



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

Case No. : CrI.A./19/2023

Padi Tamo
S/o Late Padi Kago,
A Resident of Reru Village, PO/PS Ziro, District Lower Subansiri, Arunachal Pradesh.

VERSUS

THE STATE OF AP and Anr.
Represented by the Public Prosecutor. 2:Yashi Dulom
Age: 0
Occupation

Advocate for the Petitioner : Mr . D. Majumdar, Mr. D. Laji,

Advocate for the Respondent :Mr. G. Tado, Addl. PP, AP
Ms. S.V. Darang, Amicus Curiae.

BEFORE
HONBLE MR. JUSTICE KARDAK ETE

Date of hearing : 09.01.2024
Date of judgment : 21.02.2024

JUDGMENT & ORDER (CAV)

Heard Mr. D. Majumdar, learned Senior Counsel assisted by Mr. D. Lazi, learned counsel for the appellant. Also heard Mr. G. Tado, learned Additional Public Prosecutor for the

State and Ms. S.V. Darang learned Amicus Currie.

2. This criminal appeal is preferred by the appellant Sri Padi Tamo, assailing the judgment and order dated 18.04.2023 passed by the learned Special Judge (POCSO), Yupia, in POCSO Case No. 40/2018 whereby the appellant has been convicted under section 6 of the POCSO Act, 2012 and sentenced to undergo Rigorous Imprisonment for 10 years and also to pay fine of Rs.20,000/- (Rupees twenty thousand) only and in default of payment of fine to undergo simple imprisonment for another 3 (three) months.

3. The case set up by the prosecution, in brief, is that on 07.04.2016, one Smti Yashi Dulom, lodged an F.I.R. before the Officer-In-Charge, Women Police Station, Itanagar, alleging that her neighbor one Sri Padi Tamo, residing at Old I.B. Line, C-sector, Itanagar, raped her 13 years old daughter Miss 'M' (name withheld), a student of Class-VI during the month of December,2015, on being stated by the victim. It is also stated that the matter was disclosed only after the medical formalities were done by the complainant on her daughter on being complained of having pain in the stomach and her unusual appearance.

4. On receipt of the FIR, a case was registered being Itanagar Women Police Station Case No.27/2016 under Section 376 (2)(i) of IPC, 1860 read with section 6 of POCSO Act against the accused/appellant. During the course of investigation, the investigating Officer (in short I.O.) visited the place of occurrence, prepared the scene of crime and drawn sketch map of the place of occurrence, taken photograph of place of occurrence and examined the complainant, victim girl and after examining the witnesses recorded their statements under section 161 of Cr.P.C. The accused/appellant was arrested on 08.04.2016. The statements under section 164 Cr.P.C were also recorded.

5. After completion of investigation, charge-sheet was filed against the accused/appellant under section 341/342/376(2)(i)/506 IPC read with section 6 of the PCSO Act on 16.05.2006.

6. Learned trial Court framed the charge on 19.06.2019 against the accused/appellant under section 6 of POCSO Act. The accused/appellant pleaded not guilty and claimed to be tried.

7. During the course of trial, the prosecution has examined in all 6 (six) witnesses. Prosecution evidence was closed on 06.08.2022 and thereafter, the accused/appellant was examined on 29.08.2023 under section 313 of Cr.P.C. wherein he denied all the allegations. Thereafter, the accused/appellant adduced one defence witness as DW-1. On consideration of

the evidence and the materials available on record, the learned Special Judge, POCSO, Yupia, has convicted the accused/appellant under section 6 of POCSO Act and sentenced him to undergo Rigorous Imprisonment as mentioned above.

8. Mr. D. Majumdar, learned Senior Counsel, submits that there are contradictions in the testimony of the prosecutrix. In the section 161 Cr.PC statement recorded by the I.O., the victim has stated that in the month of December, 2015 the accused appellant called her and asked her to go to nearby shop to bring some eatable thing and she went to the nearby shop and came back to handover the things at his house and it was then she was pulled in by the accused and committed rape on her person, whereas in the section 164 Cr.PC statement she stated that in the month of December, 2015 while she was going to shop the accused met her on the road side and requested her to bring something for him from the shop and therefore while she was waiting for the accused to give her money to buy things for the accused, near his house, the accused/appellant came near to her and took her inside his house. Therefore, there is a serious contradiction of facts narrated by the victim in her statement recorded under sections 161 and 164 of the Cr.PC. Further, in the statement of the victim recorded under section 164 of Cr.P.C. she had stated that the "accused opened her skirt and sporting and the accused was wearing Towel", whereas, in her deposition, she deposed that the accused had opened her long pant and panty. He further submits that FIR was lodged after more than 3 (three) months without actual date from the date of alleged occurrence and as such there is delay in lodging the FIR.

9. Mr. Majumdar, learned Senior Counsel, submits that the finding of the learned trial court regarding the age of the victim is based on a document called school leaving certificate which was exhibited as Ext.P-6 which is not a document as mentioned in section 94(2) of the Juvenile Justice (Care and protection of children) Act, 2015 (in short the Act of 2015) in as much as, as per section 94(2) of the Act of 2015 the age of the victim shall be determined by seeking evidence by obtaining the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination board, if available; and in the absence of thereof; the birth certificate given by a corporation or a municipal authority or a panchayat; and only in the absence of above two, age shall be determined by an ossification test or any other latest medical age determination test conducted on the order of the committee or the board. Moreover, the document exhibited as Ext. P-6, the school leaving certificate was purportedly issued by the Head teacher of Tani Vidyalaya, Balwadi, however

the prosecution has failed to prove the document by calling the person who issued the document. It is not in dispute that mere marking of a document as an exhibit does not amount to its proof unless the maker of the document comes before the court and prove the document. Hence, in the present case since the document exhibited as Ext. P-6 was not proved by calling the issuing authority, the learned court ought not to have relied on the exhibit P-6 document so as to come to a conclusion that on the date of alleged commission of the offence the victim was below 16 years of age more so when the exhibit P-6 document is not a document as mentioned under section 94(2) of the Act of 2015 required for determining the age of a victim.

10. Mr. Majumdar, learned Senior Counsel, submits that while convicting the accused appellant the learned trial court has failed to consider the evidence of the PW-1, who deposed in her cross examination that the termination of pregnancy of the victim was informed to the police and that the paternity of the foetus in the womb was not determined, whereas in the deposition of the investigating officer she had stated that the information about the abortion of pregnancy of the victim was never provided to the police and no permission was obtained from the police for terminating the pregnancy. Hence, there is fault in the investigation by the police in as much as from the foetus of the victim the paternity would have been easily determined through conducting that test which would have been a conclusive evidence so as to determine the guilt of the accused. Since the pregnancy of the victim was aborted without informing the investigating officer the same raises a serious doubt on the case of the prosecution and therefore the accused is entitled to the benefit of doubt as the prosecution has failed to prove the guilt of the accused beyond reasonable doubt.

11. Mr. Majumdar, learned Senior Counsel, submits that in the deposition of the investigating officer who was examined as PW-6, he had stated that he seized the Aadhar card and school progress report of the victim which were later on released on Zimma, however in the seizure memo there is no mention of any witness in whose presence the documents were seized which raises a serious doubt on the conduct of the investigation officer, more so, when the offence alleged is serious in nature.

12. Mr. Majumdar, learned Senior Counsel, submits that in the present case, the parents of the victim were never called for by the prosecution to prove the age of the victim. Moreover, in the deposition of the victim she has stated that at the time of termination of her pregnancy

in Heema Hospital her mother and elder sister were present in the hospital. However, neither her elder sister nor the doctor who conducted the abortion were ever examined by the prosecution to prove the case of the prosecution. Therefore, the prosecution has failed to prove the guilt of the accused with cogent and reliable evidence and therefore the accused is deserved to be acquitted in absence of any cogent evidence proving his guilt beyond reasonable doubt.

13. Mr. Majumdar, learned Senior Counsel, submits that while lodging FIR by the aunty of the victim had never stated that the victim was impregnated by the accused and it was for the first time she stated before the police while recording statement under 161 of Cr.PC.

14. Mr. Majumdar, learned Senior Counsel, submits that the learned trial court has not considered the evidence of the PW-3, Dr. Salim Ahmed, before whom the victim was taken for the first time as she was complaining of having not menstruation for four months. The PW-3 though suggested her for some blood test and to come back, the victim thereafter never turned up. Further, the learned trial court had also failed to consider the evidence of the PW-5 who in her cross examination deposed that she had not found injury on the private part of the victim and that after her advice for ultra sound and blood test the victim did not come back to her. He submits that such conduct of the victim and her family members raises a serious doubt on the case of the prosecution. Hence, it can be safely held that the prosecution has failed to prove the case beyond reasonable doubt so as to convict the accused for the offence as narrated above.

15. Mr. Majumdar, learned Senior Counsel, submits that from the foregoing submissions and the law laid down by the Hon'ble Supreme Court and High Court, the conviction of the accused is not sustainable in the eye of law and the same is liable to be set aside.

16. In support of his submissions Mr. D. Majumdar, learned Senior counsel, has relied on the following judgments :

- i. Ashwani Kumar Saxena -vs- State of Madhya Pradesh reported in (2012) 9 SCC 750.**
- ii. LIC of India & Anr.-vs- Ram Pal Singh Bisen reported in (2010) 4 SCC 491.**
- iii. Santosh Prashad-vs-State of Bihar reported in (2020) 3 SCC 443.**
- iv. Raja and Ors. -vs- State of Karnataka Reported in (2016) 10 SCC 506.**

- v. **Mrinal Das -vs-13 State of Assam reported in (2017) 5 GLT 626.**
- vi. **Raju Vs State of MP reported in (2008) 15 SCC 133.**
- vii. **Rai Sandeep vs State (NCT of Delhi) reported in (2012) 8 SCC 21.**
- viii. **Ram Das and Ors. -vs- State of Maharashtra reported in (2007) 2 SCC 170.**
- ix. **Bhupen Kalita -vs- State of Assam reported in (2020) 3 GLT 403.**
- x. **Manirul Islam -vs- The State of Assam reported in (2021) 3 GLT 128.**

17. On the other hand, Mr. G. Tado learned Additional Public Prosecutor submits that delay in lodging the FIR is not fatal to prosecution as an incident of Rape to victim (minor) came into light only after detection of 3 & ½ months pregnancy. He reasoned and justified that date of lodging FIR (Exh.P-1) was on 07.04.2016 soon after detection of pregnancy. Date of seizure regarding medical documents & age proof documents (Exh.P-2 & 6) was on 08.04.2016 and the date of alleged incident was in the month of December, 2015. He submits that both the depositional statement of PW-1 (informant) and her husband, PW-2, remained intact and unshaken during cross examination and the same stand corroborated by P.Exh.-4 and Sec. 164 (5) Cr.PC statement of victim. He submits that from the depositional statements and stated circumstances, it can be safely inferred that there was justifiable grounds for causing delay in lodging FIR.

18. Mr. Tado, learned Addl. PP submits that unlike physical assault case, corroboration in the form of eye-witness in sex offences especially rape is least expected or cannot be expected, having regards to the very nature of the offence. Such dastardly and heinous act generally occurs in isolation as observed by Hon'ble Apex Court in catena of decisions. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. He submits that victim was impregnated for 3 & 1½ months as opined by the Gynecologist (PW-5) is but a medical corroboration of sexual penetration suffered by the victim out of forceful physical conduct of appellant. Besides, statements of evidences of PW-1, 2 & D.W-1 are fully corroborates with consistent statements of the victim u/s. 161 Cr.PC, u/s. 164(5) Cr.PC & deposition before the court.

19. Mr. Tado, learned Addl. PP, submits that prosecution has no comments beyond record pertaining to termination of foetus as to how, when and why. However, depositions of

Informant Smti. Yashi Dulom (PW-1) dated 12/09/2019, Shri Pura Aiya, (PW-2) and deposition of Victim (PW-4) clearly proved the fact and as such from above proven facts, a question of non conducting of DNA profiling to determine paternity of the foetus does not arise as here is a case wherein the appellant admitted to have committed sex with the victim and begged apology for what he did.

20. As regards proof of age of victim, Mr. Tado, learned Addl. PP submits that the Ld' Special Judge is well justified in holding that the victim here in this case was below 16 years of age on the basis of Exh.P-6 i.e., 'School Leaving Certificate' dated 08/03/2010 issued by authority of Tani Vidyalaya, Balwadi, C-Sector, Itanagar on completion of Class K.G II wherein date of birth of the victim is mentioned as 05.01.2004 according to Admission Register and which is supported by School Progress Report documents issued from different school i.e., K.V-2, Itanagar. He submits that the learned Special Judge has given a finding with sufficient reasons for conviction of the accused/appellant. It is evidently found that the prosecutrix was below 16 years of age in the month of December, 2015, i.e. at the time of commission of offence. He further submits that section 94(2) of the Act 2015 and sections 35, 61,62 and 63 of Evidence Act has to be taken into consideration conjointly to arrived at conclusion and the same has been judiciously exercised by Ld Special Judge and as such the contention of the appellant that Exh.P-6, an age proof certificate of first attending school was not legally proved has no legal basis. It is a matter of record that evidence pertaining to age proof was not at all assailed and demolished by the defence counsel during entire period of trial.

21. Mr. Tado, learned Addl. PP, submits that sections 29 & 30 of POCSO Act are one of the basis for conviction in the instant case as reflected in paragraph 50 of impugned judgment & Order 18.04.2023 passed by the Ld. Special Judge, Yupia, who has observed that "The trajectory of criminal Jurisprudence recognizes in any form adduced by an accused in his defence. In the case on hand, testimony of D.W-1 factually established that accused and victim were known to each other for quite sometimes until occurrence. So, in the attending facts, presumption of guilt provided u/sec. 29 & 30 POCSO Act is fully justified.

22. He submits that it is often times observed by the Apex Court that an accused can be held guilty of commission of an offence of rape, if the solitary evidence of prosecutrix is sufficient provided the same inspired confidence and appears to be absolutely trustworthy, unblemished and sterling quality. A settled proposition of law is that conviction can be based

23. Mr. Tado, learned Addl. PP submits that it is always bound to have a minor discrepancies and technical defect will crept in during investigation or trial, so it shall not be impediment for delivering justice and that has to be over-looked as observed by Hon'ble Apex Court. Therefore, Mr. Tado, learned Addl. PP, prays that this Hon'ble Court may uphold the conviction and sentence of imprisonment vide impugned judgment & Order 18.04.2023 and 01.05.2023 passed by the Ld' Special Court , Yupia to secure the ends of justice or remand back the matter for retrial.

24. Mr. Tado, learned Addl. PP, in support of his submissions, has placed reliance on the following judgements:-

- a. **State of Himachal Pradesh-vrs- Sanjay kumar Sunny, reported in (2017)2 SCC 51.**
- b. **Bharwada Bhoginbhai Hirjibhai -vrs. State of Gujarat, reported in (1983)3 SCC 217.**
- c. **Rishipal Singh s. State of Uttar Pradesh reported in 2021 SCC online SC 1079.**
- d. **Sanjeev Kumar Gupta vs. State of Uttar Pradesh, reported in (2019)12 SCC 370,**
- e. **Navin Dhaniram Baraiya -vs- The State of Maharashtra, reported in (2018) 0 CrL.J 3393.**
- f. **Ganesan-vrs.- State, reported in (2020)10 SCC 573.**

25. Ms S.V. Darang, learned Amicus Currie, while referring to the statements of victim under section 161 and 164 of Cr.P.C. as well as the deposition before the Court submits that the statements of the victim are substantially consistent which is trustworthy and credible. Any minor contradiction here and there would not be fatal to the case of the prosecution. Learned Amicus curie has referred to the deposition of DW-1 who had stated that he knew victim and her aunt (PW-1) for quite some time until occurrence. He revealed that he was their neighbor during relevant time and used to call the victim as sister (Behen). He had further deposed that the accused and the complainant were his immediate neighbors residing

nearby IB Colony, Itanagar; their residences were located at about 30 meters away from his residence. DW-1 further stated that since 2009, he was neighbor of accused and complainant, and deposed that accused being Govt. Employee, used to go to his office by 7 AM, and would return by evening and not mingle up with the neighbors. He had seen him alone most of the time. He had deposed that he never heard of any similar offences committed by him in past upon any person. He further deposed that one evening at about 10 PM, PW 2 (husband of complainant) came to his room and told him that accused had impregnated the victim about two months ago. DW-1 had stated that the complainant and her relative had already brought the accused to the residence and PW-2, told him that accused should no longer be kept in his residence and should be handed over to police in order to save him from any assault by the relatives of the victim.

26. Learned Amicus curie submits that the testimony of DW-1 does not support the case of the accused appellant. She further submits that the examination under section 313 of Cr.P.C. reveals that the appellant could not give any explanation to the incriminating evidence put to the appellant.

27. In support of her submissions, Ms S.V. Darrang, learned Amicus Curie has placed reliance on the Judgment of the Supreme Court in **Dharmendra Singh Vs. NCT of Delhi**, reported in **(2011) 7 SCC 130**.

29. I have considered the submissions of learned counsel for the parties and examined the learned trial court record and also perused the judgement and order assailed herein.

30. To appreciate, this court would refer and consider the deposition/evidence of the prosecution witnesses as well as defence witness. The recorded depositions are:-

I. PW-1, the informant, had deposed that after being disclosed and narrated by the victim about the occurrence, she and her husband telephonically called the accused to the house in that evening at around 9:00 PM. When confronted with the facts of him raping their daughter (victim), he apologized with folded hands for what he did to prosecutrix. He admitted committing sexual intercourse with the victim at once. Thereafter, on confirmation from the accused himself, her husband informed the matter to police over telephone. Accordingly, the accused was arrested on the same night. PW-1 stated that on next day morning, she lodged a formal FIR at Itanagar women Police Station and the police forwarded the victim to hospital

for examination. The police also seized medical documents of victim (ultrasound, pregnancy reports, etc.) from her. PW-1 had deposed that the police has seized the age proof document of victim. She deposed that the victim was borne on 05.01.2003. PW-1 has admitted the FIR (Ext.P-1) and proved its contents by Ext.P-1(a) as her signature appended on it. PW-1 has also identified Ext.P-2(a) as her signature appended on seizure memo of victim's medical prescription. On cross examination, PW-1 stated that the victim was her niece, daughter of her younger brother. PW-1 has stated that offence was committed in the afternoon time during her absence. She has further stated that she had disclosed to the police about the accused threatening to kill her if she disclosed the offence to any person. She stated that the termination of victim's pregnancy was informed to police however, paternity of feotus was not determined.

II. PW-2, husband of informant, deposed that the accused was his neighbor at the time of occurrence since early 2016. He has admitted that victim Miss "M", aged about 13 is the daughter of informant's (PW-1) brother and studying in Class VI standard. He deposed that one day the victim girl had complained of her stomach pain and was not keeping well. Then, he took her to Heema Hospital, Itanagar for medical checkup. In the Hospital, the Gynecologist diagnosed her pregnancy. He brought her back to their home and informed the matter to his wife/informant/PW-1. PW-2 further deposed that after coming back to home, he and his wife (PW-1) enquired about her pregnancy and the victim narrated that the accused once committed sexual intercourse with her inside his bedroom. PW-2 further deposed that on the same night, the accused came to their home when called for and admitted committing sexual intercourse with the victim and the accused apologized for what he did. He has stated that on his advice, PW-1 has lodged the FIR. In the cross examination, PW-2 has admitted that the accused was his neighbor for about five years before occurrence and he has never heard the victim complaining of molestation or any other harassment done to her by the accused. PW-2 further admitted that Quarter of the accused is at the distance of about 20-30 meters away from his quarter. PW-2 has admitted that there were some quarters separating the place of occurrence from his quarter. He has admitted that there was another quarter lying adjacent to the place of occurrence towards his quarter. PW-2 has stated that the victim being minor, the doctor suggested them for termination of her pregnancy, which they have followed. PW-2 has further stated that initially some relatives of the accused came to them for settlement of the case but he was not aware of any demand made by his wife for

III. PW-3, the Doctor, Dr. Salim Ahmed, Gynecologist, deposed that on 07.04.2016, the victim came to Heema Hospital OPD and told him that she missed menstruation for last four months. So, he suggested her to get blood test. This witness has admitted the prescription (letter pad) bearing his particulars (identity) as Ext. P-3 in evidence and proved its contents by Ext. P-3(a) as his signature appended on it. On cross examination, PW-3 deposed that he has reflected the age of victim as 14 years as disclosed by her parent.

IV. PW-4, the victim (examined in-camera). She had deposed that she knew the accused, recognized him and disclosed that she used to call him as "Tamo uncle". She stated that accused was her neighbor. She deposed that in the year, 2016 at 2:30 PM, after coming back to residence from school, she was going to local shop in the meantime accused called her on pretext of giving money to buy some articles for him too. So, when she advanced her hand to get the money from him, he caught hold of hand and gagged her mouth with his palm. Thereafter, he pushed her down on the bed, opened her long pant and panty. The accused put down his pant. She further deposed that as she was lying on the bed and accused was lying on my body and the accused was physical to me. Thereafter, she was allowed to go out from his house. She had stated that she suffered pain in her private part. Since then, she was not having menstruation for two months. On her complaint of stomach ache, she was taken to Heema Hospital Itanagar by her father (PW-2) for medical check-up. Based on the Ultra sound reports, doctor detected her pregnancy and after coming back to their residence, she disclosed to PW-1 & 2 that "Tamo uncle" (accused) was responsible for her pregnancy. She has stated that her pregnancy was terminated in the Heema Hospital in the presence of PW-1 and her sister. She has admitted of giving statement before the Magistrate and police after registration of the present case. On cross examination, the victim deposed that there were two houses (bachelor barrack) between her house and the place of occurrence, being occupied by residents. She has stated that she was scared to tell the incident to her parents. On suggestion, PW-4 denied that the accused was not responsible for her pregnancy and said he was her neighbor for long period of time. On further suggestion, she denied any other person had impregnated her.

V. PW- 5, Dr. Binpi Karlo, had deposed that on 09.04.2016, police officials from Itanagar women Police Station brought Miss "M", 13 years old with history of sexual assault by her

neighbor, which occurred about three months back. As per victim's version, her last menstruation was in the month of December, 2015. PW-5 deposed that during medical examination, she found victim to be pregnant for about 18 weeks. Accordingly, she advised the victim's parent to take Ultra- sound and blood test/investigation. PW-5 has admitted her prescription (OPD Slip) (Ext.P-4), which is prescription of the patient prescribed by her and her signature as Ext. P-4(a). In cross examination, PW-5 admitted that she did not find any injury on the private part of the victim. On suggestion, the witness stated that she could not say whether victim was used to having regular sex or not. She deposed that patient (victim) did not come back to her with ultrasound report.

VI. PW-6, the I.O. She had stated that on 08.04.2016, the then OC, Itanagar Women Police Station, received a written FIR from PW- 1 (Mrs. Yasi Dulom) alleging that in the month of December, 2015 Shri Padi Tamo (accused) raped her minor daughter Miss "M". PW-6 deposed that the victim was pregnant for 3 & 1/2 months at the time of lodging of FIR. She stated that during investigation, she has examined victim, complainant and other witnesses. She got the victim examined by Medical Practitioner (doctor) at CHC, Itanagar from where she was referred to Heema Hospital, Itanagar. On the same day of lodging FIR, the accused was arrested and got medically examined at R K Mission Hospital. After taking statement of accused, she visited the place of occurrence and prepared rough sketch map of scene of crime. She stated that medical reports of victim received from the CHC, Itanagar and Heema Hospital, Itanagar confirmed the victim's pregnancy. She stated that during investigation, she forwarded the victim to learned Magistrate court, Yupia for recording her statement and collected her deposition recorded under section 164 Cr.PC. PW-6 stated that she has seized Aadhar Card and School Progress Report of the victim showing her date of birth as 05.01.2004. She had deposed that at the time of occurrence, victim was barely 11 years and 11 months old. After thorough investigation, she laid the charge sheet under section 376 (2) (1), 341, 342 & 506 IPC, R/W Sec. 6 of POCSO Act 39. She has admitted following documents: - 1. Ext.P-2 is seizure memo of victim's medical prescription and Ext. P-2(c) as her signature on the seizure memo. 2. Ext.P-5 is the rough sketch map of PO and Ext. P-5(a) as her signature. 3. Ext.P-6 is the school leaving certificate of victim. 4. Ext.P-7 is the charge sheet and Ext. P-7(a) & (b) are her signatures appended on it. On cross examination, PW-6 deposed that she has examined three witnesses in the case including the victim. On suggestion, she has admitted that the PO is surrounded by houses of neighbor, who were

residing in the locality at the relevant time. She has accepted that she did not examine the neighbors of the accused and informant. On further suggestion, she has admitted that other than the family members of the victim, she did not record the statement of other persons. She has accepted that she did not make specific request to any authority to ascertain the father of the fetus. On further suggestion, she has denied that pregnancy of victim was terminated on her permission. On further suggestion, she has denied that victim had any boyfriend at the relevant time.

VII. Shri Kuru Habung, DW-1, has deposed that he knew victim and her aunt (PW-1) for quite some time until occurrence. He revealed that he was their neighbor during relevant time and used to call the victim as sister (Behen). He further deposed that the accused and the informant were his immediate neighbors residing nearby IB Colony, Itanagar; their residence is located at about 30 meters away from his residence. DW-1 further stated that since 2009, he was neighbor of accused and informant. DW-1 stated that accused being Govt. Employee, used to go to his office by 7 AM, would return by evening and not mingle up with the neighbors. He had seen him alone most of the time. He deposed that he never heard of any similar offences committed by him in past upon any person. He further deposed that one evening at about 10 PM, PW 2 (husband of informant) came to his room and told him that accused had impregnated the victim about two months ago. DW-1 stated that the informant and her relative had already brought the accused to the residence and PW-2, told him that accused should no longer be kept in his residence and should be handed over to police in order to save him from any assault by the relatives of the victim.

31. On scrutiny of the testimony of the prosecution witnesses, it transpires that an FIR was lodged on 07.04.2006 alleging of rape against the appellant on the victim by the PW-1 after more than 3 (three) months from the date of alleged occurrence clearly stating that the victim has disclosed the same to the PW-1 and 2 after the victim was detected pregnant. PW-2 had taken the victim to Heema Hospital on being complaint of having stomach pain by the victim girl and having unusual appearance. PW-1 and PW-2 have deposed that on receipt of the medical report from the Hospital wherein their victim daughter was shown to be pregnant for four months, they have enquired the victim girl about the person who impregnated her, then initially she was reluctant to tell the name of the person and also told them that if she disclosed the name of the person, he will kill our family members. On their insistence, the victim girl finally disclosed the name of the accused to be the perpetrator of the offence. She

had further disclosed that one day, when she went out of our house to fetch maggi from the shop, the accused whose house is also located on the way to shop, requested her to bring something for him also. When she asked for money from the accused, the accused who was standing on the door dragged her inside and gagged her mouth and then committed rape. Having heard the same when PW- 1 and 2 called the accused to their house in the evening and the accused came at around 9:00 PM. On being asked about the alleged incidence the accused with his folded hand apologized for what he did. He admitted to have committed sex with the victim girl once. PW-2, in the meantime informed the matter to police over telephone. Police accordingly arrested the accused in the same night. Thus, I find that though the FIR was lodged after more than 3 (three) months of the alleged occurrence, same has been explained in the facts and circumstance of the case and as such in my considered view the delay in lodging the FIR may not be fatal to the case of the prosecution.

32. PW-3, Dr. Salim Ahmed, Gynecologist, had stated that on 07.04.2016, the victim came to Heema Hospital OPD and told him that she missed menstruation for last four months. So, he suggested her to get blood test. Thereafter, the victim did not come back. On cross PW-3 stated that he has reflected the age of victim as 14 years as disclosed by her parent. Thus, I find that the testimony of this PW does not support the case of the prosecution in establishing the guilt of the accused.

33. PW-4, the victim, had deposed that in the year, 2016 at 2:30 PM, after coming back to residence from school, she was going to local shop in the meantime accused called her on pretext of giving money to buy some articles for him. She went to the house of the accused and when she advanced her hand to get the money from him, he caught hold of her hand and blocked her mouth. Thereafter, he pushed her down on the bed, opened her long pant and panty. The accused opened his clothes of lower part. She further deposed that as she was lying on the bed and accused was lying on her body and the accused was physical to me. Thereafter, she was allowed to go out from his house. She had stated that she suffered pain in her private part. Since then, she was not having menstruation for two months. On her complaint of stomach ache, she was taken to Heema Hospital Itanagar by her father (PW-2) for medical check-up. Based on the Ultra sound reports, doctor detected her pregnancy and after coming back to their residence, she disclosed to PW-1 & 2 that "Tamo uncle" (accused) was responsible for her pregnancy. She has stated that her pregnancy was terminated at Heema Hospital in the presence of her mother and her sister. She has admitted of giving

statement before the Magistrate and police after registration of the present case. On cross examination, the victim deposed that there were two houses (bachelor barrack) between her house and the place of occurrence, being occupied by other persons. She has stated that she was scared to tell the incident to her parents. According to the victim, the offence was committed in the afternoon hours, i.e., at 2:30 in the year 2016 (does not remember the date and month) inside the house of the accused. From her testimony, it is also found that there were two houses (bachelor barrack) between her house and the place of occurrence, being occupied by other persons. However, none of the occupants has been made witness and examined by the prosecution. Neither the Doctor, who aborted the pregnancy, nor her mother or sister were examined.

34. PW-5, the other Doctor, had deposed that during medical examination, she found victim to be pregnant for about 18 weeks. Accordingly, she advised the victim's parent to take Ultrasound and blood test/investigation. In cross examination, PW-5 stated that she did not find any injury on the private part of the victim. On suggestion, the witness stated that she could not say whether victim was having regular sex or not. She deposed that patient (victim) did not come back to her with ultrasound report. In my view, though this witness found the victim to be pregnant for about 18 months on oral medical examination and advised for ultrasound and other tests, but the victim and her parents did not come back to her with the test as advised. Thus, in my considered view, same does not support the case of the prosecution and establish the guilt clearly pointing towards the accused.

35. On consideration of the testimony of the I.O. I find that the investigation appears to have been not carried out properly which has weakened the case of the prosecution as relevant documents have not been collected and the relevant persons have not been made prosecution witnesses thereby the prosecution has failed to prove the documents and examined the relevant witnesses i.e. parents of the victim, elder sister and the persons staying in the house nearby the houses of the victim and accused. At the same time, on scrutiny of the testimony of DW-1, I find that no defence is discernable from the evidence of this DW in favour of the accused appellant.

36. On perusal of the impugned judgement and order dated 18.04.2023, it transpires that the learned Special Judge has heavily relied on the sole testimony of the victim and found that the evidence of PW 1 & 2 corroborates the testimony of prosecutrix. The learned Special

Judge has held that in view of the section 59 & 60 of Evidence Act, 1872, their testimony is credible as the prosecutrix disclosed the occurrence to them in the evening of 07.04.2016, i.e., after USG (ultrasound) reports conforming her pregnancy. Therefore, two basic foundational facts of accused establishing sexual intercourse and impregnating the prosecutrix, are established by testimonies of PW 1, 2, 3, 4 & 5 as well as by MLCs (Ext.P-3 & 4). However, it is seen that the learned Special Judge has failed to consider that medical report- Ultra-sound exhibited is not proved by the prosecution as the two Doctors, PW-3 and PW-5 have deposed that they have advised for medical tests but the victim did not come back to them with the said tests/reports. No other doctor was examined by the prosecution.

37. The learned Special Judge has held that as per the Ext. P-6, i.e., School Leaving Certificate issued by Head Teacher of Tani Vidyalaya, Balwadi and ocular evidence of PW 1, prosecutrix was borne on 05.01.2004. Therefore, she was 11 years, 11 months and 26 days as on 31st December, 2015 and in any case she would be below 16 years of age on the date of commission of offence. However, learned Special Judge has failed to consider the elementary principle or procedure that certificate has to be proved. In the case in hand, the author of the certificate was not examined by the prosecution at all to prove the certificate.

38. The learned Special Judge has held that determination of age of minor victim in sex crime is guided by section 94(2) of Juvenile Justice (Care and Protection of Children) Act, 2015 and in accordance with provisions of section 35, Evidence Act, Ext.P-6 can safely be relied upon in the case on hand. The ratio of judgments laid down by Hon'ble Supreme Court in *Rishipal Singh v. State of Uttar Pradesh* (2021 SCC Online SC 1079) and *Sanjeev Kumar Gupta v. State of Uttar Pradesh*, (2019) 12 SCC 370, are applicable here. It is abundantly found that prosecutrix was below 16 years of age in the month of December 2015, i.e., at the time of commission of offence. But, the learned trial court has not made any endeavor to find out the age of the victim by following the procedure as required under section 94(2) of the Act of 2015 but relied on a document exhibited as Ext. P-6, i.e, the school leaving certificate which was in fact not proved by calling the author of the document as witness. It is a settled position of law that mere exhibiting a document does not amount to its proof.

39. This court is in agreement with the contention that the age of the victim was determined only on the basis of Exht. P-6 which is although in the format of a printed School Leaving/Transfer Certificate but in fact it is only a certificate that she was reading in Kg-II. Such certificate does not fall in any of the categories of documents as provided in section

94(2) of the JJ Act., 2015. Besides the above, the Exht.P-6 is otherwise inadmissible in evidence because it is only a photocopy and not an original document. As noted above, the author of the Exht.6 having not been examined, the contents thereof, have not been proved. For determination of age has to be only under section 94(2) of the JJ Act, 2015. The document Exht-P.6 was produced from the custody of the PW-1/informant of the victim and not from the school/authority.

40. The Learned Special Judge has observed that the trajectory of criminal jurisprudence recognizes the evidence in any form adduced by an accused in his defence. In the case on hand, testimony of DW 1 factually establishes that accused and victim were known to each other for quite sometimes until occurrence. So, in the attending facts, presumption of guilt provided under sections 29 & 30 of POCSO is fully justified, to which this court finds unacceptable. Having regard to above, I would refer to the relevant sections 29 and 30 of the POCSO Act which reads as follows:

Sec. 29 POCSO Act: Presumption as to certain offence.- (1) Where a person is prosecuted for commission or abetting or attempting to commit any offence under section 3,5,7 and sec. 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

Sec 30 POCSO Act: Presumption of culpable mental state.-(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to act charged as an offence in that prosecution. (2) For the purpose of this 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. *Explanation-* In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

41. On careful reading of the above provisions, in the present case, in my considered view, no presumption of guilt is justified in as much as no foundation facts have been established and 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.

42. It is true that child sexual abuses are mostly orchestrated by persons known to the survivor or the victim and executed in isolation so that no trace of evidences are left for investigation. Under such circumstances, the abused child is the lone witness, who may not be willing to share or disclose the occurrence to her parents, friends and relatives due to threat, allurements, manipulation, etc. and many parameters. It is only through sustained persuasion and building confidence of the victim of sex crimes, they are able to share the facts of case. In the present case, prosecution had made a vain attempt to establish that there was some kind of threat to the victim, however, same is not supported by any evidence other than the deposition of victim.

43. In **Krishna Kumar vs. State of Haryana**, reported in **(2011) 7 SCC 130**, the Hon'ble Supreme Court observed that an accused can be held guilty of commission of an offence of rape, if the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and sterling quality. In the present case, I find that evidences led by the prosecution are not at all clinching, reliable, conceivable, trustworthy and inspires the court that accused has raped and impregnated the prosecutrix as the prosecution has miserably failed to prove the case beyond reasonable doubt. Thus, benefit of doubt must tilt in favour of the accused appellant.

44. In the present case the learned trial court has not made any endeavor to find out the age of the victim by following the procedure as required under section 94(2) of the Act of 2015 but relied on a document exhibited as Ext. P-6, i.e. the school leaving certificate which was in fact not proved by calling the author of the document as witness. It is a settled position of law that mere exhibiting a document does not amount to its proof. In the present case, the prosecution has merely exhibited the school leaving certificate as exht. P-6, the prosecution cannot be absolved itself of the duty to prove the contents of the said document in accordance with law.

45. In the case of **Ram Pal Singh Bisen (supra)** the Hon'ble Supreme Court has held which is reproduced herein under:-

"31. under the law of evidence also it is necessary that contents of the documents are required to be proved either by primary or secondary evidence. At the most, admission of documents may amount to admission of contents but not its truth, documents having not been produced and marked as required under the evidence act cannot be

relied upon by the court".

46. This court is not oblivious of the law laid down by the Hon'ble Supreme Court in the case of **Sanjay kumar @ Sunny (supra)** wherein it has held that, "Testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, court should find no difficulty to act on testimony of victim of a sexual assault alone to convict accused- seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury- Deposition of prosecutrix has to be taken as a whole- victim of rape is not an accomplice and her evidence can be acted upon without corroboration- she stand in higher pedestal than an injured witness does- If court finds it difficult to accept her version- to insist on corroboration, except in rarest of rare cases, is to equate one who is a victim of lust of another with an accomplice to a crime and thereby insult womanhood- It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in case of accomplice to crime. However, in the present case, the prosecutiin has failed to elicited credible evidence from the statement of the victim, thus, some corroboration is required whereas there is none. It not the case that same is corroborated by the extra judicial confession. It has been only the ingenuity of the learned Addl. PP that the accused has admitted and apologized which cannot be accepted.

47. On the question of determination of age, it is worth relying on the judgment in the case of **Ashwani Kumar Saxena (Supra)** wherein the Hon'ble Supreme Court has held and observed which is reproduced herein below:-

"32. Age determination enquiry contemplated under section 7-A of the act r/w rule 12 of the 2007 rules enables the court to seek evidence in that process, the court can obtain the matriculation or equivalent certificate, if available. Only in the absence of any matriculation or equivalent certificates, the court needs to obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted medical board arises only if the above-mentioned documents are unavailable".

48. It is seen that the accused has been convicted on the basis of the sole testimony of

the victim and presumption under section 29 and 30 of the POCSO Act. In my considered view, when the conviction is based on the sole testimony of the prosecutrix and both the doctors evidence does not support the case of the prosecution, medical evidence has not been proved and the deposition of the prosecutrix is full of material contradictions, it is not safe to convict the accused solely on such testimony of the prosecutrix and presumption under section 29 and 30 of the POCSO Act without any foundational facts would not be justified. The Hon'ble Supreme Court has held that in a case of sexual assault the testimony of the prosecutrix must be given primary consideration and her testimony should not be viewed with suspicion, unless there are compelling circumstances requiring the court to seek corroboration or support from other independent source. But the principle that prosecution needs to prove its case beyond reasonable doubt and that the reliability of a witness depends on its credibility and trustworthiness, equally applies even in case of sexual assault. It cannot be said that whatever is stated by the victim of sexual assault, being the solitary witness, has to be relied by the court, notwithstanding, any infirmities in the testimony of such witness.

49. In the case of **Santosh Prashad** (supra), the Hon'ble Supreme Court has observed and held which is reproduced herein under:-

"5.5 with the aforesaid decision in mind it is to be considered whether it is safe to convict the accused solely on the solitary evidence of the prosecutrix? Whether the evidence of the prosecutrix inspires confidence and appears to be absolutely trustworthy, unblemished and is of sterling quality?"

"6. Having gone through and considered the deposition of the prosecutrix, we find that there are material contradictions. Not only there are material contradictions, but even the manner in which the alleged incident has taken place as per the version of the prosecutrix is not believable. In the examination-in-chief, the prosecutrix has stated that after jumping the fallen compound wall the accused came inside and thereafter the accused committed rape. She has stated that she identified the accused from the light of the mobile. However, no mobile is recovered. Even nothing is on record that there was a broken compound wall. She has further stated that in the morning at 10 o'clock she went to the police station and gave oral complaint. However, according to the investigating officer a written complaint was given. It is also required to be noted that even the FIR is registered at 4.00 p.m. In her

deposition, the prosecutrix has referred to the name of Shanti Devi, PW 1 and others. However, Shanti Devi has not supported the case of the prosecution. Therefore, when we tested the version of PW 5. prosecutrix, it is unfortunate that the said witness has failed to pass any of the tests of "sterling witness". There is a variation in her version about giving the complaint. There is a delay in the FIR. The medical report does not support the case of the prosecution. FSL report also does not support the case of the prosecution. As admitted, there was an enmity/ dispute between both the parties with respect to land. The manner in which the occurrence is stated to have occurred is not believable. Therefore, in the facts and circumstances of the case, we find that the solitary version of the prosecutrix. PW 5 cannot be taken as a gospel truth at face value and in the absence of any other supporting evidence, there is no scope to sustain the conviction and sentence imposed on the appellant and the accused is to be given the benefit of doubt".

50. In the case of **Raja and Ors. -vs- State of Karnataka (supra)**, the Hon'ble Supreme Court has observed that though generally the testimony of a victim of rape or non-consensual physical assault ought to be accepted as true and unblemished but it will still be subjected to judicial scrutiny, least casual, routine and automatic acceptance thereof, may result in unwarranted conviction of the person charged.

51. In the case of **Mrinal Das (supra)**, it has been observed which is reproduced herein under:-

"26. There is no doubt about the principle of appreciation of evidence that in a case of sexual assault the testimony of the prosecutrix must be given primary consideration and her testimony should not be viewed with suspicion, unless there are compelling circumstances requiring the court to seek corroboration or support from other independent source. But the principle that prosecution needs to prove its case beyond reasonable doubt and that the reliability of a witness depends on its credibility and trustworthiness, equally applies even in case of sexual assault. It cannot be said that whatever is stated by the victim of sexual assault, being the solitary witness, has to be relied by the court, notwithstanding, any infirmities in the testimony of such witness."

52. In the case of **Raju Vs. State of Madhya Pradesh (supra)** the Hon'ble Supreme Court has observed and held which is reproduced herein under:-

“11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication. Particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

12. Reference has been made in Gurmit Singh case to the amendments in 1983 to Sections 375 and 376 of the Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two sections, thus, raise clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualised as the presumption under Section 114-A is extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.”

53. In the present case in hand, the learned trial court has failed to appreciate the fact that there are serious material contradictions in the testimony of the victim as well as the evidence of the witnesses and therefore the sole evidence of the prosecutrix has failed to pass the test of a sterling witness. The sterling witness should be of a very high quality and calibre whose version should therefore unassailable.

54. In the case of **Rai Sandeep (supra)**, the Hon’ble Supreme Court has observed:

'Para 22: In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co- relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar 17 tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.'

55. In the case of **Ram Das (supra)**, the Hon'ble Supreme court has observed and held that it is no doubt true that the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exists no circumstances which cast a

shadow of doubt over her veracity. In the present case, as noted above, this court is not convinced about the truthfulness as no foundational facts have been proved much less the prove of documents and the evidences are not credible which cast a shadow of doubt over her veracity. The prosecution has failed to prove the guilt of the accused/appellant beyond reasonable doubt. Thus, benefit of doubt be given to the accused appellant.

56. It is noticed that the learned trial court has held that in the attending facts and circumstances of the case the presumption of guilt provided under section 29 and 30 of POCSO Act is fully justified and that the accused had exploited the minority of prosecutrix and raped her when PW 1 and 2 were away from their home. It is an admitted position that in a trial conducted under the CrPC the accused can remain silent and the burden would be upon the prosecution to prove the charge beyond reasonable doubt by leading cogent evidence. However, an exception to this general rule has been introduced in case of prosecution under the POCSO, that there would be reversed burden upon the accused to displaced any presumption of guilt.

57. Regard being had to the above, I would refer to the case of **Bhupen Kalita (supra)** wherein this court while relying on the law laid down by the Hon'ble Supreme Court in the case of **Noor Aga-vs-State of Punjab**, reported in **(2008) 16 SCC 417**, has held that the prosecution would be under an obligation to lay down the foundational facts before presumption can be drawn against the accused under section 29 and 30 (2) of POSCO. Relevant paragraph is reproduced herein below:-

"71. In the light of the discussions above, the following legal positions emerge in any proceeding under the POCSO Act. (A) The prosecution has to prove the foundational facts of the offence charged against the accused, not based 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 guilt. 24 to establish his innocence to negate the presumption of Coming to the facts of the case, the prosecution has miserably failed to establish the foundational facts qua the testimony of the prosecutrix which is full of contradictions and therefore the same is unreliable. Therefore, the conviction of the accused on the basis of presumption drawn under section 29 and 30 (2) of the POCSO is wholly unjustifiable in the absence of cogent evidence brought on record to prima facie establish the foundational facts. Hence, the accused cannot be convicted on the basis of presumption of guilt, premised on the precincts of the doctrine of reversed burden.

58. In the case of **Manirul Islam (supra)**, on the question of presumption of guilt, has held that in the absence of cogent evidence brought on record to prima facie established the foundational facts, conviction of the accused cannot be based solely on presumption of guilt. The relevant paragraph is reproduced herein below:-

52. Coming to the facts of this case, we are of the opinion that the prosecution has failed to establish the foundational facts. The testimony of the prosecutrix is also found to be full of contradictions and hence, unreliable. From the impugned judgment and order, we find that the conviction of the accused on the basis of presumption drawn under sections 29 & 30(2) of the POCSO is not sustainable. Therefore, we are of the view that in the absence of cogent evidence brought on record to prima-facie establish the foundational facts, conviction of the accused cannot be based solely on presumption of guilt, premised on the precincts of the doctrine of reverse burden"

59. In the case of **Vijayan vrs. State of Kerala**, reported in **(2008) 14 SCC 763**, the Hon'ble supreme Court held that in case where sole testimony of the prosecutrix is available, it is dangerous to convict the accused, specially when the prosecutrix could venture to wait

for seven months for filing the FIR for rape. This leaves the accused totally defenceless. Had the prosecutrix lodged the complaint soon after the incident, there would have been some supporting evidence like the medical report or any other injury on the body of the prosecutrix so as to show the sign of rape. If the prosecutrix has willingly submitted herself to sexual intercourse and waited for seven months for filing the FIR it will be very hazardous to convict on such sole oral testimony. Moreover, no DNA test was conducted to find out whether the child was born out of the said incident of rape and the appellant accused was responsible for the said child. In the face of lack of any other evidence, it is unsafe to convict the accused. In the present case, FIR was lodged after more than 3 (three) months of alleged occurrence on the disclosure of the victim against the accused/appellant. No DNA test was conducted to find out the paternity and whether the accuse/appellant was responsible for the said pregnancy. Age of the victim was not proved in accordance with law. There is no any other evidence worth reliable. The prosecution has miserably failed to proved the guilt of the accused appellant. Thus, the basis of the findings and conclusion of the learned Special Judge (POCSO) in convicting the accused/appellant under section 6 of the POCSO Act cannot be sustained.

60. This court has perused the other case laws (supra) relied on by the learned counsel for the parties and found to be settled principle of law and decided on the facts of those cases, having little or no assistance to the prosecution in the facts and circumstances of the present case.

61. From the analysis of the evidence on record and the law laid down by the Hon'ble Supreme Court and this Court, I am of the considered view that the prosecution has failed to establish and prove the guilt of the accused/appellant beyond reasonable doubt and the learned Special Judge (POCSO) has erred in convicting and sentenced the accused appellant on the sole testimony of the prosecutrix and taking recourse to presumption under sections 29 and 30 of the POCSO Act without any foundational facts. Therefore, the view taken by the learned Special Judge (POCSO) in convicting the accused/appellant under section 6 of the POCSO Act cannot be sustained.

62. Consequently, conviction and sentence of the accused appellant vide impugned judgment & Order 18.04.2023 and 01.05.2023 passed by the Ld' Special Judge (POCSO) , Yupia stands set aside and quashed and the accused/appellant is acquitted.

63. Accordingly, criminal appeal stands allowed. The accused/appellant be set at liberty forthwith if he is not required in any other case.

64. This court extends appreciation to the learned counsel for the parties for their able assistance.

TCR be sent down.

JUDGE

Comparing Assistant