



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

Case No. : Crl.A./7/2021

Manlem Wangsu
S/o Jankai Wangsu ,
Village Nyausa, PO/PS and PS Longding, District Longding, A.P, Pin . 792131
Contact Number 9612893350

VERSUS

THE STATE OF AP and Anr.
through the Public Prosecutor, Guahati High Court Itanagar Permanent Bench,
Naharlagun.

Advocate for the Petitioner : Sunil Mow

Advocate for the Respondent : P P of AP

Linked Case : IA(Crl)/23/2021

Manlem Wangsu
Age: 55
Occupation :
Address:S/o Jankai Wangsu

Village Nyausa P.O and P.S - Longding
District Longding
A.P

VERSUS

THE STATE OF AP and Anr.
Age: 0
Occupation :
Address:through the public Prosecutor
Guahati High Court Itanagar Permanent Bench
Naharlagaun
A.P.

2:Nonon Thoakdam
Age: 0
Occupation :
Address:W/o Longman

R/o Khasa Village
PO/PS Longding
District Longding
A.P Pin 792131

Advocate for : Sunil Mow
Advocate for : P P of AP appearing for THE STATE OF AP and Anr.: Advocate ,
appearing for 2, respectively.

BEFORE
HONBLE MRS. JUSTICE MARLI VANKUNG
HONBLE MR. JUSTICE N. UNNI KRISHNAN NAIR

JUDGMENT

Date : 26.07.2024
(Marli Vankung, J)

Heard Mr. S. Mow, learned counsel for the appellant. Also heard Mr. T. Ete, learned Additional Public Prosecutor for the State respondent No. 1 and Ms. N. Danggen, learned Legal Aid Counsel for the respondent No. 2.

2. The instant appeal filed under Section 374(2) of the Code of Criminal Procedure is for setting aside the Judgment & Order dated 21.06.2021 passed by the learned Special Judge (POCSO), Khonsa in Khonsa Spl. (POCSO) Case No. 02/2021, convicting the accused/appellant under Section 6 of the POCSO Act and sentencing him to undergo Rigorous Imprisonment for 20 years and to pay a fine of Rs. 20,000/-, i.d. S.I for 3 (three) months.

3. Facts of the case, in a nutshell, is that an FIR was filed on 09.12.2020 by the prosecutrix/victim before the Officer-in-Charge, Police Station, Longding to the effect that, on 06.12.2020 at around 9:00 PM, the accused/appellant along with his two friends had come to the residence of the informant searching for rice beer. Accordingly, the victim/prosecutrix prepared

rice beer for them. After serving them rice beer, she went outside to clean utensils and while she was cleaning the utensils, the accused/appellant suddenly, got hold of her, forcefully closed her mouth with his hand and took her to the NH at Donbosco colony, where he forcibly raped her. She therefore requested that necessary should be taken against the accused/appellant.

4. On receipt of the FIR, a case vide Longding P.S. Case No. 55/2020, under Section 376 IPC r/w Section 4 of the Protection of Children from Sexual Offence Act, 2012 (hereafter mentioned as POCSO Act) was registered and the OC undertook the investigation. During investigation, the statements the victim and other witnesses were recorded under Section 161 Cr.P.C. The victim girl was also sent for medical examination and examination report was duly received. The I.O also visited the place of occurrence and drew the sketch map of the P.O. The biological samples and wearing apparels were sent to CFSL, Gauhati. Thereafter, the statement of the victim under Section 164 (5) Cr.P.C was recorded before the learned JMFC, Longding. The Birth Certificate of the victim was seized. The case I.O found *prima facie* case against the accused/appellant under Section 376 IPC r/w Section 4 of the POCSO Act and filed the charge sheet on 08.02.2021 and sent the matter to the learned Judge, Special Court POCSO for trial. The learned Trial Court framed charge under Section 6 of the POCSO Act to which the accused/appellant pleaded not guilty and claimed for trial. During trial, the prosecution examined as many as 7 (seven) prosecution witnesses. The accused/appellant was examined under Section 313 Cr.P.C. No defense witnesses were produced. The learned Trial Court after hearing both the parties and on considering the evidence adduced, convicted the accused/appellant under Section 6 of the POCSO Act and sentenced the accused/appellant under imprisonment as mentioned in the above paragraphs. Aggrieved, the appellant filed the instant appeal.

SUBMISSIONS OF THE LEARNED COUNSELS FOR THE PARTIES

5. Mr. S. Mow, learned counsel for the appellant submitted that the impugned conviction and sentence order dated 21.06.2021 is liable to be set aside on the grounds that the delay of 3 (three) days in filing the FIR by the victim/prosecutrix has not been satisfactorily explained. The FIR clearly stated that the incident had occurred on 06.12.2020 at around 9:00 PM, while the FIR was filed on 09.12.2020. He also submitted that the PW-2 had deposed that the FIR was drafted by the uncle/ a relative of the victim/prosecutrix, however, the person who drafted the FIR was not made a witness in the case.

6. Mr. S. Mow, learned counsel further submitted that the depositions of the prosecution witnesses are not trustworthy and cannot be relied upon since the statements of the prosecution witnesses contradict each other and these inconsistencies in their statements make the prosecution case all together unbelievable. The learned counsel submitted that the prosecutrix/PW-1, during her cross examination stated that after the incident, she had knocked on the door of their house and that everyone in the family was asleep and her younger brother had opened the door, however, PW-2 had stated that the two other friends of the accused/appellant were playing with their mobile phones at the time when the prosecutrix had entered the house after the alleged incident. Both the PW-No.4 and PW No.5, stated that they were in the room when the prosecutrix came inside on the night of the incident. The alleged victim did not mention about the presence of the other two boys when she entered the house after the alleged incident. Due these inconsistencies the alleged victim cannot be said to a reliable witness.

The learned counsel further submits that the evidence of PW-4 and PW-5, shows that they, along with the accused/appellant, had gone to the house of the prosecutrix on that night of the incident, the offence could have also been

committed by either PW-4 or PW-5 since their presence was also confirmed from their statements and where the prosecutrix has clearly stated that she did not know the accused/appellant but was informed by her step-mother that the name of the accused/appellant was Janjam Wangsu. Thus, since the victim did not know the accused/appellant, there is every possibility that she had named the wrong person.

The learned counsel for the appellant further submitted that the learned Trial Court in the impugned judgment and order, had convicted the appellant by relying on the statement of PW-2 step-mother of the victim, who had stated that the accused/appellant had approached her and asked for forgiveness. That there can be no conviction based on an extra judicial confession. The learned counsel for the appellant has also pointed out that in the examination of the accused/appellant under Section 313 Cr.P.C., the accused/appellant had explained that when they accused him of committing the wrongful act, he went to clarify the matter but they lodged a false case against him.

7. Mr. S. Mow learned counsel thus submitted that in the instant case there were no eye witnesses to the incident wherein evidence of the victim is unreliable. That the prosecution evidence or all circumstantial evidence where the chain has not been established to prove beyond reasonable doubt the guilt of the appellant for committing an offence under section 5 of the POCSO Act and that he is entitled to be given the benefit of doubt and be acquitted.

The learned counsel for the appellant has relied on the judgment of the Apex Court in **Wakil Nayak Vs. State of Bihar**, reported in **1971 3 SCC 778** (para 16) wherein it was held that the court should examine whether the extra judicial confession is reliable and corroborated by evidence and in **Ram Singh Vs. The State of U.P.**, reported in **(2023) 7 SCC 727** where it was held that the chain of circumstances is to be so complete that it leaves no room to doubt

that the accused is guilty of the offence.

8. Per contra, Mr. T. Ete, learned Additional Public Prosecutor submitted that the delay in filing the FIR has been

explained in the statement of the prosecutrix where she explained that she did not disclose the incident immediately to her step-mother with whom she was staying, out of fear. The case I.O/PW-7 has also stated that there was a delay in filing the FIR due to the fear of the victim.

The learned Additional Public Prosecutor submitted that the evidence adduced by the victim that the accused/appellant forcefully raped her and that blood was coming out from her private when she regained consciousness, is corroborated by the medical report and the Doctor statement of the Doctor, PW3. That since there is no contradiction in the statement of the victim before the Court and her statement recorded under Section 164 Cr.P.C, the statement of the victim can be relied upon. He submits that to insist any corroboration of a reliable witness would be an insult to the injury. The presence of the accused/appellant at the place of occurrence on the said night of the incident is also duly established from the evidence of PW- No.2 and his two friends, PW-4 and PW-5.

9. The learned Additional Public Prosecutor thus submitted that from the evidence adduced by the victim girl and the other prosecution witnesses, it can be safely stated that the evidence of the victim girl is wholly reliable has cited the decision of the Apex Court in **Sunil Kumar v. State (Govt. of NCT of Delhi)** reported in **2003 11 SCC 367** (para 8 & 9) .

10. The learned Additional Public Prosecutor further submitted that the prosecution has established their case and even though the accused/appellant denied the commission of the offence, he is required to prove his innocence as per section 29 of the POCSO Act which provides that when a person is

prosecuted for committing an offence under Sections 3,5,7 and 9 of the Act, the Special Court shall presume that such person had committed an offence as the case may be, unless the contrary is proved. In the present case, the appellant has not been able to prove his innocence by producing any evidence to that effect.

The learned Additional Public Prosecutor submitted that on scrutiny of the statements given by the accused/appellant under Section 313 Cr.P.C, the accused/appellant had confirmed the evidence that the victim girl went outside on the said night and wash some dishes and that it was only him who had gone out of the house while his two friends were in the house. Further, there is no evidence to support his explanation under Section 313 Cr.P.C and failed to discredit the evidence of the prosecution through cross-examination, to dismantle the legal presumption against him and prove that he is not guilty as provided under section 29 of the POCSO Act .

The learned Additional Public Prosecutor also pointed out that the plea taken by the counsel for the appellant that the offence could have also been committed by either of the two friends who were present on the night of the incident was never raised before the Trial court and cannot be raised at this stage and since the victim girl had also mentioned the name of the accused in the FIR there was no requirement to further identification.

The learned counsel has relied on the decision of the Gauhati High Court (Principle seat) in ***Bhupen Kalita Vs. State of Assam***, reported in **2020 (3) GLT 403** (para 71).

11. Ms. N. Danggen, learned Legal Aid Counsel for respondent No. 2 submits that the age of the victim is settled and proved since the Birth Certificate and the School Certificate were seized and exhibited as Exhibit- 03. He learned legal aid counsel further submitted that the statement made by PW-

2 that the accused/appellant had asked for forgiveness under Section 8 of the Indian Evidence Act. And this was not questioned or challenged during cross examination in the Trial Court and therefore, cannot be challenged at this appellate stage That there were no grounds for setting aside the Judgement and order of the Judge, Special Court (POCSO) since the injuries sustained by the victim in her medical report clearly establishes that the offence of penetrated sexual offence was committed upon her.

EVIDENCE ADDUCED BEFORE THE LEARNED TRIAL COURT

12. We have heard and considered the submissions of the counsels for both the parties and in the light of the above submissions, we find it appropriate to briefly reproduced herein below the evidence adduced before the learned Judge, Special Court (POCSO):

13. PW-1 is the victim/prosecutrix, whoes deposition is to the effect that during the month of December, she stayed with her step-mother at Longding. On that night her step-mother had gone for Christmas carol and she was with her small brother. At about 9:00 PM, three boys came to their residents and demanded rice beer. She did not know the name of the boys. She prepared rice beer under threat and meanwhile, her step-mother came home and her step-mother prepared the rice beer for the three boys i.e., the accused/appellant and his two companions. Her step-mother then told them to go to their neighbour's house since a carol party was coming to their residence. Thereafter, the accused/appellant and his two friends went to the house of their neighbour. After some time, the carol party came and went away and the three boys came back to their house to return the glasses which they had used to consume the rice beer. Her step-mother asked her to wash the utensils and accordingly, she went outside to wash the utensils. While her step-mother was talking to the accused/appellant and the two boys, suddenly someone came near her and

shouted, which frightened her and then she saw that it was the accused/appellant who had come out and he asked her where the toilet was. She showed him the toilet and again started washing the utensils. The accused/appellant held her from behind and dragged her towards the highway. She shouted for help but he gagged her mouth and committed forceful rape upon her near the highway. Due to fear and trauma, she became unconscious. When she regained her senses, she found that she was lying on the ground, her pants was lying near her which was torn. She was bleeding from her private parts. She was very frightened but somehow managed to reach her house. She knocked on the door and her brother opened the door. Her step-mother asked her what had happened to her but she could not reply anything, since she was suffering from trauma and fear after the incident. Due to the shocked and fear, she started falling ill having pain on her stomach and private part. Because of which, she could not disclose the incident to anyone immediately. Later, she was taken to PS, Longding where she disclosed everything. She was also taken to Longding Hospital for examination and was also produced before the Judicial Magistrate, Longding for recording her statement. Because of her suffering, she was taken to Dibrugarh and thereafter to Margherita for treatment at healing centre. She identified her statement recorded under Section 164 Cr.P.C identified as Exhibit 3 and her Birth Certificate is also identified as Exhibit 4, wherein her Date of Birth is 02.03.2010.

During cross examination, she stated that she did not remember her date of birth. She also explained that she was washing the utensils outside the residents, which is near the Kitchen. She stated that she cannot remember the time when she went back home but when she reached home, everyone of the family was sleeping. She stated that she showed the bathroom to the accused/appellant by pointing the bathroom with her finger. That she could not

shout since the accused gagged her mouth with his hand. She stated that her original age is 13 years as told by her father. She stated that she did not disclose the incident immediately as she was suffering from shocked but on insistence of her step-mother, she told her about the incident after which she was taken to the police station. She denied that there was any consent on her part for performing sexual intercourse and that she had submitted the present FIR only on the insistence of her step-mother. She stated that she was taken to the hospital after 3 days of the incident and could not take bath during that time because she was suffering from ailment.

14. PW-2, stepmother of the victim has deposed that on 06-12-2020, she brought her stepdaughter (victim) from the village to look after her child since she had five minor children and her husband had died and her residence was under construction. On the date of incident, she went with the carol party for prayer. When she came back, she was told that three persons came to their resident and one of them raped her. The victim had not disclosed the matter on the same day may be due to fear or shyness, but after two days, victim complained to her of pain on her stomach and private part, then she disclosed the incident to her. PW-2 told the same to the villagers who went to the resident of accused Janjam Wangsu and then he was apprehended. She took the victim girl to Police Station where she lodged the FIR and disclosed everything. She was told by the victim that she was forcefully taken by accused Janjam and was raped. When she came to senses , the accused Janjam had fled away. She saw that her pant was torn. While the victim was still suffering, she went with the victim who lodged the FIR. The accused Janjam then came and asked for apology with folding hands. He said that he has committed the offence mistakenly. He even asked the victim whether she would like to stay with him or will he be sent to jail. PW-02 was in dismay as her husband is dead, and the

accused had committed such offence with her child. Later on, Police apprehended him. Police has seized the half pant and galey (traditional wrap skirt) of the victim where there was blood stain. The underwear was already washed. After the said incident, the victim has suffered a lot due to mental shock. She was counseled by CWC and later on taken to healing centre. Now the victim can talk properly. PW-02 has exhibited the seizure memo and photograph of wearing apparels of the victim she wore during the time of present incident.

During cross examination she stated that the matter was informed to Police by her brother-in-law. The FIR was drafted by some of her family member. She does not know the date of birth of the victim as she born before her marriage. The victim washed her inner garment after the incident. When PW-02 came home, she found the accused person at their residence, who demanded rice beer from the victim. They were drinking the rice beer. When the carol party came, she asked them to go away. She went with the carol party to the resident of neighbour but when she came back to her resident, she has again saw accused Janjam and his friends at their resident. She knows the accused and his parents. When she came back she was hungry and accordingly, took her dinner. Two companions of accused Janjam was talking to her, during that time, the victim went out of the resident for washing utensil. After about six/seven minutes, the victim came back alone. She asked her to have dinner but she did not have dinner and slept. On next morning also, she did not eat anything. She did not eat anything for few days. She denied the fact that the victim did not tell her about the incident. When the victim came back, other two boys were playing on their mobile. Accused Janjam is not known to the victim.

15. PW-3, Dr. Peter Tayeng is the doctor who conducted the medical of the victim girl on 09.12.2020. His deposition is to the effect that on that evening,

the police personnel brought the victim girl aged about 11 years for her examination and treatment. It was alleged that she was raped on 06.12.2020. Apart from the alleged history of rape, the patient was not having any other complaint. Her speech, gait and demeanor were normal. Vital signs were normal. On physical examination there were no signs of injury. On her genital examination, her labia, majora and minora were normal. There was tear on the anterior frenulum (top most part of the labia) and bleeding. There was tear on the posterior frenulum with active bleeding. There were tears on the lateral wall of hymen. There was active vaginal bleeding with white discharge. From physical and genital examination, there is sign of recent intra vaginal penetration. Doctor collected the vaginal swab and public hair sample and handed over the same to the IO for FSL examination. As per the requisition of IO., he prepared the medical report and handed over the same to the IO. The medical report is exhibited as exhibit- 02. He did not conduct any examination to determine the age of the victim as he was not asked to do so by the IO since there was a birth certificate of the victim girl.

16. PW-4, Shri Nokthap Wangpan and PW-5, Shri Nahbo Wangsu, are the two friends of the accused. Both of them deposed to the effect that on the day of incident, they were playing ludoo. Their elder brother Janjam Wangsu then came and asked them to accompany him for drinking rice beer. He took them to the residence of the instant victim girl. The girl was in the house and they asked her for rice beer, she told that her mother went to a carol party and there was no rice beer. On their request, she tried to prepare rice beer for them. After sometime, aunty (her mother) came back home and asked them to go away from their residence as carol party was coming. They told her that they may not sit at her resident but they will take away the rice beer. Then she prepared rice beer for them and gave it to them in one jug with glasses which they consumed

in a neighbor 's house. After sometime, carol party came and later went away. They again went to the resident of the sister. They have seen that the aunty was taking dinner and so they played games on their mobile. During that time, Janjam went out of the resident. The victim girl had also gone out of the house but she came in after sometime. They asked her about Janjam and she said that he went away. On 9th December 2020, they have came to know that Janjam has committed rape on the sister/victim girl during that night. During cross examination they stated that when they were sitting inside the house and do not know where the girl went. They did not know about the incident before 9th December.

17. PW-6/ Inspector Onyok Lego, the first Investigating Officer deposed to the effect that on 09-12-2020, he was posted at Longding Police Station as Officer in Charge, when at about 10.30 PM the victim appeared before him at police station and submitted a written FIR. It is alleged that on 06.12.2020 at around 9 PM Shri Janjam Wangsu S/O Manlem Wangsu of Niausa Village had forcefully raped her. On receipt of the FIR he has registered Longding PS Case No.55/2020 U/S 376 IPC R/W Sec 04 of POCSO Act and undertook the investigation of the case. During the investigation he has forwarded the victim girl to CHC, Longding for her medical examination. Accused Janjam Wangsu was arrested. He was sent to CHC, Longding for collection of Biological Sample. The attending doctor collected the biological samples of Accused as well as victim and handed over the same to him. He visited the place of occurrence and drew a rough sketch map. He has also taken photograph of PO. He has seized the clothes worn by the victim at the time of incident. The seized materials and the biological samples are sent to CFSL, Guwahati for examination. He has examined the victim as well as available witnesses and recorded their statements. The victim was send to magistrate for recording of her statements

u/s 164(5) CrPC. He has received the medical report of the victim. It is reported that there is evidence of recent intra-vaginal penetration. There after he went on leave and the case diary was handed over to Inspector A. Chama for further investigation. He has exhibited the FIR, the medical report, the 164 statement of the victim girl, birth certificate of victim, photographs and seizure memo of the wearing apparel of victim, photographs and rough sketch map of PO. During cross examination he deposed that the incident took place in the night of 06.12.2020 and the FIR filed during the night of 09.12.2020. He enquired about the delay of lodging the FIR, it is informed that due to fear, the victim disclosed the incident to her Guardian only after two days. He has not submitted charge sheet in the present case.

18. PW-7, Inspector Shri Akai Chama is the I.O who filed the chargesheet in present case. He deposed to the effect that initially the present case was investigated by Inspector O. Lego who was the OC of Longding Police Station. He availed Earned leave and accordingly the case diary was handed over to him for further investigation. He has received the 164(5) statement of victim recorded by JMFC, Longding. The CFSL report was not received, he sent reminder for the same through SP. As this is the case under POCSO act and mandatory period is about to be completed and investigation is almost completed except receipt of FSL report, he has consulted with higher Authority. The materials on record collected during investigation prima-facie revealed offence under Section 376 IPC and Sec 04 of POCSO Act against accused Janjam Wangsu. Accordingly, he laid Charge sheet. He exhibited the 164 statement of the victim girl recorded by JMFC, Longding, Charge Sheet submitted by him and his signature thereon. During cross examination he has stated that previous IO collected birth certificate of the victim. Hence, he did not send her for ossification test for determination of her age. Previous IO may say the distance

between the resident of victim and PO as he has visited the same. Maximum investigation was already done by previous IO as reflects from the CD. He has submitted the Charge Sheet as per the record. As per record he has found that the victim was raped by accused and accordingly laid the Charge sheet. The victim was raped once. During his cross examination, he stated that he has not recorded statement of the victim and other witnesses and hence he cannot say as to whom the victim disclosed about the incident first. He was not present at police station during the time of filling of FIR and he cannot say who came with the victim to the Police Station at the time of filling FIR. The statement of the prosecutrix recorded under section 164 Cr.P.C is exhibited as Exhibit No.03.

19. The accused was then examined under section 313 Cr.P.C. In the examination under section 313 Cr.P.C, the accused appellant has not denied the evidence that he along with his two other friends had gone to the house of the prosecutrix and asked her for rice beer. That her step-mother came home and she prepared the rice beer for the accused/appellant and his two companions. They left the house since a carol party was coming to their residence and they came back after the carol party left. The step-mother of the girl asked her to wash the utensils and accordingly, she went out of the residents and washed them. That the accused/appellant had asked her where the toilet was which the girl showed. The accused appellant however denied the evidence that he had committed rape upon the prosecutrix and explained that he went home after going to the toilet and had told the girl to inform his friends. He further denied that he had approached PW- No.2 to ask for forgiveness, but stated that he had approached them to explain that he did not do anything wrong.

FINDINGS AND DECISION THEREOF

20. On perusal and analysis of the evidence adduced before the learned trial court we find that that the reason for the delay of 3 days in filing the FIR,

wherein the incident is said to occur on 06.12.220 night and the FIR was filed on 09.12.2020, has been satisfactorily explained and we agree with the findings of the learned trial court where it was observed at paragraph 34 of the Judgement that *"the victim who is a child of 10 years 9 months and 4 days, has fainted due to shock and pain at the time of the offence. When she returned back, due to fear she has not stated anything to her step mother and she had not eaten anything for two days after the incident as due to the incident, she suffered from trauma and fear. In such a situation, non disclosure of such a heinous offence by a child for two days and filing FIR immediately after the disclosure of such heinous offence by a child does not create any doubt upon the case of the prosecution."*

21. We also find that the age of the victim girl is proved from her birth certificate and school certificate duly seized and exhibited as exhibit No. 04, wherein her date of birth is show as 02.03.2010 and thus the prosecutrix was below the age of 12 years at the time of the incident.

22. On the perusal of the testimony of the prosecutrix along with her statement recorded under section 164 Cr.P.C which was exhibited as exhibit-03, we find that the prosecutrix is consistent in her testimony that *the accused/appellant who had come out and he asked her where the toilet was. She showed him the toilet and again started washing the utensils. The accused/appellant held her from her back and dragged her towards the highway. She shouted for help but he gagged her mouth and committed forceful rape upon her near the highway. Due to fear and trauma, she became unconscious. When she regained her senses, she found that she was lying on the ground, her pants was lying near her which was torn. She was bleeding from her private parts. She was very frightened but somehow managed to reach her house.* The veracity of this testimony has not been shaken during her cross examination. The medical report exhibited as exhibit -02 further

corroborates her testimony wherein the PW No.3, the medical doctor, who examined the prosecutrix/victim on 09.12.2020, found injury on the genital part of the victim, which was found on both front and backside of frenulum (labia of vagina) with active bleeding and the Doctor had opined that there is evidence of recent intra vaginal penetration. We find that the depositions of PW2, PW4 and PW5 have also confirmed the presence of the accused appellant at the place of occurrence and that the accused appellant had left the house while the prosecutrix/victim girl was also outside washing utensils on 06.12.2020 night, this duly corroborates the testimony of the prosecutrix/victim girl.

23. It may be noted that the Apex court in **Sunil Kumar v. State (Govt. of NCT of Delhi), (supra)** that ;

“8. In Vadivelu Thevar v. State of Madras [AIR 1957 SC 614 : 1957 Cri LJ 1000] this Court had gone into this controversy and divided the nature of witnesses in three categories, namely, wholly reliable, wholly unreliable and lastly, neither wholly reliable nor wholly unreliable. In the case of the first two categories this Court said that they pose little difficulty but in the case of the third category of witnesses, corroboration would be required. The relevant portion is quoted as under : (AIR p. 619, paras 11-12)

“Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way — it may convict or may acquit on the testimony

of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses."

24. Thus, in our considered opinion the testimony of the prosecutrix/ victim girl comes under the category of being '*wholly reliable*' for the reasons already discussed in the foregoing paragraphs, in addition, we have noted that her testimony has been further corroborated by the medical evidence and the depositions of PW2, PW4 and PW5. This court also finds the submission that the offence of rape could also have been committed by either of the two friends of the accused who deposed as PW no4 and PW No.5, farfetched, since the prosecutrix did not depose that she did not see the accused but that her step mother told to her his name later, further this plea was not raised before the trial court.

25. We also find that the accused could not bring any contradiction to the prosecution case as provided under Section 29 of POCSO Act, which provides that when a person is prosecuted for committing any offense under Section 03, 05, 07 and Section 09 of the Act, the Special Court shall presume that such person has committed the offence as the case may be unless the contrary is proved. No evidence is produced by the accused to cast any doubt on the veracity of the prosecution evidence. We have also noted that the appellant had not crossed or raised any issue before the learned trial court regarding the statement made by PW No.2 that the accused had approached her and had

asked for forgiveness.

26. We find it appropriate to refer to the observations made by this court in the Principal seat in Bhupen Kalita Vs. State of Assam (Supra) which is applicable in the instant case wherein it was held that :-

“71.

(A) *The prosecution has to prove the foundational facts of the offence charged against the accused, not based*

(B) *on proof beyond reasonable doubt, but on the basis of preponderance of probability.*

(B) *Accordingly, if the prosecution is not able to prove the foundational facts of the offence based on preponderance of probability, the presumption under Section 29 of the Act cannot be invoked against the accused.*

(C) *If the prosecution is successful in establishing the foundational facts and the presumption is raised against the accused, the accused can rebut the same either by discrediting the prosecution witnesses through cross-examination or by adducing his own evidence to demonstrate that the prosecution case is improbable based on the principle of preponderance of probability. However, if it relates to absence of culpable mental state, the accused has to prove the absence of such culpable mental state beyond reasonable doubt as provided under Section 30(2) of the Act.*

(D) *However, because of legal presumption against the accused, it may not suffice by merely trying to discredit the evidence of the prosecution through cross-examination, and the defence may be required to adduce evidence to dismantle the legal presumption against him and*

prove that he is not guilty. The accused would be expected to come forward with more positive evidence to establish his innocence to negate the presumption of guilt."

27. Thus, for the reasons discussed above we find that the prosecution has proved the guilt of accused under section 6 of POCSO Act beyond reasonable doubt and therefore call for no interference of the Judgment & Order dated 21.06.2021 passed by the learned Special Judge (POCSO), Khonsa in Khonsa Spl. (POCSO) Case No. 02/2021, convicting the accused/appellant under Section 6 of the POCSO Act.

Accordingly, Crl.Appl No. 07(AP) 2021 stands dismissed and disposed of.

JUDGE

JUDGE

Comparing Assistant