



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

**Crl. Appl. No. 05 (AP)/2024**

**Shri Ippe Tachung,**

S/O Tamuk Tachung, a resident of Village Yoji Yora,

P.O. & P.S.- Aalo,

District: West Siang, Arunachal Pradesh.

**...APPELLANT**

**VERSUS**

**1. The State of Arunachal Pradesh,**  
through Public Prosecutor.

**2. Smti. Tongam Buchi,**  
W/o Yomkar Buchi, Village Siloni,  
P.O. & P.S. Likabali, Lower Siang,  
Arunachal Pradesh (Mother of prosecutrix/informant)

**...RESPONDENTS**

**Advocate for the Petitioners** : Mr. Muk Pertin, Sr. Cl.  
Mr. M. Yubbey

**Advocate for the Respondent** : Ms. L. Hage, Addl. P.P., A.P.  
Mr. L. Perme, Adv. for R-2

**:::BEFORE:::**  
**HON'BLE MR. JUSTICE KARDAK ETE**

Date of hearing : 08.08.2024  
Date of Judgment & Order : 13.09.2024

**JUDGMENT & ORDER (CAV)**

Heard Mr. Muk Pertin, learned Senior Counsel assisted by Mr. M. Yubbey, learned counsel for the appellant. Also heard Ms. L. hage, learned Additional Public Prosecutor for the State respondent No. 1 and Mr. L. Perme, learned counsel for the respondent No. 2/informant.

2. This criminal appeal is directed against the judgment and order dated 04.01.2024, passed by the learned Special Judge, (POCSO), Pasighat, East Siang District, Arunachal Pradesh, in PSG SC (POCSO) Case No. 09/2021, whereby accused Shri Toli Pale, has been convicted and sentenced to undergo imprisonment for a period of 3 (three) years 1 (one) month with a fine of Rs. 10,000/- (Rupees ten thousand) only for the offence under Section 8 of the POCSO Act and also sentenced to undergo imprisonment for period of 1 (one) month and a fine of Rs. 500/- (Rupees five hundred) only for the offence under Section 447 IPC, by holding guilty of sexual assault under Section 354A(2) IPC

and Section 8 of POCSO Act.

3. The case set up by the prosecution, in brief, is that on 01.10.2021, a written complaint was filed by one Smti Tongam Buchi before the Officer-In-Charge, Likabali Police Station alleging that Shri Toli Pale, convict herein, has molested her daughter Ms. XXX (name withheld), aged about 8 years, on 29.09.2021. Upon receipt of the said F.I.R. a case, being WPS Case No. 15/2021, under Section 354 A (i) IPC *read with* Section 9 of the POCSO Act was registered.

4. During investigation, the victim was examined and her statement was recorded. The victim was also forwarded to the Protection Officer, District Child Protection Unit, Pasighat for counseling. The statements of the other witnesses were also recorded. It is seen that the complaint was made at Likabali Police Station where the victim was forwarded for medical examination. MLC report was received on 06.10.2021 at WPS. The convict- Shri Toli Pale was arrested on 01.10.2021.

5. During the course of investigation, it was revealed that the victim was staying at Pasighat with her maternal aunt. On 29.09.2021, the convict, along with the guardian of the victim and one more friend, were having drinks at Sibokorong River. Thereafter, they reached the quarter of Shri Jumbo Yomgam where the victim was staying and they had drinks there again. During that time, the convict entered into the room where he hugged and kissed the victim and then inserts his hand inside lower inner garment (Panty). As per MLC report of the victim, the Medical Officer opined that the victim was sexually assaulted. The

statement of the victim under Section 164 Cr.P.C. was recorded on 02.12.2021.

6. After completion of investigation, the Charge-Sheet was laid against the accused/convict under Section 354 A (i) IPC *read with* Section 9 of the POCSO Act. The charges were framed on 13.04.2022 by the learned Special Judge against the accused/convict under Section 354 A (ii) *read with* Section 8 of POCSO Act. The charge was explained to the accused/convict to which he denied the charge and pleaded not guilty of offence and claimed to be tried.

During the course of trial, the prosecution has examined in all 7 (seven) prosecution witnesses. The learned trial court examined the accused person under section 313 Cr.PC and was recorded his statements. The defence plea is total denial. Thereafter 3 (three) defence witnesses, including the accused/convict, were examined.

7. Upon consideration of the evidence adduced on record, the learned Special Judge, POCSO, Pasighat, concluded that considering the facts and circumstances of the case and the evidences and materials on record, the accused is guilty of sexual assault under Section 354A(2) IPC and Section 8 of POCSO Act, and convicted the accused/convict under Section 354 A (ii) of IPC and Section 8 of POCSO Act and sentenced him as mentioned herein above. It is noticed that learned Special Judge, POCSO, has also sentenced the accused to undergo imprisonment for a period of 1 (one) month and a fine of Rs. 500/- (Rupees five hundred) only for the offence under Section 447 IPC.

8. Mr. Muk Pertin, learned Senior Counsel for the appellant, submits that FIR was lodged on 30.09.2021 by Complainant where it was written that the

appellant molested her daughter and touched her private part. The FIR was filed intentionally at Likabali though the place of occurrence of incident was at Pasighat. The complainant who is the mother of the victim lodged the FIR completely based on hearsay statement of PW2 and the complainant was not the witness who was present on the day of occurrence. The case was then sent back to Pasighat and registered it as WPS Case no. 15/21 U/S 354 A(i) IPC r/w Sec 9 of POCSO Act. After registering the case police recorded the statement which is corroborated by the deposition of PW7.

9. He submits that the age of the girl was not proved as the IO of the case neither collected her School certificate nor collected birth certificate was certified. The victim herself produced a birth certificate which was not the part of the charge-sheet. Though, there is no objection in the production of the birth certificate by the victim but the issue lies regarding authentication of the birth certificate which are usually maintained by the Economics and Statistics Department which can only be proved by the Department. None of the employee of the Economic and Statistic Department has been made witness and therefore there is no prove of the age of the victim.

10. Mr. Muk Pertin, learned Senior Counsel for the appellant, submits that it is the duty of the learned Magistrate and IO to maintain audio and video recording of victim's statement as per Section 25 and 26 of POCSO Act which was not done indicating probability of tutoring of victim's statement. Victim has stated before the learned Magistrate that her age is 8 (eight) years and she is studying in class-VI, so doubt arises upon the authenticity of the birth certificate as she was 2 (two) years old only and since a natural baby cannot go to school

at the age of 2 (two) years nor they can speak properly, to accept this conclusion there should be an extraordinary inborn god gifted and out of this world quality in any child which is very difficult to find and in case of such extraordinary person her extraordinary capabilities should have been published in Newspaper or Magazine.

11. He submits that during investigation, IO of the case did not draw rough sketch map along with scale to know the exact position of the place of occurrence and it is necessitated to prove whether the alleged incident has occurred in the isolated place, was there any sound made and whether the sound made in fire place can be heard from the bedroom. The convict went to bathroom while coming out a child of 3 (three) years caught hold of his finger and taken him to bedroom as this child was very fond of playing with him calling him as "chacha chacha" which shows he had no intention to go to bedroom but just to please the child, he accompanied him to room and this vital statement was not taken into consideration while deciding the case by the Learned Trial court.

12. Mr. Muk Pertin, learned Senior Counsel, submits that very surprising part of the present case is that though there was no ingredients of Section of 447 of IPC nor it was taken in consideration at the time of framing of charges or mentioned anywhere in the entire charge-sheet, while passing the impugned judgement dated 04/01/2024, the accused has been convicted under section 447 of IPC and imposed a fine of Rs 500 for the offence under Section 447 and sentenced a period of one (1) month which is erroneous and deserves to be interfered by the appellant court.

13. On circumstantial evidence, he submits that molestation and intention are essentially thing of the mind and cannot be demonstrated through physical object and the existence of intention should be culled out from various circumstance in which and upon whom the alleged offence has been committed.

The door of the bedroom was kept open, the light was not put off, the alleged place of occurrence was not abandoned and it was just adjacent to the fire place. Moreover, a child of 3 (three) year old was also present there. Had there been sexual assault done on the victim, she would have cried or she would have shouted but there was nothing as such. The victim on questioning of PW6, she made affirmation only because she was afraid of PW2 who has been alleging of sexual assault though there was no any sexual assault. In case, if such alleged offence was committed the victim would have spoken voluntarily but here in the case nothing as such is alleged by the victim but it was tutored and force of the PW2 which changed victim's statement before the learned Magistrate as well as in the court. She was put pressure by PW2 because the appellant and PW2 made a hot altercation and accused called her "mad woman". This is a case of misunderstanding between PW2 and the accused. While accused was advising the victim to study well and the conversation was misunderstood by PW2 and because of misunderstanding they exchanged heated argument. That apart, the accused is father of 6 (six) children and having a married daughter and this was his maiden visit to the house of PW6 on his request. Considering the status of accused and prevailing circumstances, it clearly shows that there was no any ill intent on the part of accused towards victim.

14. Mr. Muk Pertin, learned Senior Counsel, submits that here are serious

discrepancies and inconsistencies in the statement of the victim (PW-1) as the victim, in her statement recorded under Section 161 Cr.P.C., has never mentioned about the inserting of the hand of the accused/convict inside her Panty or touching her private parts. The victim has stated in her statement recorded under Section 164 Cr.P.C. as well as deposition before the Court that the accused/convict had kissed on her mouth and inserted his hand under her Panty and touched her private parts and the same was noticed by her Aunt (PW-2) which are by way of improvement on being tutored. He further submits that the Investigating Officer has also deposed that the statement of the victim under Section 161 Cr.P.C. is very short and does not level serious allegations against the accused. She deposed that on careful reading of the statement recorded under Section 161 Cr.P.C. and the statement recorded under Section 164 Cr.P.C., there is introduction of the new fact that the victim deposed during her statement recorded under Section 164 Cr.P.C. that the accused/convict put his hand and touched her Panty, whereas, in her statement recorded under Section 161 Cr.P.C., no such allegation was made except the allegation of kiss. She also clearly deposed that considering the age of the victim she did not believe that the accused touched the victim with sexual intent.

15. Mr. Pertin, learned Senior Counsel, further submits that that opinion of the Medical Officer, i.e. PW-4, that the victim was sexually assaulted but the final opinion can be given only after receipt of the FSL report, cannot be relied on as the intention of the accused of sexual assault cannot be proved or revealed from the medical examination. There is no proof of intention to commit any sexual assault. If the accused had assaulted the victim sexually, the victim could

have shouted when the accused was alleged to have touched the private part.

16. He submits that no rough sketch map was prepared which is fatal as the allegation in the present case is that the accused has entered into the room adjacent to the room where the accused and his friends were having drinks.

17. Mr. Pertin, learned Senior Counsel, further submits that surprisingly, the learned Special Judge, POCSO Act, has convicted and sentenced the accused under Section 447 IPC which clearly depicts the callous investigation and trial of the present case. At the same time, there is no proof of intention of the accused/convict, rather the conviction is based on the embellishment and tutored statement and the deposition of the victim. Mr. Pertin, Sr. Counsel, has summarized his submission as under:

- (i) Entries in birth certificate not substantiated by entries made in register, Hence age of the victim has not been proved.
- (ii) The prosecution has failed to prove foundational fact in support of the case of presumption under section 29 of POCSO Act. Video recording of the statement of victim was not made although under Section 26(4) of the POCSO Act it is mandatory that the police officer shall ensure that the statement of the child is also recorded by audio and video recording.
- (iii) Court should at the same time bear in mind that false charge are not uncommon and there are so many instances where parents has persuaded a gullible or obedient daughter to make a false charge of rape either to take revenge or extort money or to get rid of financial levy.

(iv) Conviction of accused cannot be based solely on presumption of guilt on doctrine of reverse burden.

(v). Testimony of victim of rape has to be tested if she is an injured witness but cannot be presumed to be a gospel truth.

Mr. Pertin, learned Sr. Counsel, submits that considering the present circumstances of the case and failing to prove the age of victim and keeping in mind all supporting rulings which are in favour of appellant and the impugned judgement of PSG SC(POCSO) Case No. 09/2021 U/S 354 A(2) IPC R/W 8 of POCSO Act State Vs Toli Pale, dated 4/1/2024 may be set aside and quashed.

18. In support of his submissions, Mr. Pertin, learned Senior Counsel, placed reliance on the following judgments of various High Courts:

- (i) **Lall Bahadur Kami & Anr. Vs. State of Sikkim**, reported in **2017 SCC OnLine Sikk 173 (High Court of Sikkim)**
- (ii) **Altaf Ahmed Vs. State (GNCTD of Delhi)**, reported in **2020 SCC OnLine Del 1938 (High Court of Delhi)**, and emphasize on paragraph Nos. 10, 21, 22, 23 & 24 of the judgment, which are quoted herein below:
- (iii) **Asraf Biswas Vs. The State of West Bengal**, reported in **2016 6 SCC OnLine Cal 4342 (High Court of Calcutta)**,

19. Per contra, Ms. L. Hage, learned Additional Public Prosecutor for the State, submits that the statement and the deposition before the Court is very much consistent as the PW-1, victim, has consistently stated in her statement

recorded under Section 164 Cr.P.C. and deposition before the Court that the accused had kissed the victim on her mouth and inserted his hand under her Panty and touched her private parts and such incident was noticed by her Aunt, PW-2, and the same is fully corroborated by the evidence of PW-2, PW-3 & PW-5. She submits that in a case like the present one, the conviction can be based on the sole testimony of the victim.

20. She submits that the evidence of victim during investigation before the Police, Magistrate and during the trial are same and no major contradictions were found in the evidence of the victim. The statement of the victim remains consistent throughout the proceeding.

21. She submits that the age of victim has been proved by the prosecution through the birth certificate which is Exhibited as P. Ext-1. The defence has not disputed and challenged the authenticity and correctness of birth certificate during cross examination. Moreover, birth certificate was produced in original and in the FIR victim's mother clearly reflected the age of the victim as 8 (eight) years old.

22. Ms. Hage, learned Additional Public Prosecutor, further submits that the statement under Section 161 Cr.P.C. has no evidentiary value and it cannot be relied upon as done by the learned Senior Counsel for the appellant in the present case, however it can be relied only for the purpose of contradiction and corroboration. Therefore, the statement under Section 161 Cr.P.C. cannot be relied on.

23. She submits that the statement of the eye witness PW-2 is corroborated by PW-5 and PW-6 which makes it confirmed that the accused had committed the offence. PW 4 deposed that there was no significant clinically findings as well in CFSL report also no blood and human semen could be detected in the vaginal swab but he opined that the victim was sexually assaulted which is corroborated by other evidences. Therefore, the prosecution has proved the case beyond all the reasonable doubt against the accused under section 8 of POCSO Act and under Section 354 A (2) of IPC, through the oral evidence of the victim, the eye witness of the incident and other supporting evidences of investigating officer, biological parents and other available witnesses and statement of victim recorded under section 164 Cr.PC and as such present appeal is liable to be dismissed.

24. In support of her submission, Ms. Hage, learned Additional Public Prosecutor, has placed reliance on the judgment of Hon'ble Supreme Court in the case of **State of Punjab Vs. Gurmit Singh & Ors.**, reported in **(1996) 2 SCC 384**.

25. Learned Addl. PP, has further relied the case of **in POCSO Special Case No. 431 of 2017**, wherein it is observed that bare perusal of section 35 of Evidence Act makes it clear that if entry is made by public servant in the official book in discharge of his official duty, then such entry becomes a relevant fact and admissible in evidence. The extract of birth register maintained by public officer in discharge of his duty is, as such admissible u/s. 35 of Indian Evidence Act and it is not necessary to examine the officer who records such entry.

26. Mr. L. Perme, learned counsel for the respondent No. 2, submits that the appellant has taken as many as 11 (Eleven) grounds for appeal. However, on the face of the impugned judgment dated 04.01.2023, learned trial court had adequately addressed all the grounds on the basis of evidence on record and the law negating every ground and contention of the convict. Therefore, in absence of any other ground indicating any perversity in the impugned judgment dated 04.01.2023, the criminal appeal is liable to be dismissed being devoid of merit.

27. He submits that, through the appellant miserably failed to point out any perversity in the impugned judgment dated 04.01.2023, this appeal being Statutory appeal, this Hon'ble Court has absolute authority to look into evidences and re-appreciate the evidences on record. However the case being under POSCO Act 2012, the appreciation and evaluation of the evidences is always subject to and guided by statutory mandate under Section 29 of POSCO Act 2012, which provides that the prosecution has to prove the foundational facts of the offence charged against the accused on the basis of preponderance of probability and once the prosecution is successful in establishing the foundational facts the burden is shifted upon the accused to prove and demonstrate that the prosecution case is improbable. Therefore, on the backdrop of the statutory mandates under Section 29 of POSCO Act 2012, if we evaluate the evidences of the PW1, PW2, PW5, PW6 and Section 313 Statement of convicted person, the prosecution not only on basis of preponderance of probability but proof beyond reasonable doubt that the incident alleged in the FIR happened on 29.09.2021. Since the foundation facts of allegation is proved

by the prosecution, it was statutory duty cast upon the convict person to prove and demonstrate that prosecution case is improbable. But, if we evaluate the evidences of the defence, the defence has miserably failed to discharged the statutory duty mandate under Section 29 of POSCO Act 2012, so in such circumstances there is no other option other than to uphold the impugned judgment dated 04.01.2023.

28. Mr. L. Perme, learned counsel, submits that the other grounds strenuously argued by the learned Senior counsel for the appellant that "Paper Exhibit No.-1" purported to be birth certificate of victim is not the part of documents filed by the prosecution under Section 173 of Cr.P.C. therefore, same cannot be exhibited and relied upon for determination of age of prosecutrix. He submits, this argument is legally not sustainable in as much as Section 242 (3) of Cr.P.C provides ample power to the trial court to take all such evidence which are not in the report submitted under Section 173 Cr.P.C by the police.

29. Mr. L. Perme, learned counsel, submits that other serious contention raised by the learned Senior counsel for the appellant is that in 161 statement Cr.PC, the allegation of victim was only about kiss and hug to her by the convict and later on the victim improvised the allegation. Assuming, but not admitting, that the convict only kiss and hug the victim then also learned trial court has rightly convicted the accused under Section 8 of POSCO Act in terms of the definition of 'Sexual Assault' as provided under Section 7 of POSCO Act, which defines that any person does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault. In above

grounds and submissions, it is humbly prayed that this Hon'ble Court may be pleased to dismiss the criminal appeal upholding the judgment & order dated 04.01.2013 passed by learned trial court.

30. Mr. L. Perme, learned counsel, in support of his submissions, has placed reliance of the following judgements:

- i. **B L. Udaykumar & Ors. Vs. State of Karnataka,** reported in **2018 3 Crimes(HC) 469.**
- ii. **Bhupen Kalita Vs. State of Assam,** reported in **2020 (3) GLT 403.**
- iii. **Amanulla & Ors. Vs. State of Maharashtra & Ors.,** reported in **2023 0 BomCR(Cri) 867.**

31. I have considered the submissions advanced by the learned counsel for the parties and have perused the materials on record including the judgement and order under appeal.

32. The Hon'ble Supreme Court, on the crime against women, has observed that of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. The Courts shoulder a great responsibility while trying an accused on charges of sexual assault and rape. They must deal with such

cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

33. It has held that the testimony of the victim of sexual assault is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice.

34. In the present case, it transpires that the conviction is based on testimony of the prosecutrix corroborated by the other evidence of prosecution witnesses particularly PW2 and PW5.

35. On consideration of the record, it transpires that an FIR was lodged on 01.10.2021, by the mother of the victim, PW-3 before the Officer-In-Charge, Likabali Police Station alleging that Shri Toli Pale, convict herein, has molested her daughter Ms. XXX, aged about 8 (eight) years, on 29.09.2021. Upon receipt of the said F.I.R., a case, being WPS Case No. 15/2021, under Section 354 A (i) IPC *read with* Section 9 of the POCSO Act was registered. During investigation, the victim was examined and her statement was recorded. The victim was also forwarded to the Protection Officer, District Child Protection Unit, Pasighat for counseling. The statements of the other witnesses were also recorded. It is seen that the complaint was made at Likabali Police Station where the victim was forwarded for medical examination. MLC report was received on 06.10.2021 at WPS. The convict- Shri Toli Pale was arrested on 01.10.2021. The victim was staying at Pasighat with PW2 and 6. On 29.09.2021, the convict, along with the PW5 and 6 had drinks at Siborong River. Thereafter, they went to the house of PW-6 and PW-2, where the victim was staying and they had drinks there again. During that time, the convict entered into the room where he hugged and kissed the victim and then insert his hand inside Panty of the victim and touch the private parts. As per MLC report of the victim, the Medical Officer opined that the victim was sexually assaulted. The statement of the victim under Section 164 Cr.P.C. was recorded on 02.12.2021.

36. On the scrutiny of the testimony of the prosecutrix, it is clearly revealed

that the accused came inside the room where the victim was sitting and said something to her to which she could not hear properly and thereafter, the accused kissed her on her mouth and inserted his hand under her panty and touched her private part. The incident of such kiss and touch on her private part was noticed by PW-2 and she caught hold of the accused by his hair and pulled him out of the room. PW-2 had slapped the accused. In the cross examination also, she had clearly stated that the accused kissed her on her lips and had explained in detail of the incident and place of occurrence. Thus, this court finds that the testimony of the prosecutrix is credible, reliable and trustworthy and there is no discrepancy in her deposition as well as statement under section 164 Cr.PC.

37. The evidences of PW.2, 3, 5 and 6 corroborates the evidence of the prosecutrix and they have clearly deposed and stated the time and place of occurrence. PW-2 had deposed that the accused wanted to see the child in her room as to know what they were doing, while saying so, the accused went inside her room. They continued their discussion while consuming *chutney* and *apong* (drinks), just then, she realized that it was late how the accused has not come out from the room. So, she immediately went to her room and saw the incident of molestation committed by the accused to the victim. She saw him kissing the victim and inserting one of his hands at the private part of the victim. She pulls him out from the room by his hair up to kitchen and slapped him. The accused stated that she had a wrong impression to see that act but he did not commit the offence. She also scolded her husband for bringing such a person to her house and the accused was sent back by her husband. She

informed the biological parents of the victim about the incident as she was in dilemma to take any decision. The mother of the victim lodged the FIR on 01.10.2021. She along with her husband arranged a meeting to settle the matter locally but the accused stated that she is a mad woman and denied to have committed the offence. Later on, the accused beg pardon from her but she did not accept as he initially denied committing the offence. PW-3 had stated that she was informed by the PW-2 over mobile phone that the accused molested her daughter and accordingly she lodged the FIR. The versions of both PW2 and 3 are consistent and there is no contradiction and discrepancies in their evidence. PW-5, a friend of the accused and who was present at the time of incident, had deposed that during the course of having cane beer, accused went inside the house of Mr. Yomgam. After around 5 minutes, the wife of Mr. Yomgam also went inside the house and suddenly shouted at the accused stating as 'tum mera beti ka sath kya kar raha hai' (what you are doing with my daughter). Immediately, after hearing it, the accused followed by the wife (PW-2) of Mr. Yomgam came out of the house to kitchen. The wife of Mr. Yomgam, PW-2 shouted at Mr. Yomgam that why he had brought such person to her house who was doing bad things to the child. On hearing of the statement of PW-2, Mr. Yomgam stated that he would discuss the matter with the accused. In replied to it, the PW-2 stated that if Mr. Yomgam does not believe, he could ask the child. The allegation of PW-2 was that she personally saw the accused touching the private part of the child. On enquiry to the child by Mr. Yomgam, by saying 'is it true' the child replied in affirmative. The accused was slapped by PW-2. The accused denied the allegation by stating that the victim is saying in affirmative upon the question of Mr. Yomgam on being afraid of the PW-2. PW-

6, had deposed that the accused, PW-5 and he had drinks and also had merrymaking of singing. After about to departure, suddenly, her wife started shouting at the accused alleging that the accused had done wrong to the victim and also caught the hair of the accused. He was very surprised and had no words to say. He asked the daughter. She told him that the accused kissed on her lips. In the cross-examination, he deposed that he know the accused for last 3 months back from the date of incident. It is not a fact that her wife got angry with them for consumption of alcohol in the river. Three of them came back to his house at the same time and his daughter was inside the bedroom. PW4, the Doctor, stated that the victim was found mentally distressed. The victim was 8 (eight) years old, there was no significant finding clinically, and opined that the victim was sexually assaulted and but the final opinion can be given only after receipt of the FSL report. PW7, the IO, narrated the entire prosecution story. On scrutiny of his deposition, it is astonished to noticed that the IO had not properly done her duty rather had sordid investigation and the investigation appears have been undertaken with callousness with an unacceptable excuse of being her first POCSO case which is certainly not expected of an officer entrusted with the investigation on such serious case. However, same would not be fatal.

38. The evidence of PW-5 and 6 clearly reveals that there was an allegation of sexual assault by PW-2 and on being enquired by the PW-6 to the victim about the correctness of the allegation, the victim has nodded in affirmative which suggest that there was an incident of kiss and touch to the body of the victim.

39. Upon scrutiny of the testimony of the defence witnesses, it is seen that vain attempt is made to establish some enmity between the family of the victim, their relatives and the family of the accused which is too remote to connect with the case. No such defence could be established as the defence unsuccessfully tried to rack up an issue of some marriage dispute to clan members which is not even remotely connected. It is also seen that a defence is also sought to be taken to indicate that a meeting was initiated to extort money and on its failure an FIR was filed. Thus, defence is absolutely unacceptable and the learned Special Judge has rightly discarded the same. Thus, I find that no defence is made out from the evidence of DWs in favour of the accused/convict.

40. As regard the submission of learned Senior counsel on the Birth Certificate of the victim, that same has not been proved for want of examination of author of the same, it is seen that the prosecution exhibited Birth Certificate as P. Ext-1 and after perusal of the original, allowed to exhibit the photostat copy. The learned Special Judge has rightly held that the P. Ext-1 being not question during cross examination on its authenticity or correctness, it was not necessary to seek corroborative evidence on its correctness as it was uncontested in the cross examination on record. Though, it is required to know the reason why the entries made by Public Servant in public register or record stating a fact or a relevant fact as per Section 35 of the Indian Evidence Act. The document or entry made in public register or record in discharge of public duty by a public servant is a relevant fact and the presumption of its correctness could be drawn in terms of Section 35 of the Indian Evidence Act. Judgement relied by learned senior counsel in the case **Lall Bahadur Kami** (Supra) of **High Court of**

**Sikkim** is on a different facts which is not applicable. In that case, victim was studying in class-X but no seizure was made but there was one certificate of the victim certifying person with disability, wherein, the victim was recorded as 18 years, as such, there was anomaly in the age of the victim. Hence, considering the catena of the Supreme Court, it has held that the Ext.-4 signed by PW-14 prepared by PW-15 on the order of Sub-Divisional Magistrate but the Sub-Divisional Magistrate not being examined and any order and register produced, the evidence furnished by the prosecution cast a shadow on the probative of Ext-4 and thereby rendering it unfit for consideration.

41. Learned Special Judge has observed and held that the accused has not adduced any evidence that there was a monetary demand from the side of the victim to settle the case during defence witness or stated in 313 CrPC examination. In the defence witness of the accused, it is deposed that the PW-6 called him over mobile phone to come in his house. Accordingly, he noticed at least 6-7 persons were present and PW-6 and PW-2 told him to beg pardon but he denied to beg pardon claiming that he did nothing wrong. The evidence of the accused does not suggest any kind of monetary demand. Although, the PW-2 has stated in her cross examination that local settlement means imposing a fine to the accused but it is upto the member of the Kebang to impose fine. In all the cases, imposing of fine is not necessary, it can be settled after admonition. Moreover, if any fine is also imposed, the natural parents are to receive the fine and not by PW-2. Hence, the explanation of PW-2 that settlement means imposing of fine cannot be read to the extent that the FIR was lodged to extort money from the accused as it is to be understood from

each case and there is no straight jacket formula to hold the opinion that the delay of lodging FIR was to extort money from the accused, rather the victim, normally, would not like to report the incident to the police and thereby resorted to settle the case.

42. On careful perusal of the evidence of the victim, she has consistently stated about the kiss by the accused during recording of 161 CrPC statements by the Police as well as before the Magistrate and also during trial, however, no statement is made before the Police during recording of her statement under Section 161 CrPC about the touching of her private part by the hand of the accused by inserting inside her panty but it is clearly reflected in FIR, 164 CrPC statement and before the Court. The testimony of PW-2 corroborated by PW-5 and 6 makes it confirmed that the accused kissed the victim. The testimony of PW-2 reveals that she saw the incident of kissing the victim. The evidence of victim also reveals that the accused kissed her on mouth and touched the private part of the victim while kissing the victim by inserting his hand inside her panty. This piece of evidence could not be impeached, therefore, the prosecution has conclusively proved the allegation of kissing and touching the private part of the victim while kissing the victim by inserting his hand inside her panty by the accused.

43. Regard being had to contention of learned senior counsel of improvement in the statement of the victim on being tutored under 164 CrPC statements and before the court on allegation of touching her private part or the contents of the FIR was concocted, it is seen that FIR clearly mentioned of molestation and

touching of private parts of the victim. Needless to say that an FIR is not a substantial piece of evidence but it is a corroborative piece of evidence which is in favour of the prosecution. Learned Special judge has returned a finding that observed that as per IO, it is admitted that the victim did not state about the touching of her private part by inserting his hands inside her panty but it cannot also be denied that the IO was a rank of SI promoted from the Cadre of constable. She has categorically admitted that she passed Class-VIII standard during re-examination by SPP and filed the CS with the help of other officers. She has also admitted that the statement of 161 CrPC and CS was typed by the writer in her presence on examination of victim and witness. After reading out of the contents of the CS, the IO has admitted that she does not understand the entire meaning of the language. In such a situation, we cannot expect that the recorded statement under Section 161 CrPC is correct. While agreeing with the above finding, this court deprecates such sordid state of affairs on the part of IO who has been entrusted to investigate such serious offence in the case.

44. The evidence of the PW-5 clearly reveals that there was an allegation of touching the private part of the victim by PW-2 at the time of incident and the same was brought into FIR by PW-3, therefore, evidence of the IO that she has not recorded statement of the victim on touching of the private part, cannot be ground to treat it as contradiction and improvement as allegation in FIR, 164 CrPC statements recorded by the learned Magistrate and deposition before the court are consistent. Therefore, contention of the learned senior counsel regarding contradiction or improvement is unacceptable as the deposition of PW-5 that PW-2 was shouting and scolding at the accused and dragged out him

of the room by pulling his hair an allegation of molesting and touching private part of the victim is very clear and unimpeachable. Further, it is also narrated in the FIR, as such, non recording of the statement of the victim by the IO cannot be treated as un-existed fact as the PW-2 was eye witness of the incident.

45. Upon scrutiny of the evidence of the DWs No. 1 & 2 to have previous enmity with the elder brother of the accused by a distance clan brother of the accused who are not known to each other, it is seen that same is an attempt to connect into the case to show some previous enmity with the family of the accused, however, during court examination, DW-2 has failed to convince that the victim and PW-2 had a knowledge about the divorce between the elder brother of the accused with a Buchi clan and thereby the allegation was made against the accused. In such case, it is not possible to have any enmity on the part of the PW-2 to make or concocted case against the accused using the victim to take revenge to the accused without having any knowledge of enmity with the elder brother of the accused. It was simply an attempt to take a plea of enmity.

46. Reference may be made to the observation of the Hon'ble Supreme Court in case of **State of Himachal Pradesh Vs. Shree Kant Shekari**, reported in **(2004) 8 SCC 153**, wherein it has been observed that in case where there is no enmity in between the parents of victim girl and the accused which could be foundation of false implications against the accused, no girl of tender age and her parents would like to jeopardize her entire future by false implicating a person alleging such heinous offence of rape.

47. There is no inconsistency or contradiction to disbelieve the evidence of the victim. The evidence of victim is of sterling character without any major contradiction and inconsistent, except a negligible inconsistency created by the IO due to her ignorance which this court has recorded (*supra*). It is well settled principle of law that conviction can be based on the sole testimony of prosecutrix provided it is credible, reliable and trustworthy and does not suffer from any infirmity. In present case, the evidence of the victim corroborated by PW-2 & 5 and the recorded statement under Section 164 CrPC which are materials facts or incriminating facts constitutes the guilt of the accused and the conviction can be based on the same.

48. In the case of **State of Maharashtra Vs. Bharat Fakira Dhiwar**, reported in **AIR 2002 SC 16**, the Hon'ble Supreme Court has held that some discrepancies in the statement of the victim of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in materials particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix up what witness saw with what he or she is likely to imagine to have been seen. While appreciating the evidence of the child witness, the court is required to rule out the possibility of the child being tutored. In absence of any allegation regarding tutoring or suing the child witness for ulterior purposes of the confidence inspiring testimony of such witness for purpose of holding the accused guilty or not.

49. In **State of H.P Vs. Prem Chand Singh**, reported in **AIR 2003 SC 708**, held that "children, in the first place, mix up what they see with what they

like to imagine to seen and besides, a little tutoring is inevitable in their case in order to lend coherence and consistency to their disjointed thought, which tend to stray. The extreme sentence cannot seek its main support from evidence of this kind, which even if true, is not safe enough to act upon for putting out a life.

50. On consideration of the evidence, it is safe to draw that the prosecution has proved the foundational fact of the case that the accused kiss the victim and inserted one of his hand inside the panty of the victim and thereby touched the private part of the victim. As correctly observed by the learned Special Judge that one fails to understand how IO has collected the swab of the victim when there was no allegation of penetrative sexual assault. It was not at all required to collect swab and sent it to FSL, a futile exercise and wastage of the time, resulted in delay in filing of the Charge-sheet for which the trial of the case has been obviously delayed.

51. On criminal sexual intent as well as presumption under section 30 of the Act, learned Special Judge has rightly observed the criminal intent could be broadly viewed from two aspects. Firstly, from circumstances gathered from the incident or pre-episode or posts episode incident and the other is gathered directly from incident itself under principle of *res ipsa loquitur*, a thing speaks itself. Section 7 defines the "Sexual Assault" as-*Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without*

*penetration is said to commit sexual assault."*

52. As recorded by the learned Special judge that it is admitted that it was first visit of the accused to the house of PW-2 and PW-6, therefore, the victim and the other child were not acquainted with the accused, however, the evidences of PW-2 revealed that the accused wanted to see her daughter and son and her husband PW-6 called the children. This piece of evidence is not disputed by the accused but he has admitted this fact in his personal defence evidence that PW-6 introduced him as uncle to the children and he gave some eatable items and money but PW6 stopped him to give any money to children. The evidence of PW2 about introducing the victim to accused by the PW6, is undisputed fact. PW-2 had deposed that the accused was holding the victim on his lap while sitting in Mura (A local tool). This piece of evidence has not been impeached by accused in his defence evidence but there is missing chain in defence evidence how the children went inside the room but the evidence of PW2 is very clear on it very deposing that she did not like the conduct of the accused on the statement of the accused saying that " arey beti tum itna bada ho geya" as there was no reason to say it as the accused was visiting her house for first time and also the conduct of accused to have taken the victim on lap while sitting in Mura. The evidence of PW2 also reveals that the accused went inside to see the children inside room as to know what they were doing, however, the accused in his defence evidence did not categorically deny it but claimed that he went to wash room. This fact is not also cross checked by the defence during cross examination from PW-5 and 6 as to know its correctness. In this regard, the plea of the accused is that he went to wash room and the

little child of the PW2 caught her hand and took him to room which is bed room of the accused. However, it is hard to believe the version of the accused to caught his hand by the children who is not acquainted with him.

53. In view of the evidence above, it is safe to draw a conclusion that the accused wanted to see the children of the PW- 2 ad 6 and took the victim child on his lap while sitting in Mura (Local Tool) and it was dislike by the PW-2 and sent off the victim with own child to room giving her own mobile. Further, the accused stated that he wanted to see the child inside the room as to know what they were doing and did not return for few minutes i.e. five 5 minutes or more. Hence, the pre-episode conduct of accused is not good and his criminal intent is manifest from his way of taking the child on his lap to which PW-2, who noticed bad intention of taking on his lap as well as statement of making a remark as if the accused had seen the victim before. The second aspects of criminal intent gathered directly from incident itself under principle of res ipsa loquitor, a thing speaks itself. As it is already conclusive that the accused, while kissing the victim touched the private part of the victim by his one hand inserting inside the panty. This piece of evidence has nothing to elaborate but itself speaks everything. No prudent man will say that the accused was not having culpable mental state to commit offence of sexual assault. Therefore, this court is in complete agreement with the learned Special Judge that the criminal intent and culpable mental state of the accused is crystal clear from the pre-episode incident as well as from the incident itself. In view of the fact, the prosecution has able to bring home the charge of offence under Section 8 of POCSO Act as well as Section 354 A (i) & (ii) of IPC.

54. On discharge of reverse burden of proof ad presumption 29 of POCSO Act, as recorded by the learned Special Judge, the Hon'ble Supreme Court has held that it is the general rule that in a criminal case the burden of proof is always on the prosecution, however, Section 106 of Indian Evidence Act is certainly not intended to relieve it of that duty. But then, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that it means facts that are pre-eminently or exceptionally within his knowledge. The section cannot be used to undermine the well-established rule of law that save in a very exceptional class of case, the burden is on the prosecution and never shifts decided in the case of **Shambu Nath Mehra V. State of Ajmer, (1956 SCR 199)**, however, Section 29 and Section 30 of the POCSO Act create statutory presumption of commission of the crime and culpable mental state of the accused and thereby it curves out an exception to the ordinary rule of presumption of innocence. The statutory presumption of Section 29 does not require the Court to believe the prosecution story as a gospel truth rather the prosecution has to lay the foundation of the case by proving the necessary facts. In this way, the rule of reverse burden does not violate human rights of the accused as he would always have the opportunity to rebut the presumption though the degree of that rebuttal evidence would be greater in such cases.

55. In **Federation of Obstetrics & Gynaecological Societies of India v. Union of India**, reported in **(2019) 6 SCC 283**, the Hon'ble Supreme Court has held, which is quoted herein under-

*"There can be a legislative provision for imposing burden of proof in reverse order relating to gender justice. In the light of prevalent violence against women and children, the legislature has enacted various Acts, and amended existing statutes, reversing the traditional burden of proof. Some examples of reversed burden of proof in statutes include Sections 29 and 30 of the POCSO Act in which there is presumption regarding commission and abetment of certain offences under the Act, and presumption of mental state of the accused respectively. In Sections 113-A and 113-B of the Evidence Act there is presumption regarding abetment of suicide and dowry death, and in Section 114-A of the Evidence Act there is presumption of absence of consent of prosecutrix in offence of rape.*

*These provisions are a clear indication of the seriousness with which crimes against women and children have been viewed by the legislature. It is also evident from these provisions that due to the pervasive nature of these crimes, the legislature has deemed it fit to employ a reversed burden of proof in these cases."*

56. The Hon'ble Supreme Court in **Attorney General v. Satish**, reported in **(2022) 5 SCC 545**, held that as under-

*"39. It may also be pertinent to note that having regard to the seriousness of the offences under the POCSO Act, the legislature has incorporated certain statutory presumptions. Section 29 permits the Special Court to presume, when a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of the Act, that such person has committed or abetted or*

*attempted to commit the offence, as the case may be, unless the Contrary is proved. Similarly, Section 30 thereof permits the Special Court to presume for any offence under the Act which requires a culpable mental state on the part of the accused, the existence of such mental state. Of course, the accused can take a defence and prove the fact that he had no Such mental state with respect to the act charged as an offence in that prosecution.*

*It may further be noted that though as per sub-section (2) of Section 30, for the purposes of the said section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability, the Explanation to Section 30 clarifies that "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact. Thus, on the conjoint reading of Sections 7 11, 29 and 30, there remains no shadow of doubt that though as per the Explanation to Section 11, "sexual intent" would be a question of fact, the Special Court, when it believes the existence of a fact beyond reasonable doubt, can raise a presumption under Section 30 as regards the existence of "culpable Mental state" on the part of the accused."*

*POCSO Act, unlike other statutes like NDPS Act, Prevention of Corruption Act, etc., is a special statute, providing stringent provisions as regards the nature of offences, investigation and trial and providing for steep penalties.*

*There is a paradigm shift in the burden of proof and degree of proof*

*under POCSO Act.*

*Presumption of guilt under the Act certainly cannot be based on presumed acts or assumptions, but established facts only.*

*Before the court presumes the guilt of the accused the Court must be satisfied that the charges brought against the accused are highly probable and not the product of figment of imagination, not mere allegations without any proper foundation. There must be cogent materials before the court to take the view that in all probability, the accused has committed the offence.*

*Presumption under Section 29 is a determinative deeming provision when certain fact is legally presumed to be established by holding the accused guilty of the offence charged.*

*Presumption under Section 29 will start operating only on the conclusion of the recording of evidence of the prosecution when the prosecution is able to make out a highly probable case on the basis of preponderance of probability.*

57. In **Bhupen Kalita (Supra)**, it has been held that which is quoted herein under:

*"Presumption of guilt under Section 29 of POCSO Act has to pass the test of reasonableness and fairness under Article 14 and 21 of the Indian Constitution.*

*The prosecution must establish the foundational facts (actual sexual act, sexual act Committed against the victim's will or consent, consent*

*obtained fraudulently etc.) on the standard of preponderance of probability.*

*The reverse burden upon the accused under Section 29 of the Act is akin to Section 105 Indian Evidence Act.*

*The accused has to discharge his reverse burden by proving his innocence on the touchstone of preponderance of probability.*

*Prosecution is not required to prove mens rea, rather the Court shall presume the existence of mens rea or guilty mind with respect to the offence Committed.*

*Absence of mens rea has to be proved by the accused beyond reasonable doubt under Section 30(2) of the Act.”*

58. On careful scrutiny of the defence witnesses, the accused has failed to disprove that he had no criminal intention to kiss while inserting his hand and touching the private part of the victim inside the room of PW-2 and on the other hand, has taken inconsistent plea of kissing on forehead of the victim in cross-examination and also attempt to make plea of enmity which is too remote to connect the case. Thus, this court has no other option but to agree with the learned Special Judge that from the proven facts of high probability to commit an act with culpable mental state is conclusive beyond all reasonable doubt. The prosecution has discharged the imposed duty to prove the charges not only through the foundational facts which does not suffer any infirmity but beyond reasonable doubt against the accused to constitute offence under section 8 of the Act. On the other hand, the duty of the accused to discharge the imposed

duty of reverse burden of proof even through preponderance of probability is not helpful to the defence to impeach the evidence of victim and PW-2 corroborated by PW-5 & 6 to disprove the incriminating evidences brought before the court by the prosecution against him but the accused has made a failed attempt to take plea of enmity and inconsistent plea.

59. In view of above, this court is of the firm view that the learned Special Judge, has rightly held that the accused had committed act of kissing and touching private part of victim with culpable mental state of mind and thereby committed an offence of sexual assault under Section 8 of POCSO Act and Section 354 A (i) & (ii) IPC, as the accused has failed to disprove the fundamental foundational facts proved against him by the prosecution under the principle of reverse burden of proof that the accused has not committed the offence of sexual assault. In view of the above facts, the conclusion by the learned Special Judge, that on the day of incident on 29.09.21 at 8.30 pm, the victim was in the bed room of PW-2 and 6, the accused came to the room and committed sexual assault as defined under section 7 of POCSO Act and punishable under section 8 of the Act and under section 354 A (i) & (ii) IPC as sexual assault by kissing and touching private part of victim with criminal intention of advancing physical contact is upheld.

60. As regard the submission of Learned Senior counsel, that the place of occurrence has not been proved by preparing rough sketch map, the learned Special Judge is right in his verdict that there is a difference between establish or prove of place of occurrence and preparing of rough sketch map of place of

occurrence. It is not always necessary to prepare rough sketch map of the incident when it could be narrated properly. Without rough sketch map also, place of occurrence could be proved. In the present case, place of occurrence is bed room of the PW-2 and it is clearly deposed by victim and PW-2 and established and proved during trial. The accused himself in his defence admitted that he went to the room of PW-2 where victim was sitting. Preparation of rough sketch map and proved of place of occurrence is two different things. Therefore, the case **Asraf Biswas** (Supra), by Hon'ble Calcutta High Court, relied upon, is not applicable to the present case and otherwise also has no binding on this court.

61. From the analysis of the evidence on record in its entirety and the law enunciated by the Hon'ble Supreme Court, I am of the view that prosecution has been able to establish the guilt of the accused/convict beyond reasonable doubt.

62. Upon careful examination and scrutiny of PW-1, 2, 3, 5 and 6, I am of the view that evidences of these witnesses are credible, reliable and trustworthy and the conviction of the accused/convict can be based on testimony of the PW-1 which is corroborated by other evidences which warrant no interference. I have, therefore, no incertitude in holding that the evidences led by the prosecution establishes the charges brought against the accused/convict beyond shadow of doubt. Therefore, learned Special Judge has rightly convicted the accused/convict.

63. Consequently, conviction and sentence of the accused/ convict, Shri Toli

Pale, vide judgement and order dated 04.01.2024, passed by the learned Special Judge, (POCSO), Pasighat, East Siang District, Arunachal Pradesh, in PSG SC (POCSO) Case No. 09/2021, is upheld. However, conviction and sentence of the accused under section 447 of IPC, is hereby set aside as the same is erroneous in view of the fact that no consideration was taken at the time of framing of charges or mentioned anywhere in the charge-sheet nor charge was framed under Section of 447 of IPC with an advise and observation that the learned Special Judge, POCSO, to be more careful in future.

64. Criminal Appeal stands dismissed, accordingly.

**JUDGE**

**Comparing Assistant**