to substantiate the submission of the learned counsel for the appellant that the victim had any reason for falsely implicating her own father. It is a settled principle of law that in offences of sexual assault/rape where generally it is difficult to get any other ocular witness apart from the victim herself, the conviction can be based on sole testimony of prosecutrix provided her testimony inspire confidence. In the instant case, this

court finds no reason as to why the victim (PW-1) would falsely implicate her father so as to disbelieve her testimony. The learned trial court, in the considered opinion of this court, was right in relying on the testimony of the victim (PW-1).

30. As regards submission of, learned counsel for the appellant that as PW-4, the doctor who examined the victim on 28.07.2017, did not find any physical injury stain etc. and as he stated in his cross-examination that he can't say that the victim was raped as her vagina admitted only one finger, this Court is of the considered opinion that in view of observations made by Hon'ble Supreme Court of India in "***Aman Kumar and Another vs. State of Haryana***" (***Supra***), that the shape and texture of hymen may be variable and this variation sometimes permits penetration without injury, hence, mere absence of injury in the private parts of the prosecutrix would not always lead to a finding that there was no forcible sexual intercourse or that if there was any sexual intercourse, it was consensual. The PW-1, during her cross-examination, has stated that she tried to seek help by screaming however, her father closed her mouth with her hand. This testimony of PW-1 which has remained uncontroverted, itself shows that her father (*appellant*) had forced himself upon her (*victim*) without her consent. Hence, mere absence of injuries, in the private parts of the victim, in the instant case is not sufficient to disbelieve the testimony of PW-1 (*victim*) that she was raped by the appellant on the night of 21.07.2017. However, as the victim PW-1 is the daughter of appellant, the conviction of the appellant for committing rape on her, ought to have been under Section 376 (2) (f) of the Indian Penal Code instead of 376 (1) of the Indian Penal Code as held by

learned trial court. The conviction of the appellant under Section 354 A (1) (i) of the Indian Penal Code by the learned trial court needs no interference.

31. As regards, the submission of learned counsel for the appellant that the appellant had suffered double jeopardy for his punishment in this case, as he was already ex-communicated from Lakhuti Village for a period of ten years by Lakhuti Village Council, this Court is of the considered opinion that in view what has been discussed in “***Maqbool Hussain v. State of Bombay***” (*Supra*), the ex-communication of the present appellant from the Lakhuti Village by Lakhuti Village Council would not mean that the appellant was either prosecuted or convicted and punished for the offence alleged against him by the victim, hence, the plea of double jeopardy is not applicable in the instant case.

32. As regards submission of learned counsel for the appellant that in view of the fact that the victim and the appellant as well as the family members have compromised the matter amongst them, hence in view of the judgment of Hon’ble Apex Court in “***K. Dhandha Pani -Vs- The State of Tamil Nadu***” (*Supra*), the conviction of appellant should be set aside and quashed. I have carefully perused the aforesaid ruling of the Hon’ble Apex Court. It appears that in the above mentioned case, Hon’ble Apex Court, considering the peculiar facts and circumstances of the said case, namely, though, the appellant, who was the maternal uncle of the prosecutrix, was convicted under Section 6 of the POCSO Act, he had actually married the prosecutrix and they also had children and there was a custom in Tamil Nadu of marriage of a girl to the maternal uncle, the Apex Court set aside the conviction of the appellant so that the

happy family life of the appellant and the prosecutrix is not disturbed. The Apex had also categorically stated in the above mentioned case that the said case shall not be treated as a precedent. In view of categorical observation of the Hon'ble Supreme Court of India in "**K. Dhandha Pani -Vs- The State of Tamil Nadu**" (*Supra*), for not treating the same as precedent, this Court is of the considered opinion that the learned counsel for the appellant was wrong in citing the said ruling in support of the case of the appellant. Moreover, the facts and circumstances of this case are totally different. In the instant case, the helpless victim, who was living with her father (*appellant*) along with her younger brother after her parents got divorced, was subjected to sexual assaults and was raped by her own father which are abominable offences involving mental depravity which may not be allowed to be compromised in view of what has been observed by Hon'ble Supreme Court of India in "**State of Madhya Pradesh -Vs- Laxmi Narayan and Ors.**" (*Supra*). On perusal of the additional affidavit submitted by the appellant on 24.11.2022, in this case, bringing on record the fact of compromise with the victim, it appears that the main ground for entering into compromise was the plight of the family and the fact that the siblings of the victim were dependant on the appellant. However, considering the abominable nature of the offence involved in this case as well as the observations made by Hon'ble Supreme Court of India in "**State of Madhya Pradesh -Vs- Laxmi Narayan and Ors.**" (*Supra*) that those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. which are not private in nature and have a serious impact on society are not to be quashed merely on the basis of compromise between the

victim and the offender, this Court is of the considered opinion that merely because of the fact that the matter has been compromised between the appellant and the victim, his conviction and sentence may not be set aside.

33. In view what has been discussed in forgoing paragraphs and for the reasons mentioned therein, the impugned judgment dated 28.06.2022 of the learned trial court is modified in following manner:

a) The conviction of the appellant under Section 6 of the POCSO Act, 2012 is converted into conviction under Section 8 of the POCSO Act, 2012 and accordingly his sentence is modified from rigorous imprisonment of 10 years with a fine of Rs. 1,000/- and in default of payment of fine to undergo simple imprisonment of one month under Section 6 of the POCSO Act, 2012 to a sentence of rigorous imprisonment of 3 years with a fine of Rs.1,000/- and in default of payment of fine to undergo simple imprisonment of one month under Section 8 of the POCSO Act, 2012.

b) The conviction of the appellant under Section 376 (1) of the Indian Penal Code is converted into conviction under Section 376 (2) (f) of the Indian Penal Code, however, sentence imposed against the said conviction shall remain same, i.e., to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.1,000/- and in default of payment of fine to undergo simple imprisonment for one month.

c) The conviction of the appellant under Section 354 A (1) (i) of the Indian Penal Code and sentence imposed there for, by the learned trial court, is not interfered with by this

appellate court.

d) All sentences shall run concurrently.

e) The observation and direction made by the learned trial court regarding payment of compensation to the victim is not interfered with by this appellate court.

34. With the above observations, this Criminal Appeal is disposed of.

35. Let the records of the trial court be sent back along with a copy of this judgment.

Sd/-

JUDGE

Comparing Assistant