

GAHC040013212022

2024:GAU-AP:984



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

Crl.A. 38(AP) of 2022

**Shivkant Mishra S/O Late Ram Prakash Mishra,
Permanent Resident Of Malwan Village,
PO/PS Malwan,
District Etah,
Uttar Pradesh.**

.....Appellant

VERSUS

**THE STATE OF AP And Anr.
Through The Public Prosecutor,
Arunachal Pradesh.
2:The Alleged Victim
Age: 0 Occupation :
Through Her Father Shri Tokar Bomsok
Resident Of Taba Sora Village
PO/PS Aalo
West Siang District
Arunachal Pradesh.**

..... Respondents

Advocates for the appellant: Mr. D. Soki, Advocate

Advocates for the respondents: Mr. T. Ete, Addl. P.P.

Ms. N. Anju, Legal Aid Counsel
for the respondent no.2.

B E F O R E
HON'BLE MR. JUSTICE KARDAK ETE

Date of hearing : 25.09.2024

Date of Judgment : 06.11.2024

JUDGMENT&ORDER(CAV)

Heard Mr. D. Soki, learned counsel for the appellant. Also heard Mr. T. Ete, learned Addl. P.P. for the State and Ms. N. Anju, learned legal aid counsel for the respondent no.2.

2. This Criminal appeal under Section 374(2) of Code of Criminal Procedure, 1973, is directed against the Judgment and order dated 18.10.2022 passed by learned Special Judge (POCSO), Aalo, in POCSO Case No. 02/2021, whereby, the accused/appellant has been convicted and sentenced to undergo rigorous imprisonment for 7 (seven) years for the offence under Section 10 of the POCSO Act, 2012, with a fine of Rs. 25,000/- with a default stipulation to undergo further imprisonment for a period of three months.

3. The case set up by the prosecution, in brief, is that on 19.11.2020 at around 1545 hours a written FIR was lodged at Police Station, Aalo, by the father of the victim girl, alleging that on 16.11.2020 one Shri Shivkant Mishra (appellant herein) Principal In-charge of ITBP School, Aalo, had sexually

assaulted his minor daughter, a student of class-IX of ITBP Public School, Aalo, by touching her breast and other body parts with sexual intent.

4. On receipt of the said FIR, Aalo P.S. Case No. 72/2020, under Section 354-A IPC and Section 10 of POCSO Act was registered. The Investigating Officer had recorded the statement of the witnesses including that of the complainant father, victim and mother of the victim under Section 161 of Cr.PC. The original birth certificate of the victim was seized on being produced by the mother of the victim. The statement of the victim was recorded under Section 164 of the Cr. PC.

5. During the course of investigation, the Investigating Officer (IO in short) had visited the place of occurrence and drawn up the rough sketch map of place of occurrence. The IO had also recorded the statement of other relevant witnesses.

6. On completion of the investigation, the I/O had filed charge-sheet against the accused appellant under Section 354-A IPC and Section 10 of the POCSO Act, 2012. Thereafter, the Court had framed the charges against the accused appellant under Section 10 of the POCSO Act, read with Section 354-A IPC. The accused appellant, on being read over of the charges, pleaded not guilty and claim for trial.

7. During the course of the trial, the prosecution had examined as many as 13 (thirteen) prosecution witnesses and had exhibited documents through these witnesses and closed the evidence. Thereafter, the accused was examined under Section 313 of the Cr.P.C. The defence has examined two defence witnesses including the accused appellant.

8. Learned Special Judge, (POCSO), on consideration of the evidences and materials available on record, has held that the accused/appellant had committed an offence of sexual assault on victim girl in his office chamber on 16.11.2020 at about 11.00 A.M. and convicted the accused appellant and sentenced to undergo imprisonment for a period of 7(seven) years with a fine of Rs. 25,000/- with default stipulation to undergo further simple imprisonment of 3 (three) months by holding that the accused appellant had committed an offence of aggravated sexual assault on victim girl as defined under clause (f) of Section 9 of the POCSO Act, 2012, and punishable under Section 10 of the POCSO Act, 2012.

9. Mr. D. Soki, learned counsel for the appellant, submits that the allegation against the accused/appellant, is that he had assaulted the victim on two occasions on 16.11.2020, firstly, when the victim with her classmates went to request for transportation and secondly, after an hour when she was called through her class teacher. Whereas, the defence of the appellant is that a bottle of local liquor was recovered from the bag of the victim and as such, false allegations have been labelled against the appellant.

10. He submits that the deposition of the victim before the court is contradictory to the statements made under Section 164 Cr.PC. The victim had stated that in the first instance, the appellant hugged and kissed her and later when she was called again, the appellant touched her breast. Whereas, in her deposition before the court, the victim had deposed that in the first instance, the appellant touched her breast and later when she was called again the appellant tried to drag the victim by left and tried to touch her breast, but he couldn't. In the cross, the victim stated that she had given the same statements

under S. 161 and S. 164(5) Cr.P.C. Therefore, the same is a major contradiction. Further, the victim in her statement under S.164(5) Cr.P.C and deposition before the court stated that when she returned, mathematics class was going on. Upon cross examination, she had only stated that the appellant had hugged her and did not mention anything about being kissed or groped. The victim had stated that she did not shout for help or at the appellant as the incident happened suddenly. Whereas, as per the allegation, the victim was sexually assaulted two times within an interval of one hour. Further, the victim admitted that she had been expelled from JNV on the ground of being an undisciplined student.

11. He submits that the PW-6 (classmate of victim), who accompanied her to the office chamber in her cross stated that all the doors and windows were open and upon re-examination, PW-6 stated that the office of Principal is visible for the front benchers from their class room. The PW-10, who was teaching in the classroom, when the victim returned after being allegedly sexually assaulted for the second time stated that the victim came back to the classroom in a normal way and continued in the class while he was teaching economic subject, whereas, the victim in her statements stated that maths class was going on when she came back.

12. He submits that the PW-11 in his cross stated that on 16.11.2020, he came to know about the seizure of liquor i.e. on the day of the alleged sexual assault. He had also stated that all the windows and doors of the Principal's office always remains open on all working days. He stated that there is always an attendant outside the office of the principal and the same is connected with other parts of the school with veranda. The PW-11 was never re-examined by the prosecution.

13. He submits that the PW-12 stated that she witnessed the seizure of the liquor bottle from the bag of the victim by the appellant and saw the victim leaving the office room. During the cross, PW-12 stated that all the windows and doors of the Principal's chamber remain open during school hours and there is a lady attendant outside the Principal's chamber.

14. He submits that the PW-13 (IO) stated that after thorough examination of the PW-12 during the investigation, it was revealed that the appellant had recovered liquor from the bag of the victim on 16.11.2020. During the cross, the IO denied collecting any physical or material evidence corroborating the evidence of the victim. The DW-1, who is the attendant also witnessed the seizure of the liquor bottle and also exhibited her attendance sheets and signature.

15. Mr. D. Soki, learned counsel, submits that the learned special judge wrongfully arrived at the conclusion that the foundation facts for the presumption under sections 29 and 30 of the POCSO Act, have been laid, whereas, the evidence led by the prosecution itself leads to circumstances, under which the sexual assault on the victim on 2 (two) occasions is highly improbable. He submits that the absence of any injury mark, even after force being used and the victim not shouting for any help on being sexually assaulted twice on the same day belies the statement of the victim, other than the statements of the victim under Section 164 Cr.P.C and deposition before the court being contradictory to each other. As such, the contradiction of the statements by the victim, including the cross- examination, coupled with the fact that the Principal's chamber being within the same school building and the presence of an attendant makes it improbable for the assault to have happened

upon the victim. Therefore, the presumption against the appellant could not have been laid under sections 29 & 30 of the POCSO Act. He submits that even to invoke the presumption under sections 29 and 30 of the POCSO Act, the prosecution cannot be relieved of its responsibility to lead the evidence and prove its case, as the presumptions are not absolute presumptions. As such, in order, to invoke the presumption under sections 29 & 30 of the POCSO Act, the foundational facts as to the crime must be fully established to the satisfaction of the court. Even in cases in which statutory presumption arise regarding the guilt of the accused, then, the burden is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn.

16. Mr. D. Soki, learned counsel, submits that the learned special judge has come to the conclusion that the seizure of the liquor from the victim has been planned by planting two lady staffs from the school including the PW-12, whereas, no re-examination was made by the special PP to that aspect with respect to PW-12 and her evidence was not discredited by the special PP. And as such, the said conclusion is totally wrong. The learned special judge further came to the conclusion that the appellant sexually assaulted the victim by touching her breast on two occasions. Whereas, the victim herself has stated (with contradictions under S. 164(5) Cr.PC. and deposition before the court) that her breast was touched once only.

17. Mr. D. Soki, learned counsel, submits that the learned special judge failed to appreciate that the prosecution has led two sets of evidence, each contradicting and striking at the other and as such, no reliable and trustworthy evidence was available upon which the conviction of the appellant could be based. And as such, the appellant would have the benefit of such a situation. He

submits that the Hon'ble High Court in exercise of its appellate powers can reappreciate or re-visit the evidence which is on record. Therefore, this Hon'ble Court can sift, weigh and re-appreciate the evidence.

18. Mr. D. Soki, learned counsel submits that all the relevant prosecution witnesses other than the victim and her parents and more particularly PW6, PW10, PW11 and PW12 have in their depositions before the learned special judge have led to the conclusion that the alleged sexual assault on the victim was highly improbable given the circumstances. Therefore, he submits that as per the "two- views theory", the controversy is to be resolved in favour of the accused.

19. He submits that the learned special judge could not have selectively chosen to rely on evidence of some prosecution witness, while discard the evidence of other prosecution witnesses, that are in favour of the appellant. He further submits that though the conviction can be based on the evidence of sole witness/ prosecutrix, but to hold that the evidence, even if the story is improbable and belies logic has to be accepted, is contrary to the principles governing the appreciating of evidence in criminal matter. The appellant has all along maintained a clean and respectable image which has been stated by all the staffs of the school, who appeared as prosecution witness. Therefore, same may also be taken into consideration.

20. In support of his submissions, Mr. D. Soki, learned counsel for the appellant has placed reliance on the following judgments:-

I. Sanjay Vs. State of Maharashtra, Through Police Station Officer reported in **2024 SCC Online Bom 2608**.

II. M.S. Narayan Menon @ Mani Vs. State of Kerala and Another reported in **(2006) 6 SCC 39.**

III. Harchand Singh and Another Vs. State of Haryana reported in **(1974) 3 SCC 397.**

IV. Mallappa and Others Vs. State of Karnataka reported in **(2024) 3 SCC 544.**

V. Tameezuddin @ Tammu Vs. State (NCT of Delhi) reported in **(2009) 15 SCC 566.**

21. On the other hand, Mr. T. Ete, learned Addl. PP for the State, submits that the victim, PW-1, provided a consistent and clear account of the incidents. In her statement recorded under Section 164(5) of the Cr.PC, she described two specific encounters with the accused in the Principal's chamber. In the first incident, the accused isolated the victim from her two friends, PW-6 and PW-7, and during that time alone with him, she alleged inappropriate physical contact, including hugging, kissing, and touching her breast. In the second incident, the victim was again subjected to inappropriate advances by the accused after being called to the Principal's chamber. He asked her to accompany him to the washroom in the Principal's chamber, which she declined. The accused then tried to drag her towards him by her left arm and attempted to touch her breast. However, because she was carrying a school bag over her chest, he was unable to touch her breast.

22. Mr. T. Ete, learned Addl. PP, submits that the statement of the victim is corroborated by the depositions of PW-6 and PW-7 and conduct of the accused. Both PW-6 and PW-7 corroborated the victim's account, confirming that they were present when the accused asked them to leave the principal's chamber, instructing the victim to remain behind. This corroboration significantly strengthens the victim's narrative, demonstrating a clear pattern of the accused isolating the victim to exploit the situation. The conduct of the accused is also a

relevant factor, as the ordinary course of human behaviour and probabilities must be considered when evaluating the facts of the case

23. Mr. T. Ete, learned Addl. PP, submits that the victim's testimony has remained consistent and trustworthy throughout the trial. The defence failed to shake her statement during cross-examination. To contradict the statement of the victim, the defence should have acted in accordance with Section 145 of the Evidence Act, which allows for cross-examination to impeach the credibility of the witness. If a portion of the testimony is not meticulously cross-examined, it stands proved and is accepted as true. Even where cross-examination has been conducted in compliance with the requisite procedure, any contradictions brought forward must be of such magnitude that they affect the core or very nature of the prosecution's case. Minor discrepancies do not invalidate the testimony of a witness who has otherwise been consistent and credible. In this case, the victim's testimony, despite being tested in cross-examination, remains unshaken and reliable, and any minor contradictions do not detract from the truthfulness of her statements.

24. Mr. T. Ete, learned Addl. P.P., submits that the victim's testimony is further corroborated by other witnesses, including PW-2, PW-3, PW-4, PW-5, PW-8, PW-9, PW-10 and PW-11. These witnesses provided supporting evidence that aligns with the victim's narrative, strengthening the credibility of her account. Their testimonies, combined with the victim's clear and consistent account, form a strong foundation for the prosecution's case.

25. Mr. T. Ete, learned Addl. PP, submits that PW-12, a clerical staff member, testified that on 16.11.2020, she overheard the accused instructing the victim to open her school bag and later allegedly discovered a plastic bottle containing a

black liquid, presumed to be locally prepared alcohol. PW-12 also stated that the victim apologized to the accused for carrying alcohol. DW-1, the office peon, testified that she overheard the accused questioning the victim about the alcohol found in her school bag. She confirmed that she was present outside the chamber when the victim, along with two other students, entered the Principal's office. In her testimony, she mentioned hearing the victim respond that other students also carried alcohol to school but that she was being singled out. DW-2 (the accused) claimed that he recovered the plastic bottle containing suspected alcohol from the victim's school bag in the presence of PW-12 and DW-1. He stated that this incident occurred during the victim's second visit to his chamber. He further testified that the victim apologized after the recovery, which he claimed was overheard by PW- 12. However, DWs testimony does not directly address the accusation of sexual assault.

26. Mr. T. Ete, learned Addl. PP, submits that there are significant contradictions in the testimonies of PW-12, DW-1, and DW-2 regarding the alleged recovery of alcohol as DW-1 testified that the recovery occurred when the victim came to the Principal's office with her two friends, while DW-2 claimed the bottle was recovered during the second meeting. DW-1 stated that only three people including herself were present during the recovery including the accused and the victim while DW-2 claimed that PW-12 was also present. PW-12 stated that the victim apologized, while DW-1 mentioned the victim arguing that other students also brought alcohol to school. These inconsistencies undermine the credibility of the defence narrative and raise questions about the truthfulness of the accused's account.

27. He submits that considering the inconsistencies in the testimonies of the

defence witnesses and the failure of the accused to follow standard procedures, the finding of the learned Special Judge (POCSO) is absolutely reasonable and supported by the evidence on record. The court's opinion that the allegation of alcohol recovery from the victim's bag appears to be a fabricated story created by the accused is correct and does not call for any interference by this Hon'ble Court. The defence's narrative lacks credibility and seems to be a deliberate attempt by the accused to divert attention from the serious allegations of sexual assault. The accused, instead of reporting the alleged recovery of alcohol in a timely and proper manner, chose to remain silent until the victim disclosed the sexual assault. The lack of immediate disclosure to the class teacher, other school staffs, or the victim's parents is highly questionable and further undermines the accused's version of events. He submits that the accused's claim of alcohol recovery was orchestrated to avoid prosecution and it is not the victim who is falsely accusing the accused, rather, it is the accused who has made a false claim of alcohol recovery to shield himself from the allegations of sexual assault.

28. He submits that the prosecution has demonstrated through the testimonies of PW-1, PW-2, PW-3, as well as reveals from the 313 statements of the accused, that there was indeed physical contact between the accused and the victim. Even assuming but not admitting that the physical contact was limited to a hug, it is important to note that the hug itself, when done with sexual intent, can be enough to attract the provisions of Section 7 of Pocso Act.

29. He submits that the presumption under Section 29 of the POCSO Act, 2012, is not absolute. To trigger this presumption, the prosecution must establish a foundation of fact not based on the principle of beyond reasonable

doubt, but on the basis of the preponderance of probability. Once the prosecution successfully establishes this foundational fact, the burden shifts to the accused to rebut the presumption by cross-examining the prosecution witnesses and/or by adducing their own defence evidence to demonstrate that the prosecution's case is improbable based on a preponderance of probability. Moreover, if the issue relates to the absence of culpable mental state, the accused must prove such absence beyond reasonable doubt, as provided under Section 30(2) of the POCSO Act, 2012. Should the accused fail to rebut or discredit the testimony of the prosecution witnesses, the prosecution's case stands proven beyond reasonable doubt.

30. Mr. T. Ete, learned Addl. PP, submits that the legal principle fits well with the facts of this case. The POCSO Act is designed to protect children from any form of sexual abuse, and a hug that involves inappropriate intent or conduct on the part of an adult towards a minor is not to be dismissed lightly. The intent behind the physical contact is crucial here, and the prosecution has clearly established that the hug was not an innocent gesture but was done with sexual intent, as corroborated by the victim's testimony and supported by other witnesses. Moreover, under Section 30(2) of the POCSO Act, once prima facie evidence of such physical contact is presented, the burden shifts to the accused to rebut this evidence and prove that the contact was not sexual in nature, beyond reasonable doubt as provided under section 30(2) of POCSO Act, 2012. The accused, however, has failed to discharge this burden adequately. By law, this failure strengthens the prosecution's case, leading to the conclusion that the contact was indeed made with sexual intent. The presumption under Section 29 holds unless successfully rebutted by the defence. Therefore, the hug, kiss &

touching breast in this case, combined with the accused's failure to rebut the evidence, confirms that the physical contact qualifies as sexual assault under Section 7, and the accused is thus punishable under Section 10 of the POCSO Act, given the status of the relationship between the accused and the victim.

31. Mr. T. Ete, learned Addl. PP finally submits that the evidence provided by the defence is riddled with contradictions, casting serious doubt on the accused's credibility. The accused's failure to report the alleged recovery of alcohol, coupled with the inconsistencies in witness testimonies, strongly indicates that the narrative was fabricated to shield the accused from the charges of sexual assault. The victim's testimony, corroborated by PW-2, PW-3, PW-4, PW-5, PW-6, PW-7, PW-8, PW-9, PW-10, PW-11, and PW-13, remains consistent, credible, and inspires confidence, thereby justifying the conviction of the accused. Furthermore, it is well settled that an accused can be convicted solely on the testimony of a single witness, which is the essence of Section 134 of the Indian Evidence Act. It is also a well-established principle that a conviction can be based solely on the testimony of the prosecutrix. The victim's testimony alone is sufficient to convict the accused, and seeking corroboration before relying on the testimony of such a victim as a matter of rule would, in effect, amount to adding further insult to injury. Even though such corroboration is not necessary, in this case, there is indeed corroboration from multiple prosecution witnesses, further solidifying the credibility of the victim's account. Moreover, It is held by the Hon'ble Supreme Court that Court is not merely to see that no innocent man is punished. It has also to be seen that a guilty man does not escape. Therefore, considering the facts and circumstances of the case and the evidence on record, learned Addl. PP has prayed that the present

appeal may be dismissed, and the conviction and sentence of the accused appellant may be upheld.

32. Mr. T. Ete, learned Addl. PP, in support of his submissions, has placed reliance upon the following judgments:-

- 1. Mulakh Raj and Ors Vs. Satish Kumar and Ors. reported in (1992) 3 SCC 43.**
- 2. Anees Vs. State Govt. of NCT, reported in 2024 SCC Online SC 757.**
- 3. State Vs. Meena Kumari @ Raj Rani reported in(1986) Crimes (HC) 630.**
- 4. Sunil Kumar Vs. State Govt. of NCT of Delhi reported in(2003) 11 SCC 367.**
- 5. Harivadan Babubhai Patel Vs. State of Gujarat reported in (2013) 7 SCC 450.**
- 6. Gangabhavani Vs. Rayapti Venkat Reddy and Ors. reported in (2013) 15 SCC 298.**
- 7. Attorney General for India Vs. Satish and Another, reported in (2022) 2 SCC 545.**
- 8. Bhupen Kalita Vs. State of Assam reported in (2020) 3 GLT 403.**
- 9. State of Himachal Pradesh Vs. Sanjay Kumar @ Sunny reported in (2017) 2 SCC 51.**
- 10. Mukesh and Another Vs. State (NCT of Delhi) and Ors. reported in (2017) 6 SCC 1.**

33. Ms. N. Anju, learned Legal Aid Counsel for the respondent no. 2, submits that Pw-1 (Victim) was cross -examined. However, there is absolutely nothing in her cross-examination which would discredit her version as the testimony of the Prosecutrix remained consistent. The statement of the victim is amply supported by the evidence of PW-4 to whom victim made immediate disclosure about the incident. Testimony of PW-8 is confirming the claim of the victim that she

(Victim) was called by accused appellant in his chamber. Accused himself admitted in his deposition before Court as DW-2 as well as during 313 Cr.pc that Victim with PW-6 &7 came to his chamber. That the statements of PW-12 (who is an interested witness), DW-1 and DW-2 statements to be looked into. Their statements are contradictory. The evidence of PW-4, 5, 6 and 7 is well corroborated. That the statement of prosecutrix (PW-1) before Magistrate under section 164(5) of the Cr.PC and deposition on oath before Court is corroborated and consistent. That no serious endeavour on the part of accused to rebut the presumption under section 29 of the POCSO Act or to disprove the allegations of the prosecution for sexual assault with the prosecutrix in this present case. She submits that the accused has misused his position. At that relevant time, the accused was employed as Vice-Principal in the educational Institution. PW-1 verbalized the entire episode of sexual assault committed with her by the accused who was a student of the school. The provision of section 29 of the POCSO Act, manifestly made it clear that if the accused person is prosecuted for committing or abetting or attempting to commit the offence under section 3, 5, 7 and section 9 of the Act, it is mandatory for the special court to presume that such person has committed/abetted/attempted to commit the offence unless contradiction is proved. It is settled law that evidence of the victim of sexual assault is enough for conviction unless there is a serious contradiction. The evidence of PW-1, PW- 4, 5 & 6 is well corroborated. The case has been proved against the appellant beyond reasonable doubt. The conclusion arrived by the Learned Trial Court is proper, legal and in accordance with law. Therefore, she submits that the appreciation of evidence, as done by the Learned Special Court does not suffer from any error or infirmity and does not require any interference

of the judgement and order dated 18.10.2022 passed by the learned Special Judge and as such the present appeal is liable to be dismissed.

34. Ms. N. Anju, learned Legal Aid Counsel, has placed reliance on the judgment in the case **Padurang Narayan Jadhav Vs. State of Maharashtra Through Investigating Officer**, reported in **2019 SCC OnLine Bom 634**.

35. I have considered the submissions advanced by the learned counsel for the parties and perused the materials on record.

36. In order to prove the case, the prosecution had examined 13 (thirteen) prosecution witnesses and had exhibited documents and materials through these witnesses. The accused was examined under Section 313 of the Cr.P.C. The defence has examined two defence witnesses including the accused himself.

37. The allegation is that on 16.11.2020 around 11 a.m., the victim along with her two friends visited the office chamber of the principal to enquire about the School Bus, and then accused directed the victim to wait for sometime at his chamber and asked her other two friends to leave the chamber for their classes. Thereafter, the accused caught hold of the victim and touched her breast and other parts of her body with sexual intent, but somehow victim had managed to escape from his grip. After about one hour (of the first incident), again the victim was called to office chamber of accused appellant through her class teacher. When victim entered the accused chamber for second time, the accused again touched the breast of the victim with sexual intent.

38. The accused appellant was thereafter arrested, although, he had denied the allegation, but had admitted the fact that, victim came to his chamber with

other two student of her class, and that he asked those two students to leave the chamber and directed victim to stay back in his chamber. The accused appellant had also admitted the fact that he had directed the class teacher of victim to call the victim with her school bag. The accused appellant claimed that, on random checking of victim's bag, he found half litre plastic water bottle containing suspected local drinks called *Apong*. As such, accordingly to the defence, to hide the recovery of local Apong from her bag, victim is alleging false allegation against the accused.

39. On the basis of the evidences the learned Special Judge has found the following facts not disputed in the case: That, accused was the vice-principal of ITBP, Public School, Aalo, and was working as principal In-charge at the time of the alleged incident of this case. That, victim was studying in class-IX of the said school and her age was about 14 years as per the school record at the time of alleged incident. That, on 16.11.2020 at about 11 am, victim with PW-6 and PW-7 visited the chamber of accused and had talked with the accused regarding their pick up by school bus. That, after having discussion on school bus, when three of them were leaving the chamber of accused, accused asked the victim to stay back in his chamber and sent back the two other student to their classes. That, after first alleged incident, victim went back to her class, but she was called back by the accused in his chamber with her school bag, through her class teacher (PW-8), and accordingly, victim went to the chamber of accused. That, after the second alleged incident, when victim was rushing out from chamber of accused towards her class room. That, after sometime victim went to teaching staff's room to complaint about the alleged incident. Accordingly, she disclosed the incident to teaching staffs including to PW-4, PW-5, PW-9 and

PW-11. That, on such disclosure, PW-5 and PW-11 with victim came to the chamber of accused, and confronted the accused with the allegation levelled against him by the victim. That, after alleged incident that claimed to have been taken place on 16.11.2020, victim did not turn up to school for next 2 (two) days i.e. 17th and 18th of November 2020. That, in the evening of 18.11.2020, on being asked by the PW-2 the mother, reason for not going to the school, victim disclosed the incident that happened to her in the chamber of Principal of the school on 16.11.2020. That, then mother disclosed the incident as narrated by the victim to PW-3, father of the victim, who got confirmation of the same from the victim daughter on next morning of 19.11.2020. Thereafter, her father, mother and relatives along with the victim went to school, confronted the accused person and then lodged the FIR on 19.11.2020.

40. After consideration of the evidences, the learned Special Judge has held that the accused appellant, the then Vice-Principal of ITBP Public School, Aalo, and Principal In-charge at the time of the incident, had committed an offence of sexual assault on the victim in his office chamber on 16.11.2020 as defined under section 7 of the POCSO Act 2012 and had committed an offence of aggravated sexual assault as defined under section 9 (f) of the POCSO Act 2012 and convicted and sentenced as noted here above.

41. Now this court would analyse and appreciate the relevant testimony of the witnesses.

42. PW-1, the victim, had deposed that on that day of 16.11.2020 she along with her friends (PW-6) and (PW-7) went to the chamber of the Principal for requesting him to provide school bus facility at their residential area at RWD Complex, Aalo. They met the accused inside the Principal's chamber and he

assured them to provide pick up and drop bus service. Thereafter, when they were leaving the Principal's chamber, the accused asked her to stay back inside the chamber and sent both her friends to go to their classes. She deposed that accused enquired about her progress in her studies and other studies related issues. After a while he stood up from his chair and hugged her. The accused kissed her on her right cheek and touched upon her right breast. She then pushed by his hand and got back to her Class- IX room. She had deposed that when she got back to class, no teacher was teaching. After break period, they had class on Economics subject which was attended by their teacher- one Tumpak Ete Sir, during which one of their school teacher one Ms. Puja Madam came to their class and asked her to go to Principal's office with her school bag and she went there. PW-1 while continuing with her narration about the incident that took place in the chamber of accused for the second time, had deposed that when she went to Principal's chamber for second time, the accused again asked her to study properly to which she did not respond however, she has shown him by gesture obliging his instruction. The accused checked her school bag, she was carrying her books and stationary inside the bag. Thereafter, he said that apart from studies we should indulge in other form of enjoyment. She perceived his message in negative sense. He tried to continue conversation with her and asked her to accompany him to wash room of Principal's chamber which she declined to do so. Thereafter, he tried to drag her towards him by her left arm and attempted to touch on her breast. Since she was carrying her school bag over her chest, he could not touch her breasts. He took of her school bag forcibly, while he was trying to keep it on sofa she swiftly taken over and came into her class room. She had deposed that before

entering into her Class room, she passed by a female teacher, she asked her as to why she was in hurry. She did not respond to her query.

43. Before the Magistrate, under 164 Cr. PC statement on the same fact, PW-1 had stated that "then I picked up my bag from the sofa and ran back to my class. Meantime, I met Ms. Ngomdir madam on the corridor nearby classroom and she asked why I was running but I did not respond as I was in shock and nervous." She had stated that, "after that we had mathematics class. While attending maths class I was feeling uncomfortable and I decided to report the matter to Ms. Kemin Ma'am, so I took permission of class teacher and went to staff room. Ms. Kemin Ma'am was not there but Ms. Yanam Madam, Ms. Ngomdir Madam and Mr. Pakam Sir was present there. I informed all of them about the incident. Thereafter, Ms. Ngomdir Madam informed about the incident to Mr. Bomjen sir. After hearing the incident, Mr. Bomjen sir directed me to go to my classroom so I went back to my classroom".

44. PW-1 had deposed that "it was mathematics period in my class. I felt uncomfortable, so I took permission from the math teacher and directly went to the staff room. I found Miss Yanam Ragmuk, Miss Tumngam Ngomdir and Pakam sir present in the staff room, I revealed the incident to them in the staffs' room itself. Tumngam Ngomdir madam told this incident to Mr. Bomjen sir and Shri Pankaj sir asked me to attend the class ensuring me that they will speak to accused in a short while. I came back to my class room". She deposed that, "After sometime, Bomjen sir and Pankaj sir escorted me to the Principal's office; we saw the accused seated in the Principal's office. When Bomjen sir and Pankaj sir asked the accused as to whether he did the incident as revealed by me, then the accused denied totally, however, he had accepted that he hugged

me with no mala fide motive and tried to hug me again in front of them. In presence of Bomjen sir and Pankaj sir, he apologized for his conduct".

45. PW-6 had deposed that on 16.11.2020, she, Victim and Shri Nyabom Gamlin (PW-7) had gone to the Principal's office, met the vice Principal Shri Shivkant Mishra and requested him to provide pick up and drop bus service to our respective residential area at Aalo. After meeting the vice principal (accused), when we were coming out from the Principal's office, the accused asked victim to stay back at the Principal's office. Thereafter, she and PW-7 came back to our economic class. After sometime victim came back to our class. The PW-7 had also deposed that on 16.11.2020, she, Victim and PW-6 had gone to the Principal's office, met the vice Principal Shri Shivkant Mishra and requested him to provide pick up and drop bus service to our respective residential area at Aalo. After meeting the vice principal, when we were coming out from the Principal's office, the accused asked victim to stay back at the Principal's office. Thereafter, I and PW-6 came back to our economic class.

46. It is seen that accused appellant admitted these facts in his deposition before the court as defence witness as well as during his examination under section 313 of Cr.PC, that Victim with PW-6 and PW-7 came to his chamber to discuss regarding providing of school bus service to them, after discussion, he sent back both PW-6 and PW-7 to their class and Victim stayed back at his chamber on being asked by him. The aforesaid fact disclosed by the victim is corroborated by the PW-6 and PW-7.

47. PW-8, the class teacher, had deposed that on day of incident, the accused asked me to get victim from her Class-IX room at Principal's office along with her school bag. I brought the victim up to the door of Principal's office and

thereafter she had gone back to Class-VII for continuing Hindi class session. In the cross, this witness deposed that she brought the victim at the office of Vice Principal which might have been 11:50 am. Thus, the testimony of PW-8 is confirming the claim of the victim, that she was called by the Principal in his chamber for the second time after the first incident through her class teacher. This fact has also been admitted by the accused during his examination under section 313 of Code, and in his deposition as DW-2 that he asked PW-8, the Class teacher of Class-IX student to bring victim along with her school bag to the Principal's chamber. That PW-8 brought the victim inside his chamber and left.

48. PW-4 deposed that she saw victim running towards her class room from inside the Principal's chamber. She quickly asked the reasons for and she said only "nothing" as swiftly gone inside her class room. Thus, the testimony of the victim that, after the incident she rushes back to her class room is found to be true. She had further stated that in the meantime the victim appeared in front of her and told her that the vice Principal (accused) has attempted to kiss her and pressed on her breasts. Since she was teaching in the school for 2 years only, as such she could not take the decision therefore, she took victim to Smt. Kemin Sora Ingo and Mr. Tummar Bomjen who were seniors in the school. Then she revealed the incident to them.

49. PW-5 had deposed that at about 11:30 a.m. on 16.11.2020 Miss Tumngam Ngomdir, junior teacher told him at his chamber that Vice Principal has allegedly molested the victim, as such she requested me to take appropriate step. He called the victim girl at his chamber, enquired about the incident, she revealed that the Vice Principal sir has molested her inside the chamber of Principal. After

hearing the incident from the victim girl, he immediately informed Shri Pankaj Kumar about the incident and requested him to take the accused in confidence and discuss with him whether the later has committed any such offence or not. He had deposed that after a while Shri Pankaj Kumar, requested me to accompany him for having discussion with the accused at the Principal's chamber. The accused denied of committing molestation on the victim however, he offered to apologize the victim if his conduct in anyway offended the victim. Thereafter, he asked the victim girl to come inside the Principal's chamber to know the facts about the allegation from her in front of the accused and Mr. Pankaj Kumar. The victim stood on her allegation that accused had molested her inside the Principal's chamber. After a while the victim had gone back to her class room. Thereafter, the victim girl did not come to school for 2 days, i.e. 17th and 18th of November 2020.

50. PW-11 had deposed that Mr. Tummar Bomjen told him that the victim was alleging Vice Principal committing molestation upon her. He found the victim girl in the staff room. He was shocked. He decided to take the matter to the accused therefore; he and Shri Tummar Bomjen took the victim to the Office of Principal and met the accused at Principal's Chamber. He revealed allegation to the accused, he too was shocked to hear such allegation. The accused denied committing molestation or even touching upon her body with any bad intention.

51. The PW-12, a clerical staff of the school, had deposed that on 16.11.2020, during day time I had to get some papers signed from the accused who was performing as Principal In-Charge of the school on leave of the full-fledged Principal. She was about to enter his chamber, I saw Victim entering the chamber of the Principal therefore I stood by the door of the said chamber. She

heard the accused instructing the victim girl to open up her school bag and show to him. The victim was a bit in nervousness. She saw the victim girl taking a transparent plastic bottle containing some black color liquid. Thereafter, the accused was questioning to victim that why was she carrying only 2 to 3 text books and brought locally prepared alcohol. She also heard the victim seeking pardon from the accused saying that she will not repeat carrying alcohol bottle in the school. Thereafter, she saw her going towards the Class-IX room and after that she got her papers signed by the accused from inside his chamber. She also got back to her office in the mean time she heard the victim talking to PW-5 (Shri Tummar Bomjen), one of the school teacher at the school during the relevant time, however she did not hear what they were discussing about. She came to know about the local alcohol found in the school bag of victim on 16.11.2020 through Mr. Shivkant Mishra. She has personally seen the bottle seized from the victim.

52. The DW-1, an office peon of the school, had deposed that she was performing her duty as attendant (peon) of the Principal and then Vice Principal. Being attendant, she check any student or any person visiting the Principal and Vice Principal. On 16.11.2020, she allowed victim girl, one girl and a boy to enter the office of the Principal. Being the attendant I sit just near the door of the chamber. She heard the accused (Vice Principal) taking out a liquor bottle from the school bag of victim and reprimanding her as to why she has brought such restricted liquor to the school. She overheard the victim saying that many more students were carrying among (locally prepared alcohol) in their school bag but why was the accused only scolding her. In cross examination, she had stated that she generally sit outside the chamber, to serve food, tea or water to

the officers sitting inside the Principal's chamber as and when asked for. She do not remember that time period of witnessing accused seizing apong (alcohol) from the school bag of the victim on 16.11.2020 at Principal's chamber. On 16.11.2020, accused seized bottle of alcohol from school bag of a girl in her presence, there were only three of us namely, accused, myself and that girl from whose bag alcohol was seized.

53. The accused examined himself as DW-2 and had deposed that while he was asking the victim to open her school bag in the same time, PW-12, Miss Hemlata Dixit, wanted to get his signature on some documents. I seized a plastic bottle containing locally prepared alcohol from school bag of the victim in presence of school peon DW- 1 and PW-12 who was standing outside the door of my chamber. The accused person has claimed that from the sources he came to know about the bringing of alcohol to school by the victim. Therefore, he called the victim with her school bag through her class teacher.

54. On the scrutiny of the testimony of PW-12, DW-1 and DW-2, it appears that these witnesses claimed that the victim is alleging false allegations against the accused to defend herself from the action to be taken by the school authorities after she was caught with a bottle of local alcohol from her school bag. However, on the appreciation of entire evidences, the testimonies are not convincing as the accused did not disclose the recovery of the bottle containing local alcohol from the school bag of the victim on the day of such recovery to any of the teaching staffs including to the class teacher who brought the victim to the chamber of the accused on his direction, and even to PW-5 and PW-11, who confronted the accused with the victim girl just after the alleged incident was disclosed by the victim.

55. This court is in agreement with the learned Special Judge that when a school Principal, recovers bottle containing alcohol in the school bag of its student, as a normal course of action, it would be the first duty of school Principal to call the class teacher of that student from whom such recovery was made, and then to other teaching staffs, and thereafter to the parents of the student, to inform the recovery of such alcohol bottle. However, the accused, after recovery of alleged suspected alcohol bottle from victim's bag, did not disclose to anybody, on the day of recovery, including to her class teacher, who brought the victim with school bag to accused chamber, not even to the senior teacher and the school Inspector who confronted the accused just after the incident of alleged sexual assault, neither to other teaching staffs, nor to parents of the student from whom it was recovered. Thus, it appears to be a well planned story created by the accused person. It was not the victim, who is alleging false allegation of sexual assault against the accused, to hide her misdeed of bringing alcohol to school, but it is the accused, who is alleging false allegation of recovery of alcohol from the school bag of victim girl, to escape from the prosecution against him on the allegation of sexual assault on the victim girl.

56. The deposition of victim/PW-1, on the incident remain consistent and same, that the accused, after sending off her two friends from the chamber, had molested her by touching her breasts, by kissing on her right cheek and by hugging her inappropriately with a bad and sexual intention. After that first incident, when victim returned to her classroom, victim was called back by the accused to his chamber through her class teacher PW- 8. When victim went to the chamber of the accused on such call, again for the second time, accused

hugged her inappropriately, touched her breasts and kissed on her cheek and also accused tried to drag her by her arms towards the washroom of the accused chamber with sexual intention. The defence could not place any material evidence contrary to the facts that has been placed by the prosecution including that of the testimony of the prosecutrix, that she has been subjected to sexual assault by the accused not only once but twice in the chamber of Principal on 16.11.2020 at about 11 am. Thus, in my view the entire statement and depositions of the victim remains same and consistent and corroborated by other witnesses and as such same is trustworthy.

57. The Hon'ble Supreme Court, on the crime against women, has observed that of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. The Courts shoulder a great responsibility while trying an accused on charges of sexual assault and rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be

appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

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

59. In the present case, it transpires that the conviction is based on testimony of the prosecutrix corroborated by the other evidence of prosecution witnesses particularly PWs-2, 3, 4, 5, 6, 7, 8, 9 and PW-11.

60. On careful perusal of the evidence of the victim, this Court finds that she has consistently stated about the kiss and touching of breasts by the accused. The testimony of PW-1 makes it confirmed that the accused kissed and touched the breasts of the victim. The testimony of PW- 4, 5, 6, 8, 9 and 11 corroborates the circumstances of sexual assault on the victim by the appellant. The evidence of victim also reveals that the accused kissed her and touched the breasts of the

victim. This piece of evidence could not be impeached, therefore, the prosecution has conclusively proved the allegation of kissing and touching the breasts of the victim by the accused.

61. Regard being had to contention of learned counsel for the appellant that the deposition of the victim before the court is contradictory to the statements made under 164(5) Cr.PC as the victim under S. 164(5) Cr.P.C had stated that in the first instance, the appellant hugged and kissed her and later when she was called again, the appellant touched her breast whereas, in her deposition before the court, the victim had deposed that in the first instance, the appellant touched her breast and later when she was called again the appellant tried to drag the victim by left and tried to touch her breast, but couldn't and as such, the same is a major contradiction, this court finds no inconsistency or contradiction to disbelieve the evidence of the victim. The evidence of victim is of sterling character without any major contradiction and inconsistency.

62. It is well settled principle of law that conviction can be based on the sole testimony of prosecutrix provided it is credible, reliable and trustworthy and does not suffer from any infirmity. In the present case, the evidence of the victim corroborated by PW-4, 5, 6, 7, 8, 9 and 11 and the recorded statement under Section 164 CrPC which are materials facts or incriminating facts constitutes the guilt of the accused and the conviction can be based on the same. On consideration of the evidence, I am of the view that the prosecution has proved the foundational fact of the case that the accused kissed and touched the breasts of the victim with sexual intention.

63. In **Federation of Obstetrics & Gynaecological Societies of India v. Union of**

India, reported in **(2019) 6 SCC 283**, the Hon'ble Supreme Court has held, which is quoted herein under-

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

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

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

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

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

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

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

There is a paradigm shift in the burden of proof and degree of proof under POCSO Act.

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

Before the court presumes the guilt of the accused the Court must be

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

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

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

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

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

The prosecution must establish the foundational facts (actual sexual act, sexual act Committed against the victim’s will or consent, consent obtained fraudulently etc.) on the standard of preponderance of probability.

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

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

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

Committed.

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

66. On careful scrutiny of the defence witnesses, this Court finds that the accused appellant has failed to disprove that he had no criminal intention to hug and kiss while touching the breasts of the victim inside the chamber of Principal, and on the other hand, has taken unbelievable plea of hugging without bad intention and attempt to make a plea of recovery of alcohol bottle from the victim and to evade punishment made the allegations. Thus, this court has no other option but to agree with the learned Special Judge that from the proven facts of high probability to commit an act with culpable mental state is conclusive beyond all reasonable doubt. The prosecution has discharged the duty to prove the charges not only through the foundational facts which does not suffer from any infirmity but beyond reasonable doubt against the accused to constitute offence under section 9 of the Act. On the other hand, the duty of the accused to discharge the imposed duty of reverse burden of proof even through preponderance of probability is not helpful to the defence to impeach the evidence of victim corroborated by PW-4, 5, 6, 7 and 8 to disprove the incriminating evidences brought before the court by the prosecution against him but the accused has made a failed attempt to take strange plea of recovery of alcohol bottle.

67. In view of above, this court is of the firm view that the learned Special Judge, has rightly held that the accused had committed act of kissing and touching the breasts of victim with culpable mental state of mind and thereby

committed an offence of sexual assault under Section 9 of POCSO Act as the accused has failed to rebut the foundational facts proved against him by the prosecution under the principle of reverse burden of proof that the accused has not committed the offence of sexual assault. In view of the above facts, the conclusion by the learned Special Judge, that the accused, the then Vice Principal and the Incharge Principal of the School on the day of incident on 16.11.2020 at 11 am, had committed an offence of aggravated sexual assault on the victim in his office chamber as defined under section 9 (f) of POCSO Act and punishable under section 10 of the Act by kissing and touching the breasts of victim with sexual intention warrants not interference.

68. Now, I would refer to the case laws relied on by the learned counsel for the parties.

I. Sanjay Vs. State of Maharashtra, (supra), the Hon'ble Supreme Court has held which is quoted herein under:-

"21. In the facts and circumstances, I conclude that prosecution has miserably failed to establish the identification of the accused, being the perpetrator of the crime. The evidence on the point of the identification of accused is not of sterling quality. In the absence of test identification parade, in the fact situation, implicit reliance cannot be placed on the evidence of PW-3 alone. Section 164 Cr.P.C. statement of PW 4 cannot be used as a substantive piece of evidence. Learned Judge, in my view, has failed to properly appreciate the above stated facts and evidence properly. It is not out of place to mention that a crime of this kind needs to be condemned. It is a brutal and deplorable crime. In such a crime, the sympathy of the Court is bound to be with the victim. However, the conviction cannot be based on sympathy and moral consideration. However, the conviction cannot be based on sympathy. The accused is entitled to benefit of doubt. In this case, Section 29 of the POCSO Act was invoked by the learned Judge. In my view, learned Judge was not right in invoking the presumption provided

under Section 29 of the POCSO Act. The presumption is not an absolute presumption. Even on the basis of such a presumption the prosecution cannot be relieved of its responsibility to lead the evidence and prove its case. In short, in order to invoke the presumption under Section 29 of the POCSO Act the foundational facts as to the crime must be fully established to the satisfaction of the Court. In this case, the foundational facts with regard to the identification of the accused and the commission of the crime by the accused has not been proved. In this case, therefore, I conclude that the evidence falls short to prove the guilt of the accused. As such, the judgment and order cannot be sustained. The appeal is accordingly allowed."

II. M.S. Narayan Menon @ Mani (supra), the Hon'ble Supreme Court has held which is reproduced herein under:-

"48. In Kali Ram v. State of Himachal Pradesh [(1973) 2 SCC 808], Khanna, J., speaking for the 3-Judge Bench, held:

" One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused. There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn. Once those facts are shown by the prosecution to exist, the Court can raise the statutory presumption and it would, in such an event, be for the accused to rebut the presumption. The onus even in such cases upon the accused is not as heavy as is normally upon the prosecution to prove the guilt of the accused. If some material is brought on the record consistent with the innocence of the accused which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal."

III. Harchand Singh(supra), the Hon'ble Supreme Court has held which is quoted herein under:-

“11.The function of the court in a criminal trial is to find whether tile person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offence with which Ile is charged. If in a case the prosecution leads two sets of evidence, each one of which contradict and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be, left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.”

IV. Mallappa (supra), the Hon'ble Supreme Court has held which is quoted herein under:-

“26. No doubt, an order of acquittal is open to appeal and there is no quarrel about that. It is also beyond doubt that in the exercise of appellate powers, there is no inhibition on the High Court to re-appreciate or re-visit the evidence on record. However, the power of the High Court to re-appreciate the evidence is a qualified power, especially when the order under challenge is of acquittal. The first and foremost question to be asked is whether the Trial Court thoroughly appreciated the evidence on record and gave due consideration to all material pieces of evidence. The second point for consideration is whether the finding of the Trial Court is illegal or affected by an error of law or fact. If not, the third consideration is whether the view taken by the Trial Court is a fairly possible view. A decision of acquittal is not meant to be reversed on a mere difference of opinion. What is required is an illegality or perversity.

27. It may be noted that the possibility of two views in a criminal case is not an extraordinary phenomenon. The 'two-views theory' has been judicially recognized by the Courts and it comes into play when the appreciation of evidence results into two equally plausible views. However, the controversy is to be resolved in favour of the accused. For, the

very existence of an equally plausible view in favour of innocence of the accused is in itself a reasonable doubt in the case of the prosecution. Moreover, it reinforces the presumption of innocence. And therefore, when two views are possible, following the one in favour of innocence of the accused is the safest course of action. Furthermore, it is also settled that if the view of the Trial Court, in a case of acquittal, is a plausible view, it is not open for the High Court to convict the accused by reappreciating the evidence. If such a course is permissible, it would make it practically impossible to settle the rights and liabilities in the eyes of law."

V. Tameezuddin @ Tammu, (supra), the Hon'ble Supreme Court has held which is quoted herein under:-

"9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that story is indeed improbable."

VI. Anees, (supra), the Hon'ble Supreme Court has held which is quoted herein under:-

"66. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination.

The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need of further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process

the contradiction is merely brought on record, but it is yet to be proved.

Thereafter, when the Investigating Officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the Investigating Officer who, again, by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted.

If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the Evidence Act, that is, by drawing attention to the parts intended for contradiction." [See: V.K. Mishra v. State of Uttarakhand : (2015 9 SCC 588)]"

VII. Sunil Kumar, (Supra) the Hon'ble Supreme Court has held which is quoted herein under:-

"10..... Merely because of the fact that there were some minor omissions, which are but natural, considering the fact that the examination in court took place years after the occurrence the evidence does not become suspect. Necessarily there cannot be exact and precise reproduction in any mathematical manner. What needs to be seen is whether the version presented in the court was substantially similar to what was stated during investigation. It is only when exaggerations fundamentally change the nature of the case, the court has to consider whether the witness was telling the truth or not....."

VIII. Harivadan Babubhai Patel, (Supra) the Hon'ble Supreme Court has held which is quoted herein under:-

"28.....It is well settled in law that when the attention of the accused is drawn to the said circumstances that inculpated him in the crime and he fails to offer appropriate explanation or gives a false answer, the same can be counted as providing a missing link for building the chain of circumstances. (See State of Maharashtra v. Suresh[21]). In the case at hand, though number of circumstances were put to the accused, yet he has made a bald

denial and did not offer any explanation whatsoever. Thus, it is also a circumstance that goes against him."

IX. Attorney General for India Vs. Satish, (Supra) the Hon'ble Supreme Court has held which is quoted herein under:-

"35. The word "Touch" as defined in the Oxford Advanced Learner's Dictionary means "the sense that enables you to be aware of things and what are like when you put your hands and fingers on them". The word "physical" as defined in the Advanced Law Lexicon, 3rd Edition, means "of or relating to body....." and the word "contact" means "the state or condition of touching; touch; the act of touching.....". Thus, having regard to the dictionary meaning of the words "touch" and "physical contact", the Court finds much force in the submission of Ms. Geetha Luthra, learned senior Advocate appearing for the National Commission for Women that both the said words have been interchangeably used in Section 7 by the legislature. The word "Touch" has been used specifically with regard to the sexual parts of the body, whereas the word "physical contact" has been used for any other act. Therefore, the act of touching the sexual part of body or any other act involving physical contact, if done with "sexual intent" would amount to "sexual assault" within the meaning of Section 7 of the POCSO Act.

36. There cannot be any disagreement with the submission made by Mr. Luthra for the accused that the expression "sexual intent" having not been explained in Section 7, it cannot be confined to any predetermined format or structure and that it would be a question of fact, however, the submission of Mr. Luthra that the expression 'physical contact' used in Section 7 has to be construed as 'skin to skin' contact cannot be accepted. As per the rule of construction contained in the maxim "Ut Res Magis Valeat Quam Pereat ", the construction of a rule should give effect to the rule rather than destroying it. Any narrow and pedantic interpretation of the provision which would defeat the object of the provision, cannot be accepted. It is also needless to say that where the intention of the Legislature cannot be given effect to, the courts would accept the bolder construction for the purpose of bringing about an effective result. Restricting the interpretation of the words "touch" or "physical

contact" to "skin to skin contact" would not only be a narrow and pedantic interpretation of the provision contained in Section 7 of the POCSO Act, but it would lead to an absurd interpretation of the said provision. "skin to skin contact" for constituting an offence of "sexual assault" could not have been intended or contemplated by the Legislature. The very object of enacting the POCSO Act is to protect the children from sexual abuse, and if such a narrow interpretation is accepted, it would lead to a very detrimental situation, frustrating the very object of the Act, inasmuch as in that case touching the sexual or non sexual parts of the body of a child with gloves, condoms, sheets or with cloth, though done with sexual intent would not amount to an offence of sexual assault under Section 7 of the POCSO Act. The most important ingredient for constituting the offence of sexual assault under Section 7 of the Act is the "sexual intent" and not the "skin to skin" contact with the child.

X. Sanjay Kumar @ Sunny,(Supra) the Hon'ble Supreme Court has held which is quoted herein under:-

"31..... By now it is well settled that the 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, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the 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 the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion?"

The plea about lack of corroboration has no substance {See Bhupinder Sharma v. State of Himachal Pradesh[4]}. Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove.”

XI. Mukesh,(Supra) the Hon’ble Supreme Court has held which is quoted herein under:-

“89. In Krishna Mochi v. State of Bihar [46], the Court ruled that:

“32. The court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in an ivory tower. I find that in recent times the tendency to acquit an accused easily is galloping fast. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal. Some discrepancy is bound to be there in each and every case which should not weigh with the court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, the court should tread upon it, but if the same are boulders, the court should not make an attempt to jump over the same. These days when crime is looming large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim “let hundred guilty persons be acquitted, but not a single innocent be convicted” is, in practice, changing the world over and courts have been compelled to accept that “society suffers by wrong convictions and it equally suffers by wrong acquittals”. I find that this Court in recent times has conscientiously taken notice of these facts from time to time”. 87. In Inder Singh (supra), Krishna Iyer, J. laid down that:

“2.....Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes.”

In the case of State of U.P. v. Anil Singh[47], it was held that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform.”

69. On the perusal of above case laws relied by the learned counsel for the appellant, I find that the contextual facts in the judicial precedents above and the quality of evidence on record in the present case, are clearly distinguishable and of no avail to the appellant. Thus, I am not inclined to accept the argument advanced on behalf of appellant to exonerate the appellant from the serious charges levelled against him.

70. As held in the catena of judgements that there would not be any controversy on the legal issue that the evidence of prosecutrix in the criminal trial for the charges of sexual assault against the accused needs no corroboration, as the victim of sexual offences cannot be put at par with accomplices and the law nowhere contemplates that her evidence cannot be accepted unless it is corroborated on material particulars. Undisputedly, the prosecutrix is an competent witness and her evidence must receive same weightage, as is attached to the evidence of injured witness in the case of physical violence. It is settled law that credibility of the evidence of prosecutrix in the matter of sexual assault must be necessarily depend on the facts of each case and the degree of proof required must not be higher than is expected from an injured witness. However, while dealing with evidence of prosecutrix the Court must be conscious of the fact that it is dealing with the evidence of person, who is interested in the outcome of the charge levelled by her.

71. In the present case, the victim at the relevant time of incident was aged 14 years old school going student studying in IXth standard. At the relevant time she had an age of understanding to realize the consequence of the alleged act committed by the accused appellant. The conduct and demeanour of the victim girl disclosing the mischief of the accused immediately to her teacher and

then to mother, is relevant. Therefore, there is no impediment to appreciate the version of PW-1, victim girl for the charges pitted against the accused in this case. It is not in dispute that accused appellant is charged for the offence of aggravated sexual assault as envisaged under [section 9\(f\)](#) of the POCSO Act, punishable under [Section 10](#) of the POCSO Act. At the relevant time, the appellant was employed as Vice Principal holding the charge of Principal of the School. PW-1 verbalized the entire episode of sexual assault committed with her by the accused appellant. The alleged sexual assault committed by the appellant is essential to be appreciated as aggravated mode of sexual assault for which punishment is prescribed under [Section 10](#) of the POCSO Act. Therefore, prerequisite conditions required to raise presumption under [Section 29](#) of POCSO Act, appears to be satisfied and accordingly, the onus to prove innocence or to disprove the allegations cast on behalf of prosecution came to be shifted on the appellant. However, the appellant failed to disprove the allegations against him. The defence propounded on behalf of accused appears to be fallacious, preposterous and totally ridiculous. The defence appears to be rest on figment imagination and such kind of defence put-forth by the Vice principal of the school to rebut the allegation cast on behalf of victim is unacceptable.

72. This court finds that in the statement under section 313 of the [Cr.P.C.](#) the appellant did not explain the cause for his false implication on the allegation by the prosecution witnesses against him. It would be significant factor for consideration that there was no serious endeavour on the part of appellant to rebut the presumption under [section 29](#) of the POCSO Act or to disprove the allegations of the prosecution for sexual assault with the victim. The feeble

attempt on behalf of the appellant to bring on record some sort of defence found not sufficient to cause any serious dent in the veracity of allegations by the prosecution. When the appellant did not succeed to discharge his burden of presumption under [section 29](#) of the POCSO Act, all the circumstances including minor contradiction in the depositions, if any, and keeping open of the door and windows of the office chamber of Principal, where offence alleged to have been committed are not much mean for consideration being fatal to the prosecution case.

73. From the analysis of the evidence on record in its entirety and the law enunciated by the Hon'ble Supreme Court, I am of the view that prosecution has been able to establish the guilt of the accused appellant beyond reasonable doubt. I find that the conclusion drawn by learned trial Court is just, proper and reasonable.

74. Upon careful examination and scrutiny of testimony of PW-1, 4, 5, 6, 7, 8, 9 and PW 11, I am of the view that evidence of these witnesses are credible, reliable and trustworthy and the conviction of the accused appellant can be based on testimony of the PW-1 which is corroborated by other evidences which warrant no interference. I have, therefore, no incertitude in holding that the evidence led by the prosecution establishes the charge brought against the accused appellant beyond shadow of doubt. The learned Special Judge has rightly convicted the appellant. Thus, I am not inclined to cause any interference in the impugned findings of conviction and resultant sentence passed by the learned Special judge. Thus, the present appeal being devoid of merit, deserves to be dismissed.

75. Consequently, conviction and sentence of the accused appellant, Shri

Shivkant Mishra, vide judgement and order dated 18.10.2022 passed by learned Special Judge (POCSO), Aalo, in POCSO Case No. 02/2021, is affirmed and upheld.

76. In the result, Criminal Appeal stands dismissed.

JUDGE

Comparing Assistant