

GAHC040010332021

2024:GAU-AP:853



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

Case No. : CRL.A(J)/1/2021

Dulpak Saring
S/o Shri Dulkek Saring,
Permanent resident of Vill. Poblung, PO and PS Dambuk, District Lower Dibang
Valley (Arunachal Pradesh), presently lodging at District Jail, Tezu, Lohit District
(Arunachal Pradesh)

VERSUS

THE STATE OF AP and Anr.
Represented by PP

2:X
Age: 0
Occupation :
(Daughter of Lt. Indian Darbong)
C/o Nikong Pertin

Vill Poblung - B
PO/PS Dambuk
Dist. Lower Dibang Valley
Arunachal Pradesh

Advocate for the Petitioner : Gimi Tarak,

Advocate for the Respondent : P P of AP, Minki Boje, Amicus Curiae

:::BEFORE:::
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 10.06.2024

Date of Judgment & Order : 18.09.2024

JUDGMENT & ORDER (CAV)

Heard Mr. G. Tarak, learned Amicus Curiae for the appellant. Also heard Ms. L. Hage, learned Additional Public Prosecutor for the State respondent No. 1 and Mr. M. Boje, learned Amicus Curiae for the respondent No. 2.

2. This jail appeal, under Section 374(2) of the Code of Criminal Procedure, 1973, is preferred against the judgment & order dated 03.05.2021, passed by the learned Special Judge (POCSO Act), Tezu, District Lohit, Arunachal Pradesh in POCSO Case No. 12/(LDV)/2019, under Section 376(2)(f) of the Indian Penal Code, whereby the accused/appellant has been sentenced to undergo rigorous imprisonment for a period of 10 (ten) years and fine of Rs. 1,000/- and in default further simple imprisonment of another 1 (one) month.

3. The prosecution case, if brief, is that on 21.03.2019, one Shri Nikong Pertin (informant), father-in-law of the convict/appellant, lodged an F.I.R. before the Officer-In-Charge, Dambuk Police Station, alleging that on 16.04.2019, at about 3.00 p.m., the present convict/accused/appellant- Shri Dulpak Saring forcefully raped his stepdaughter (victim), who was aged about 10 (ten) years, and threatened her with dire consequences. Upon receipt of the said F.I.R., the

Officer-In-Charge, Dambuk Police Station registered a case, being Dambuk P.S. Case No. 01/2019, under Sections 376(2)(f)/506 of the Indian Penal Code *read with* Section 4 of the POCSO Act, and started investigation.

4. During investigation, the I.O. recorded the statements of all the available witnesses, along with the statement of the victim, and forwarded the victim to CHC Dambuk for her medical examination and also collected the MLC report. The victim was also produced before the Magistrate for recording her statement under Section 164 Cr.P.C. The accused was also arrested and produced before the Magistrate for recording his statement under Section 164 Cr.P.C., wherein the accused has partially admitted his guilt.

5. Thereafter, on completion of investigation, the I.O. laid Charge-Sheet against the present accused/appellant under Sections 376(2)(f)/506 of the Indian Penal Code *read with* Section 4 of the POCSO Act and the learned Special Judge (POCSO Act), East Sessions Division, Tezu, Lohit District, Arunachal Pradesh, after considering the materials available on record and also finding *prima facie* case, framed charge against the present accused/appellant under the aforesaid Sections. The charges were read over and explained to the accused/appellant, to which he pleaded not guilty and claimed to be tried.

6. During the trial of the case, the prosecution examined as many as 7 (seven) numbers of witnesses including the informant, victim, Doctor and Investigating Officer. The accused was also examined under Section 313 Cr.P.C. Thereafter, the learned Special Judge (POCSO Act), Tezu, District Lohit, Arunachal Pradesh, after hearing the parties and on perusal of the materials available on records, vide judgment & order dated 03.05.2021, in POCSO Case

No. 12/(LDV)/2019, convicted the accused/appellant under Section 376(2)(f) of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for a period of 10 (ten) years and fine of Rs. 1,000/- and in default further simple imprisonment of another 1 (one) month.

7. On being highly aggrieved and dissatisfied with the aforesaid impugned judgment & order dated 03.05.2021, passed by the learned Special Judge (POCSO Act), Tezu, District Lohit, Arunachal Pradesh in POCSO Case No. 12/(LDV)/2019, the present appeal has been preferred by the accused/appellant from jail.

8. Mr. G. Tarak, learned Amicus Curiae for the appellant, submitted that the learned Court below did not consider the evidence on record in its true perspective and arrived at a wrong decision which is bad in law and liable to be set aside and quashed. He further submitted that there is a delay of 5 (five) days in lodging the F.I.R., which is not explained in the F.I.R. and the non-explanation of such delay is also fatal for the prosecution case and also arises reasonable doubt regarding the veracity of the prosecution case. In this context, he relied on a decision of Hon'ble Tripura High Court, which was reported in **2019 (5) GLT (TR) 35 [Bimal Acharjee Vs. State of Tripura]**, and emphasized on paragraph No. 29 of the judgment, which reads as under:

"29. Keeping this established aspect suffered by the victim of rape, if this court consider the factual matrix of the case and apply the principles laid down above by the Patna High Court, there might be a delay in lodging the FIR when it is a case of rape, but there must be reasonable explanation what caused the delay in lodging the complaint to the police. In the case in hand, the incident occurred in the intervening night of 23rd/24th July, 2009 and the matter was also informed to the BDO and local MLA, though the matter went to public. Under those circumstances, what prevented

PW-4, being mother not to lodge the FIR in the same day has not been explained. In the instant case, I have already discussed that there are so many improved versions and huge variations from the statements which the prosecutrix, her mother, her brother, her uncle and PW-7 have stated in their statement recorded under Section 161 Cr.P.C. I find force in the submissions of learned counsel appearing for the appellant that in the context of the said case, the delay of lodging the FIR is fatal to the prosecution case and the appellant deserves to get the benefit of doubt."

9. He further submitted that there are lots of contradictions in the statements of the prosecution witnesses, especially the victim (PW-2) and her aunt (PW-4), who claim herself to be the eye witness of the prosecution case. Though the PW-4 claim herself to be the eye witness, but she contradicts her own statement while giving her statement before the I.O. under Section 161 Cr.P.C. He further submitted that as per PW-2, the victim of this case, while adducing her evidence before the learned Court below, had stated that she was tutored by her grandmother (PW-5) to give her statement before the police as well as the Magistrate at the time of recording of her statement under Sections 161 & 164 Cr.P.C., respectively, and the same was recorded in presence of her mother (PW-3) and grandmother (PW-5).

10. Mr. Tarak further submitted that from the evidence of the Doctor as well as from the medical report, it is seen that at the time of examination of the victim, the hymen was intact and it was not found ruptured. He further submitted that the false case has been brought against the present accused/appellant as the mother of the victim wanted to get herself free from the accused and soon after the incident, she got married with one another person. More so, PW-4 also did not see the occurrence, though she only heard the sound. Thus, with the conspiracy of the family members of the victim, the false case has been lodged against the present accused/appellant and since the year 2019, he is in custody

in connection with this false and concocted allegation.

11. Mr. Tarak further submitted that though the conviction may be based on the sole testimony of the prosecutrix but the same should inspire confidence and should be reliable. But from the contradiction of the vital witnesses, especially the victim as well as PW-4, it does not inspire confidence to convict the accused/ appellant. In this context, he also relied on the decision of Hon'ble Calcutta High Court passed in **CRA No. 011/2018 [Subrata Biswas & Anr. Vs. The State]**.

12. In this context, Ms. L. Hage, learned Additional Public Prosecutor for the State respondent No. 1, submitted that the medical evidence can only be taken as expert evidence and it cannot be taken as substantial evidence. However, the Doctor also found injury on the private part of the victim at the time of her examination. Her statement recorded under Section 164 Cr.P.C. also corroborates her testimony before the Court and in both the stages, her statement as well as evidence is found consistent and there is nothing to disbelieve the victim who brought such a nasty allegation against her own stepfather. It is a fact that there are some days delay in lodging the F.I.R., but considering the entire circumstances of this case, the prosecution case cannot be disbelieved only on delay in lodging the F.I.R.

13. She further relied on the judgment of Hon'ble Apex Court passed in the case of **State of Punjab Vs. Gurmit Singh & Ors. [(1996) 2 SCC 384]**, wherein it has been held that "*while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a*

court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.' It is further held that "corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice."

14. He further emphasized on paragraph No. 21 of the aforesaid judgment, which reads as under:

"21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault-it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

15. Ms. Hage, learned Additional Public Prosecutor, further relied on another decision of Hon'ble Supreme Court passed in the case of **Phool Singh Vs. State of Madhya Pradesh [(2022) 2 SCC 74]** and emphasized on paragraph Nos. 9 & 10 of the judgment, which reads as under:

"9. In Pankaj Chaudhary (supra), it is observed and held that as a general rule, if credible, conviction of accused can be based on sole testimony, without corroboration. It is further observed and held that sole testimony of prosecutrix should not be doubted by court merely on basis of assumptions and surmises. In paragraph 29, it is observed and held as under:

"29. It is now well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix if it inspires confidence. [Vishnu v. State of Maharashtra [Vishnu v. State of Maharashtra, (2006) 1 SCC 283]. It is well-settled by a catena of decisions of this Court that there is no rule of law or practice that the evidence of the prosecutrix cannot be relied upon without corroboration and as such it has been laid down that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence, as a general rule, there is no reason

to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. [State of Rajasthan v. N.K. [State of Rajasthan v. N.K., (2000) 5 SCC 30]."

10. In *Sham Singh v. State of Haryana*, (2018) 18 SCC 34, it is observed that testimony of the victim is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is further observed that seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. In paragraphs 6 and 7, it is observed and held as under:

"6. We are conscious that the courts shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations or sexual assaults. [See *State of Punjab v. Gurmit Singh* [*State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384] (SCC p. 403, para 21).]

7. It is also by now well settled that the courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. (See *Ranjit Hazarika v. State of Assam* [*Ranjit Hazarika v. State of Assam*, (1998) 8 SCC 635]."

16. In regards to delay in lodging the F.I.R., Ms. Hage submitted that in every

facts and circumstances the delay cannot be considered as a fatal to the prosecution case and in the present case also, in a given situation and circumstances, the delay in lodging the F.I.R. cannot be held to be the fatal for the prosecution case. In this context, she further emphasized on paragraph No. 15 of the above referred judgment of the Hon'ble Supreme Court, viz. **Phool Singh** (supra), which reads as under:

"15. Now so far as the submission on behalf of the accused that there was a delay of three days in lodging the FIR is concerned, at the outset, it is required to be noted that it was the specific and consistent case on behalf of the prosecutrix that immediately on the occurrence of the incident, she narrated the incident to her sister-in-law (Jethani) and mother-in-law but they did not believe the prosecutrix. On the contrary, they beat her. Even no other family members in her matrimonial home supported the prosecutrix and therefore she sent message to her parental house and thereafter she was taken to her parental house and FIR was lodged. It is very unfortunate that in this case the sister-in-law and mother-in-law though being women did not support the prosecutrix. On the contrary, she was compelled to go to her parental house and thereafter the FIR was lodged. Being women at least the sister-in-law and mother-in-law ought to have supported the prosecutrix, rather than beating her and not believing the prosecutrix. Therefore, when in such a situation, the delay has taken place in lodging the FIR, the benefit of such delay cannot be given to the accused who as such was the relative."

17. Mr. M. Boje, learned Amicus Curiae for the respondent No. 2, submitted that there is nothing to disbelieve the statement made by the victim before her family members, who was subjected to sexual assault by her stepfather, i.e. the accused/appellant. More so, the matter was placed before the Kebang for a decision only after the return of the accused from jungle and thus, it took some time in lodging the F.I.R. and it cannot be considered as fatal for the prosecution case. Though it is not specifically mentioned in the medical report that as to whether the victim was subjected to any penetrative sexual assault, but from the injury found on her private parts, it is seen that she was subjected to sexual assault by the accused/ appellant. Accordingly, Mr. Boje submitted that

there is no need of any interference of this Court in the judgment and order passed by the learned Trial Court below wherein the evidence of the prosecution witnesses as well as the defence witness was discussed in detail and accordingly convicted the present accused/appellant.

18. Mr. Boje, learned Amicus Curiae for the respondent No. 2, further submitted that the burden shifts to the defence to prove his case once the prosecution establish the foundational facts of the case. Here in this case, it is seen that the prosecution has already established the foundational facts of the case, but the defence, even by adducing his own evidence as DW-1, could not rebut the case of the prosecution. In this context, he also relied on a judgment of Division Bench of this Court passed in **Crl. A. (J) No. 26/2019 [Purna Nahar Deka Vs. The State of Assam]** and emphasized on paragraph No. 33 of the judgment, which reads as under:

"33. Section 29 and 30 of the POCSO Act does not actually relieve the prosecution of its burden to prove a case. These provisions of law, however, lessen the burden of the prosecution by shifting the onus of proof to the accused. Once the foundation for holding the presumption is established, after that the duty is cast upon the accused to prove his innocence. In the case in hand, the appellant did not prove his innocence by adducing evidence. Therefore, this court is of the opinion that the appellant failed to discharge his statutory burden. The learned trial court rightly held that the charge brought against the appellant has been proved beyond all reasonable doubt. We are of the opinion that the learned trial court has correctly appreciated the prosecution evidence in the light of the aforesaid statutory provision. We, therefore, hold that the impugned judgment does not require any interference. Accordingly, we hereby hold that the appeal is devoid of merit and therefore, the appeal stands dismissed."

19. After hearing the submissions made by the learned counsels appearing on behalf of the parties, it is seen that as per the prosecution case, the accused sexually assaulted the victim, who was aged about 10 (ten) years at the

relevant time of incident. On the other hand, it is the case of the defence that the informant had instituted the case with some false and concocted allegation and he has been victimized by his wife, who is alleged to have extra marital affairs with another man.

20. So, before arriving at any decision, let us scrutinize the evidences of the prosecution witnesses as well as the defence witnesses.

21. PW-1, the informant of the case, deposed that on the day of incident, while he was planning to throw a party to his family members and other relatives, his second daughter (PW-4) told him that his granddaughter (victim), who was about 7 ½ years old at that time, went with the accused, who is the second husband of his first daughter, in their house and suspected that the accused, being the stepfather, might do something wrong with the victim sexually. He then went to their house and found both of them sitting together. Thereafter he took the victim back to his house and asked her whether the accused sexually assaulted her not. At first the victim did not reveal anything, but when she was beaten with a stick, she told him that she has been sexually assaulted by the accused. She further told him that the accused raped her twice before that incident by offering with sweets to her to refrain her from telling the incident to others. Accordingly, after hearing the same, he lodged the complaint against the accused. He further deposed that they also went to the Court as well as to hospital for medical examination of the victim.

22. In his cross-examination, he deposed that while he went to the house of the accused, he did not see that accused raping his granddaughter and the

victim was beaten by his wife. He denied when suggested that he lodged the F.I.R. only on the information given by the Aido Pertin, his second daughter, and they came to know about the incident only from the victim herself.

23. PW-2 is the victim of the case and she deposed that the accused is her father and he used to apply oil in her private parts and insert his penis in her private parts. She also deposed that the accused did the same to her for 4 (four) times and he restrained her from telling the same to her mother. The accused once did the same to her at jungle where blood came out from her private part.

24. During her cross-examination, she deposed that she stays with her grandfather- Nikong Pertin (PW-1). She was asked by her family members to tell what happened to her while recording her statement by the police. She was beaten up by her grandmother to disclose about the fact whatever dirty thing was done by her father before the police. She denied when suggested that she was not raped by the accused. She also deposed that her grandmother told her that what has happened to her is wrong. She further deposed in her cross-evidence that the accused put his private part in her vagina and asshole also. She did not inform about the incident to his grandfather. She was fully examined by the doctor and she narrated the incident to the doctor. She was taken by police along with her mother and grandparents to the Court at Roing. She also deposed that she was tutored by her grandmother, who was also with her, while recording her statement in the Court. She was not read over the statement made under Section 164 Cr.P.C. before the Court and she did not remember whether she was asked by the Magistrate as to whether she want to give her

statement or not.

25. PW-3 is the mother of the victim and as per her, she did not know anything about the case. At the time of incident, she was at Mali. Her statement was recorded by the police. The victim is the daughter from her first husband and the accused is her second husband and she was informed by her mother that her daughter was raped by her second husband, the accused herein. She believed that the accused must have raped her daughter as her daughter (victim) told her and her sister- Aido also told her that she saw the incident.

26. In her cross-examination, she deposed that her sister- Aido Pertin informed her that her daughter was raped by the accused, her second husband, and after the incident, her daughter stayed with her mother. However, she did not know whether her mother tutored her daughter (victim) or not. She was present while the sister did the medical examination of her daughter (victim) and her daughter narrated the incident to the sister.

27. PW-4, Aido Pertin, deposed that the accused is her brother-in-law and as the accused told the victim to go with him to Roing, she told the victim to take bath and while the victim was taking bath, the accused entered from the back door and had sex with her. She also deposed that the said incident happened in the house of the accused and she disclosed the incident to her parents.

28. In her cross-evidence, she deposed that the accused is of bad character. However, she did not hear any such incident committed by the accused prior to the present incident. She also deposed that she did not go the house of the

accused on the day of incident and when she heard the voice of the accused and the victim in the house of the accused, she informed her father to check on it. She denied when suggested that due to extra marital affairs in between Gudi (mother of the victim/PW-3) and one Otem, the accused has been falsely implicated in the present case. She told her parents that the accused and victim were having sex.

29. P.W.-5, who is the grandmother of the victim, deposed that she came to know from her granddaughter (victim) that the accused/appellant had sex with her. She had beaten her granddaughter (victim) and then she revealed that the accused had sex with her. Thereafter she informed the matter to her relatives and there was a kebang wherein it was decided by both the parties to report the matter before police.

30. In her cross-evidence, she deposed that she had cordial relationship with the accused and she came to know about the incident from her daughter- Aido Pertin (PW-4), who saw the accused having sex with the victim by her own eyes. She admitted in her cross-evidence that the victim revealed the entire incident out of fear as the victim was beaten up by her and then the victim revealed that her stepfather/accused/ appellant had sex with her. She further stated that the victim was taken for medical examination wherein also it was confirmed that the victim was sexually assaulted. She denied when suggested that she tortured the victim to falsely give her statement before the learned Magistrate as well as before the Court.

31. PW-6 is the Doctor who examined the victim and as per her, at the time of

examination of the victim girl, she found erythema in vagina and tear of mucosa of labia minora. But she deposed that it cannot be stated as to whether there was any penetration because such kind of injury may also cause without any penetration. The hymen was intact at the time of examination. She further deposed that she obtained consent from the mother of the victim at the time of examination of the victim.

32. In her cross-evidence, she deposed that in a very rare case the hymen may remain intact even if the penetration is done, but she could not say as to whether the victim was habituated with sex or not. As per her, such kind of injury may also cause due to skin disease and the victim did not report anything in regards to rape or sexual assault on her.

33. PW-7 is the I.O. who investigated the case. As per her, on receipt of information, the Officer-In-Charge has registered the case, being Dambuk P.S. Case No. 01/2019, under Sections 376(2)(f)/506 *read with* Section 4 of POCSO Act, and she was endorsed with the case for investigation. Accordingly, she visited the place of occurrence, drawn the sketch map and also recorded the statements of the witnesses. She found that the aunt of the victim is the eye witness and accordingly she forwarded the victim for medical examination and thereafter she collected the medical examination report. She also produced the victim before the Magistrate to record her statement under Section 164 Cr.P.C. and also got the statement of the accused recorded by the Magistrate, wherein he partially admitted his guilt. After completion of investigation and after obtaining the medical report etc., she filed the Charge-Sheet against the accused/appellant under Section 4 of the POCSO Act. She also exhibited the

Charge-Sheet and the sketch map and the statement of the victim etc. while adducing his evidence before the Court.

34. From her cross-evidence, it is seen that she recorded the statement of the victim in presence of her mother and grandmother as she used to stay with her grandmother and on the same day, she also recorded the statement of the mother and grandmother at Dambuk Police Station. She further deposed that the accused admitted that he pulled out the innerwear of the victim and was about to penetrate his private part into the private part of the victim, but in the meanwhile, the grandfather of the victim came and he gave up. More so, the victim stated before the Magistrate that before the said incident also, she was raped trice by the accused appellant and sexually assaulted her. She further revealed that the accused penetrate his private part in her anus as well as in vagina. He did the same misdeed once in his house and twice in the jungle. However, she stated that she did not collect any medical report from the Doctor in regards to proof of sexual assault on the victim through her anus.

35. From the record, it reveals that at the time of recording his statement under Section 313 Cr.P.C., the accused took the plea of denial and he also retracted his partial confession and stated that he was tortured by the I.O. and for which, he had to make his partial confession before the learned Magistrate.

36. It also reveals from the record that though initially the accused denied to adduce evidence in his favour as a defence witness, but subsequently he examined himself as DW-1 in support of his own case. As DW-1, he deposed that on 16.04.2019, the victim came to his house with a burn injury on her left

thigh and asked him to put some oil in the injury. The injury was caused due to use of baby diaper and accordingly, he applied oil on her injury and then she left. Thereafter, his father-in-law (PW-1/informant) came and asked him to accumulate some firewood and he left. Then he saw the PW-4 on the road and she was going somewhere. But, after sometime, the victim again came to his house with a mobile phone belonging to PW-4, who is his sister-in-law, and gave him the mobile phone and asked to talk with her mother. Thereafter, at 5.00 p.m., he again went to Dambuk Market to buy alcohol for his father and on next day, he went to jungle for collecting Kochchu and stayed there for 5 (five) days and when he returned back to his house, he was told that an F.I.R. was lodged against him alleging that he had rape the victim. In the same night, he was arrested by police along with 2 (two) other persons. After few days from lodging of the F.I.R., his wife left with someone else. He further deposed that he did not commit any such offence as alleged against him. Rather he love the victim as she was staying with him since she was 8 (eight) months old. He did not know the reason as to why the F.I.R. was lodged against him and his relationship with the informant is also cordial. However, his relationship with the mother of the victim was strained. He further deposed that his victim daughter has deposed against him only as per the guidance and instruction given to her by his wife/mother of the victim.

37. In his cross-evidence, he stated that on the day of incident, his wife was out-of-station and he also admitted that he was not present in the meeting conducted on 20.04.2019. Further he stated that he never assaulted his wife and daughter, though sometimes he used to have some arguments with his wife/mother of the victim.

38. So from the above discussion, it is seen that as per the case of the prosecution, the minor victim girl was subjected to penetrative sexual assault by her own stepfather on 3 (three) occasions prior to the present incident, i.e. 2 (two) inside the jungle and one in his own house. As per the prosecution version, PW-4, i.e. the aunt of the victim, came to the place of occurrence and saw the victim while she was inside the house of the accused/appellant. However, there is no evidence at all that she saw the incident while the victim girl was subjected to sexual assault by the accused/appellant. However, as per the prosecution case, PW-1, i.e. the informant, came there, saw them while sitting there and thereafter when the girl was asked about the incident, initially she did not say anything, but when the victim girl was beaten by her grandmother, then only she narrated the entire story before her grandparents.

39. On the other hand, it is the case of the defence that he has been falsely implicated in this case only with a conspiracy of the family members of the victim as the mother of the victim had some extramarital affairs with another person and soon after the incident, she got married with another person leaving the accused/appellant. Thus, it is the case of the defence that false case has been brought against him only to harass him. It is also the case of the defence that he had to make his partial confession before the learned Magistrate while recording his statement under Section 164 Cr.P.C. only due to torture on him by the Investigating Officer. While adducing his evidence before the Court as DW-1 also, the accused/appellant brought the story that the victim came to his house only to apply some oil on her injury which she sustained on her left thigh and accordingly, out of love and care, he put oil on her injured part and thereafter he left his house to accumulate some fire wood as per the instruction from his

father-in-law. At that moment, he saw PW-4 on the road as she was going somewhere and on the next day, he went to jungle for collecting Kochchu and stayed there for 5 (five) days and only on his return, he came to know that the F.I.R. has been lodged against him with the allegation of rape on the victim.

40. Thus, from the evidence of the DW-1 itself, it is seen that the victim was present in his house on the day of incident, though he took the plea that she came to his house only to put oil on her injury. Further it is also admitted by him that he saw the PW-4 while she was going somewhere. This part of evidence support the case of prosecution that the victim was inside the house of the accused and the PW-4 heard the sound of both the victim and the accused and she asked her father to make an enquiry in this regard. Apart from this story brought by the defence, there is no other rebuttal evidence produced by the defence to demolish the case of the prosecution that on the day of incident, he committed penetrative sexual assault on his minor victim daughter. Further from the evidence of the DW-1 or the accused/appellant, it is seen that he had cordial relationship with the informant/father-in-law, though he has some strain relationship with the mother of the victim. More so, he admitted in his cross-evidence that his relationship with the PW-4, maternal aunt of the victim, was also normal during the relevant time of incident. Thus, it cannot be stated that the accused/ appellant was falsely implicated in this case by the informant as well as the PW-4, who claim herself to be the eye witness. The mother of the victim might have developed some relationship with another person, but it is the admitted position that till the date of incident, the mother of the victim was staying with the accused/appellant and the relationship with the informant as well as the PW-4 was cordial with the accused/appellant. Thus, the defence

could not substantiate the plea that only due to some previous grudge or enmity, the accused/appellant was falsely implicated to harass him with such a nasty allegation of committing penetrative sexual assault on the victim of this case.

41. Further it is seen that the accused/appellant had given his partial confessional statement before the learned Magistrate wherein he admitted that on the day of incident, the victim came to his house and she was plucking his grey hair and at that time, he pulled out the panty of the victim without knowing its consequence and at that very moment, the informant/father-in-law had arrived in his residence and he took the victim with him. Further it is seen that his confessional statement made before the learned Magistrate was found to be voluntary and the statement was recorded by the Magistrate after giving necessary precautions and the other formalities as mandatorily required to be followed while recording the confessional statement of an accused under Section 164 Cr.P.C. More so, it is seen that the accused/appellant was arrested by police on 23.04.2019 and he was produced before the learned Magistrate on 24.04.2019 and as such, there was no such police remand and he was in judicial custody while he was produced before the learned Magistrate for recording of his confessional statement under Section 164 Cr.P.C., which was recorded accordingly on 29.04.2019. Thus, it cannot be held that he was under threat of police or I.O. to give his confessional statement before the learned Magistrate. More so, it is seen that during the entire period of trial, he did not retract his confession and at the time of recording his statement under Section 313 Cr.P.C. only, he took the plea that he made his confession before the learned Magistrate only under threat as he was tortured by the I.O.

42. It is well settled that a Court can act upon the confessional statement if the Court is satisfied that the confession is voluntary and true. To act upon a confessional statement, such confessional statement has to meet the twin test : (i) it must be perfectly voluntary; and (ii) apart from being perfectly voluntary, it should be true and trustworthy. The Hon'ble Apex Court in the case of **Aloke Nath Dutta & Ors. Vs. State of West Bengal, (2007) 12 SCC 230**, has observed that it is mindful of the fact that in India, retractions are as plentiful as confessions. The Court should be a little slow in accepting the confession although the accused may not be able to fully justify the reasons for his retraction. The Court at first, has to be satisfied that the confession at the first instance, is voluntary and true. Cause and prudence before accepting a retracted confession is an ordinary rule. If a retracted confession is found to be corroborative in material particulars, it may be the basis of conviction.

43. In the instant case, it is seen that the accused/appellant was brought before the learned Magistrate for recording his statement only on 29.04.2019 and during that period, he was not under the police custody as he was forwarded for judicial custody on 29.04.2019. As stated above, the partial confessional statement of the accused/appellant was found to be voluntary and true. More so, the learned Magistrate has observed all necessary formalities before recording the statement of the accused under Section 164 Cr.P.C.

44. Coming to the statement of the victim recorded under Section 164 Cr.P.C. and her evidence before the Court, it is seen that in both the stages, she narrated the story as to how her stepfather had sexually assaulted her on 4

(four) occasions including the incident which had happened on 16.04.2019. She stated before the learned Magistrate that her stepfather used to apply mustard oil on her anus and sexually assaulted her through anus and she also saw the watery substance coming out from the private parts of the accused/appellant. Further in her statement made under Section 164 Cr.P.C., she clearly stated that she was threatened by her stepfather not to disclose the matter to anyone else. On one occasion, there was bleeding from her private parts and it was very painful though she did not report about the same to anyone. Her statement in regards to the sexual assault on her remain consistent and she also deposed before the learned Special Judge that the accused/ appellant used to apply oil on her private parts and he used to insert his private part in her vagina and repeated the same 4 (four) times and restrained her not to disclose anything before her mother.

45. It is a fact that the victim admitted in her cross-evidence that she was instructed by her grandmother to state everything before the police as well as the Magistrate which had happened with her and her grandmother was also with her while she gave her statement under Section 164 Cr.P.C. before the learned Magistrate. But her statement remain consistent in respect to the incident that she was subjected to penetrative sexual assault by her stepfather on 4 (four) occasions and on other occasion, the accused used to apply oil on her private parts and asshole and had sexual assault on her. Further it is seen that there is no improvement in her statement while adducing before the Court. More so, applying oil on her private parts etc., though directly not admitted by the accused/appellant but from this evidence, it is seen that on the day of incident also, he was applying oil on her injured part, i.e. thigh portion of her

leg, which was caused due to using of baby diaper. So that part of the prosecution case is admitted by the accused/appellant that he applied oil on her body, though he did not disclose the fact that the oil was applied on her private parts. More so, as per POCSO Act, the statement of the victim can also be recorded in presence of the person with whom she is comfortable while giving her statement as the child should not feel that she is sitting or deposing anything before the Court and she should feel comfortable while giving her statement and hence, the presence of her grandmother cannot directly affect the statement made by the victim before the learned Magistrate.

46. Section 26(1) of the POCSO Act provides as under:

"26. Additional provisions regarding statement to be recorded.-(1)The Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence."

47. More so, she denied when suggested in her cross-evidence that she was not subjected to sexual assault by her stepfather, rather in her cross-evidence, she stated that the accused/appellant put his private part in her vagina and asshole also. Thus, it cannot be held that she made her statement before the learned Magistrate while recording her statement under Section 164 Cr.P.C. only as per the instruction or tutoring of her grandmother. Rather her evidence corroborates with the statement made by her under Section 164 Cr.P.C. before the learned Magistrate.

48. So, from the entire discussions made above, it is seen that there is no reason to disbelieve the prosecutrix, whose evidence goes unrebutted and

remain consistent in every stages. It is a settled law that the victim of a sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence if her sole testimony inspires confidence and trustworthy.

49. The Hon'ble Apex Court in the case of **Moti Lal (supra)** has held in paragraph Nos. 7 & 9 as under:

"7. It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian women as tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim has falsely implicated the accused does not appeal to reasoning. There was no apparent reason for a married woman to falsely implicate the accused after scattering her own prestige and honour.

9. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge leveled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix. There is no rule of law or practice incorporated in the Indian Evidence Act, 1872 (in short Evidence Act) similar to illustration (b) of Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult

and of full understanding the Court is entitled to base a conviction on her evidence unless the same is own to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. This position was highlighted in State of Maharashtra v. Chandraprakash kewalchand Jain (1990 91) scc 550)."

50. In **State of Himachal Pradesh v. Raghubir Singh, (1993) 2 SCC 622; 1993 SCC (Cri) 674**, the Hon'ble Supreme Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. A similar view has been reiterated by the honourable Supreme Court in Wahid Khan v. State of Madhya Pradesh (2010) 2 SCC 9; AIR 2010 SC 1, placing reliance an earlier judgment in Rameshwar S/o kalian Singh v. State of Rajasthan, AIR 1952 Sc 54. Thus the law that emerges on the issue is to the effect that the statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The Court may convict the accused on the sole testimony of the prosecutrix.

51. It is a settled law that the child witness also can be considered as a competent witness under Section 118 of the Evidence Act and there is no legal principle that a child would not be able to recapitulate facts in his or her memory. However, the probability of tutoring a child witness cannot be denied, but that cannot be the only reason to disbelieve the child witness who is otherwise considered as a competent witness.

52. In regards to the acceptance of evidence of child witness, the Hon'ble Supreme Court in case of **Hemmat Sukhadeo Wahurwagh Vs State of Maharashtra**, reported in **(2009) 6 SCC 712 (FB)**, has held that "... *though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and molded, but it is also accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.*"

53. Here in the instant case, from the discussion made above, it is seen that there is nothing to disbelieve the minor victim of this case and there is no rebuttal evidence to disprove the case of the prosecution or to disbelieve the child witness who is a victim of a sexual assault.

54. However, it is the case of the defence that there are some contradictory statement made by the witnesses, especially by PWs- 1, 2 & 3, while giving their statement under Section 161 Cr.P.C. before the I.O. But, surprisingly, it was not confirmed while recording the evidence of the I.O. if any contradiction was there in the statement made by the witnesses before the I.O.

55. Coming to the medical evidence of the Doctor, it is seen that at the time of examination, she found injuries over the private part of the victim, though the hymen was found intact. While adducing her evidence as PW-6, it is stated by her that she cannot say to as to whether there was any penetration as such kind of injury may also caused even without penetration. In her cross-evidence also, she stated that such kind of injury may cause due to skin disease also and

the victim did not say that she was raped and even she did not know that she was sexually assaulted. But, from the report of the Doctor, it is seen that history of the case was not recorded by the Doctor and she submitted before the Court only from her memory as there is nothing in the report regarding the history of the case. In the same time, from the medical report, it is seen that the Doctor found injury on the private part of the victim, but there is no clarification as to what kind of injury was found at the time of examination of private parts of the victim. More so, the medical evidence or the medical report cannot be considered as a substantive piece of evidence and it may only use for corroboration or contradiction.

56. However, it is a fact that she found injury on her private parts at the time of examination, though it is not revealed from the evidence of the Doctor as to whether such kind of injury can be sustained with or without penetration. But the oral testimony of the prosecution witnesses cannot be disbelieve only on the evidence of the Doctor.

57. Section 3 of POCSO Act reads as under:

"3. Penetrative sexual assault.—A person is said to commit "penetrative sexual assault" if—

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration

into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

58. Degree of penetration does not matter if it is established that there was a penetration of male organ into the private parts of the victim, anus or even into the mouth of the prosecutrix.

59. Coming to the delay in lodging the F.I.R., it is seen from the evidences of prosecution witnesses that the mother of the victim was not at home at the relevant time of incident as she was at Mali and when she got information, she came there. In the same time, from the evidence of the grandmother of the victim, it is seen that prior to lodging the F.I.R., the matter was placed before the Kebang and as per the decision of the Kebang, they lodged the F.I.R. before the police station. So in that process, there was a delay in lodging the F.I.R. and it was lodged on 21.04.2019, though the incident had taken place on 16.04.2019. Thus, it is seen that due to such situation and circumstances there is delay in lodging the F.I.R. and the same cannot give the benefit to the accused/appellant when the prosecution case is established on the basis of the reliable witnesses.

60. So, from the discussion made above, it is seen that the prosecution could establish the foundational facts of the case that the minor victim girl was subjected to penetrative sexual assault by her stepfather, not only on one occasion but in 4 (four) occasions. In the same time, it is seen that though the accused/appellant adduced his evidence as DW-1, but he could not rebut or

demolish the case of the prosecution, rather he admitted the presence of the victim girl in his house on the relevant day of incident. Moreover, applying oil etc. is also established from the evidence of DW-1 and the fact of presence of PW-4 near the house of the accused/appellant is also found to be admitted in the evidence of DW-1.

61. In a landmark judgment reported in **2020 (3) GLT 403 (Bhupen Kalita Vs. State of Assam)**, this Court had discussed the legal position concerning the provision of POCSO Act, 2012, and paragraph No. 71 of the said judgment reads as under:-

"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 to establish his innocence to negate the presumption of guilt."

62. Here in the instant case, from the discussion made above, it is seen that the prosecution has been able to prove the foundational facts of the case to discharge the burden. As per Section 29 of the POCSO Act, the burden of rebutting the presumption is upon the accused and he could not discharge his burden by adducing any rebuttal evidence. Section 29 of the POCSO Act mandates legal presumption against the accused for offence under Sections 3, 5, 7 & 9 of the POCSO Act, 2012. Unlike other criminal prosecution wherein it is first presumed that an accused is innocent until proven guilty under Sections 29 & 30 of the POCSO Act, 2012, there is an adverse presumption of certain offence and culpable mind against the accused and the accused has to discharge that burden. It also empowers the Special Judge to have presumption about the guilt of an accused and the doctrine of reverse burden is applicable in such cases.

63. For ready reference, Sections 29 & 30 of the POCSO Act is quoted hereinbelow:

"29. Presumption as to certain offences.—Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 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.

30. 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 shall 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 the act charged as an offence in that prosecution.

(2)For the purposes 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."

64. So, from the entire discussions made above, it is seen that the prosecution could establish the case against the accused/ appellant that he sexually assaulted the victim/PW-2, who is his stepdaughter, and thus, it is seen that the learned Special Judge rightly passed the impugned judgment and order convicting the accused/appellant. More so, it is also not disputed that the victim was below 16 (sixteen) years of age at the relevant time of incident and thus, the learned Court below rightly held that the case is established under Section 376(2)(f) of the Indian Penal Code *read with* Section 4 of the POCSO Act and it is also rightly held that the amendment of the POCSO Act was notified on 06.08.2019 and the incident occurred on 16.04.2019 before commencing or implementation of the amended penal provision of Section 4 of POCSO Act. Accordingly, applying the provision under Section 42 of the POCSO Act, the accused/appellant was rightly convicted and sentenced under Section 376 (2)(f) IPC and sentenced him accordingly. More so, considering the nature of offence committed by the accused/appellant against his stepdaughter, who was not even 10 (ten) years old at the relevant time of incident, I find that the learned Special Judge had rightly passed the term of sentence which requires no interference of this Court.

65. In the result, I find no merit in this appeal and accordingly the same stands dismissed. Consequently, the judgment & order dated 03.05.2021, passed by the learned Special Judge (POCSO Act), Tezu, District Lohit, Arunachal Pradesh in POCSO Case No. 12/(LDV)/2019, under Section 376(2)(f)

of the Indian Penal Code, stands upheld.

66. Before parting, I put on record the appreciation for the valuable assistance rendered by Mr. G. Tarak, learned Amicus Curiae for the appellant as well as Mr. M. Boje, learned Amicus Curiae for the respondent No. 2, and I recommend that they are entitled to a fee, as per the notified rate, to be paid by the State Legal Services Authority.

67. With the above observation, the criminal appeal stands disposed of.

JUDGE

Comparing Assistant