

GAHC010111882019



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

Case No. : CRIMINAL APPEAL NO. 207/2020

Sri Dhan Bahadur Dorjee, S/o - Late Debraj Dorjee, R/o -
Village - Jirin Borholi, P.S.- Kheroni, P.O.- Hawaipur,
District - Karbi Anglong [W], Diphu, Assam, Pin –
782460.

.....Appellant

-VERSUS-

1. The State of Assam, Represented by Public Prosecutor,
Assam.

2. Smti Debumaya Devi, W/o Dhan Bahadur Dorjee,
Resident of Village – Jirin Borholi, P.O. – Hawaipur, P.S. –
Kheroni, District – Karbi Anglong, Diphu, Assam, Pin –
782460.

.....Respondents

Advocates :

Appellant	:	Mr. A. Chamuah, Legal Aid Counsel
Respondent no. 1	:	Ms. S. Jahan, Additional Public Prosecutor, Assam
Date of Hearing	:	22.04.2024
Date of Judgment & Order	:	02.05.2024

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT & ORDER

[M. Choudhury, J]

The instant criminal appeal under Section 374[2], Code of Criminal Procedure, 1973 [‘the CrPC’ or ‘the Code’, for short] is directed against a Judgment and Order dated 04.12.2018 passed by the Court of learned Special Judge, POCSO, Karbi Anglong at Diphu [‘the trial court’, for short] in Special Case no. 01/2015. By the said Judgment and Order dated 04.12.2018, the accused-appellant has been convicted for committing the offence of ‘penetrative sexual assault’, defined in Section 3 of the Protection of Children from Sexual Offences [POCSO] Act, 2012, and he has been sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000/-, in default of payment of fine, to undergo simple imprisonment for a further period of 2 [two] months.

2. The case of the prosecution, in brief, is that investigating machinery was set into motion when the informant as the mother of the prosecutrix, lodged a First Information Report [FIR] before the Officer In-Charge, Kheroni Police Station on 12.03.2015 in respect of an incident alleged to have occurred on 04.03.2015. In the FIR, the informant had *inter alia* alleged that at around 10-00 p.m. on 04.03.2015, the accused who is the husband of the informant, finding the second daughter of the informant [hereinafter referred to as ‘the prosecutrix’], aged about 16 years, alone at home, raped her after giving her threat that she would be cut. The informant had alleged that the accused had

committed the act even though the prosecutrix resisted him. The informant had further mentioned that on that day, she had gone to the house of her elder daughter located at Sildubi. It was mentioned that when the informant returned after a few days, the prosecutrix narrated the incident to her.

3. On receipt of the said FIR, the Officer In-Charge, Kheroni Police Station registered the same as Kheroni Police Station Case no. 32/2015, on 12.03.2015, for the offences under Section 376[2][f], Indian Penal Code [IPC] and Section 6 of the POCSO Act, 2012 and entrusted the investigation to one V. Hmar [P.W.8], a Sub-Inspector of Police [W] attached to Kheroni Police Station.

4. The Investigating Officer [I.O.] of the case, during the course of investigation; visited the place of occurrence; and drew a sketch map of the place of occurrence. The I.O. of the case apart from recording the statements of the witnesses under Section 161, CrPC, got the prosecutrix medically examined on 13.03.2015. The I.O. of the case also made a prayer before the learned Sub-Divisional Magistrate, Hamren for recording the statement of the prosecutrix under Section 164, CrPC and the statement of the prosecutrix under Section 164, CrPC was recorded by the learned Sub-Divisional Magistrate, Hamren on 24.03.2015. During the course of investigation, the accused was arrested and after arrest, the accused was produced before the learned Magistrate, First Class, Hamren Court, Karbi Anglong on 19.04.2015. On being so produced, the learned Magistrate, First Class, Hamren Court remanded the accused to jail custody. The I.O. of the case upon completion of investigation, submitted a charge-sheet under Section 173[2], CrPC vide Charge-Sheet no. 35/2015 on 30.04.2015 in connection with Kheroni Police Station Case no.

32/2015 [corresponding G.R. Case no. 68/2015] finding a *prima facie* case for the offences under Sections 376[2][f], Indian Penal Code [IPC] read with Section 6 of the POCSO Act, 2012 well established against the accused, named in the FIR.

5. On receipt of the Charge-Sheet, the Court of learned Magistrate, First Class, Hamren Court, Karbi Anglong secured appearance of the accused from jail custody and, by an Order dated 08.02.2016, committed the case records of G.R. Case no. 68/2015 to the Court of Sessions with a finding that the offences under Sections 376[2][f], Indian Penal Code [IPC] and Section 6 of the POCSO Act, 2012 were exclusively triable by the Court of Sessions. The learned Magistrate, First Class, Hamren Court, Karbi Anglong stated to have followed the committal procedure following the provisions of Rule 16 of the Administration of Justice and Police in Sivsagar, Nowgong and Mikir Hills Track, 1937. On appearance of the accused before the learned Deputy Commissioner, Karbi Anglong, Diphu from jail custody on 02.02.2017, the learned Deputy Commissioner, Karbi Anglong, Diphu framed charges against the accused for the offence under Section 276[2][i], IPC and under Section 6, POCSO Act, 2012. When the charges were read over and explained to the accused, he pleaded not guilty and claimed to be tried.

6. It may be stated that till that time, the Judiciary was not separated from the Executive in the Karbi Anglong district of Assam. It was by a Notification no. N.J.D.J.[E] 260/2010/24 dated 21.09.2012 and on the recommendation of the Gauhati High Court, the Governor of Assam established the following courts in the Karbi Anglong district of Assam, for trial of Civil and Criminal cases within

their respective local limits with effect from the date of taking over charge by the Presiding Officers of these Courts :- [1] Court of District & Sessions Judge; [2] Court of Civil Judge [Senior Division]; [3] Court of Munsiff; [4] Court of Chief Judicial Magistrate; [5] Court of Additional Chief Judicial Magistrate; [6] Court of Sub-Divisional Judicial Magistrate; [7] Court of Judicial Magistrate, First Class; and [8] Court of Judicial Magistrate, Second Class. Another Notification was issued by the State Government, on the recommendation of the Gauhati High Court, whereby, all suits, cases, appeal, application, proceeding or other business relating to both Civil and Criminal Justice pending on that date before the Deputy Commissioner, Karbi Anglong or Assistants to the Deputy Commissioner stood transferred to the competent Civil and Criminal Courts of appropriate jurisdictions which had been established by the Notification dated 21.09.2012. Subsequent to the said Notification, the case records of G.R. Case no. 68/2015 stood transferred to the Court of Sessions Judge, Karbi Anglong at Diphu. After such transfer, the testimonies of the witnesses were recorded by the Court of Sessions.

7. During the course of the trial, the learned Special Judge finding that under Section 33[1] of the POCSO Act, 2012, it is the Special Court which needs to take cognizance of any offence under the Act without the accused being committed to it for trial upon a Police Report of such facts or upon receiving a complaint which constitute such offence, took cognizance for the offences under Sections 376[2][f], Indian Penal Code [IPC] read with Section 6 of the POCSO Act, 2012 against the accused afresh. It is also pertinent to state that during the course of the trial, the learned Special Court finding that charges were not framed by a Special Court constituted under the POCSO Act, 2012,

and after hearing the learned counsel for both the sides, framed a charge under Section 6 of the POCSO Act, 2012 afresh on 30.11.2018. The charge so framed, was read over and explained to the accused to which he pleaded not guilty and claimed to be tried. As the depositions of the prosecution witnesses were already recorded, the prosecution side as well as the defence side declined to re-examine the prosecution witnesses already examined, when asked by the learned trial court.

8. During the course of the trial, the prosecution side examined 8 nos. of witnesses and exhibited 4 [four] nos. of documents to bring home the charge against the accused-appellant. The witnesses examined by the prosecution were :- [i] P.W.1 :- the prosecutrix; [ii] P.W.2 :- the informant, the mother of the prosecutrix and the wife of the accused; [iii] P.W.3 :- an uncle of the prosecutrix and the husband of P.W.4; [iv] P.W.4 :- a maternal aunt of the prosecutrix; [v] P.W.5 :- Senior Medical & Health Officer, Diphu Civil Hospital; [vi] P.W.6 :- a co-villager; [vii] P.W.7 :- a co-villager; and [viii] P.W.8 :- the I.O. of the case. The documentary evidence exhibited were :- [i] Ext.1 :- the statement of the prosecutrix recorded under Section 164, CrPC; [ii] Ext.2 :- Medical Examination Report; [iii] Ext.3 :- the Sketch Map; and [iv] Ext.-4 :- the Charge-Sheet no. 30/2015 dated 30.04.2015. After closure of the evidence from the prosecution side, the accused was examined under Section 313, CrPC and his plea was denial. After appreciation of the evidence on record and hearing the learned counsel for the parties, the learned trial court has convicted the accused for the offence, mentioned above, and the accused-appellant has been sentenced in the manner, indicated above.

9. We have heard Mr. A. Chamuah, learned Legal Aid Counsel for the accused-appellant and Ms. S. Jahan, learned Additional Public Prosecutor for the respondent State of Assam.

10. Mr. Chamuah, learned Legal Aid Counsel appearing for the accused-appellant has submitted that there were inconsistencies in the testimonies of the prosecution witnesses, more particularly, in the testimony of the prosecutrix. He has submitted that the alleged incident of sexual assault occurred on 04.03.2015. But, the alleged incident was reported only on 12.03.2015. There was, therefore, a delay of 8 [eight] days in lodging the FIR and the said delay had the effect of creating doubts about the veracity of the prosecution case. He has contended that the ocular evidence and the medical evidence are at variance with each other. As the medical evidence has not supported the ocular evidence, the benefit of doubt should go in favour of the accused-appellant. It is further contended that one P.T. and the maternal aunt [P.W.4] of the prosecutrix were two persons to whom the prosecutrix had disclosed about the incident immediately on the day following the date of incident. But, they had not disclosed the incident to anyone else for a number of days. It is also contended that there are inconsistencies in the prosecution evidence on the point of presence or absence of the accused-appellant at the residence, after the date of the alleged incident. With such contentions, the learned Legal Aid Counsel has submitted that the prosecution has not been able to establish the charge of penetrative sexual assault.

11. Ms. Jahan, learned Additional Public Prosecutor appearing for the State has supported the findings recorded by the learned trial court in the impugned

Judgment and Order of conviction and sentence. It has been contended that the versions of the prosecutrix was consistent all throughout and the defence has failed to elicit anything to doubt the testimony of the prosecutrix, which, according to learned Additional Public Prosecutor, is trustworthy to inspire confidence. It is submitted that the testimony of the prosecutrix was corroborated not only by the testimonies of the other prosecution witnesses but it found corroboration also from the medical evidence. It has been submitted that contrary to what has been contended by the defence, the medical examination report goes to indicate that the prosecutrix was sexually assaulted. It has been submitted that in the evidence on record, reasons for the delay occurred in lodging the FIR are clearly available and in such view of the matter, such delay, which was of eight days, cannot be a factor to doubt the prosecution case. Moreover, the defence had abjectly failed to rebut the presumption under Section 29 of the POCSO Act, 2012 after the prosecution had duly discharged its burden to establish all the foundational facts beyond reasonable doubts. Taking into consideration the obtaining facts by which the act of penetrative sexual assault was committed upon the prosecutrix and by whom such act was committed, there cannot be any leniency on the sentence.

12. We have given due consideration to the submissions advanced by the learned counsel for the parties and have also gone through the materials/evidence on record including the testimonies of the witnesses and documentary evidence, available in the case records of Special Case no. 01/2015, in original. We have also gone through the decisions cited by the learned counsel for the parties.

13. In order to appreciate the submissions of the learned counsel for the parties, it appears necessary to refer to the testimony of the prosecutrix, who had been examined as P.W.1, at first.

14. In her testimony-in-chief, the prosecutrix deposed that the accused is her father and the informant [P.W.2] is her mother. The prosecutrix stated that her age was 18 years at the time of recording the deposition. Narrating about the alleged incident, the prosecutrix had deposed that on the night of the incident, her mother [P.W.2] was not at home as her mother [P.W.2] had gone to Sildubi to leave the elder sister of the prosecutrix there. On that night, her father [the accused-appellant], one of her younger brothers and one of her younger sisters were with her at home. On that night, the prosecutrix was sleeping with her younger sister in one room and her father [the accused] was sleeping with her younger brother in a separate room. It was stated by the prosecutrix that before going to bed, she tied the door of the room with a long piece of cloth. At around midnight when someone held her, she woke up and waking up, she found that her father [the accused] embracing her, touched her breast. Then the prosecutrix resisted her father. But giving threat of death, her father stripped her naked forcibly and had forcible sexual intercourse with her. The prosecutrix further deposed that when her younger sister, who was sleeping with her, woke up her father left her and went to his room. It was deposed by the prosecutrix that her father threatened to kill her in the event she would tell about the incident to someone. The prosecutrix further deposed that when after urinating she was sleeping in her bed, her father entered the room again and had sexual intercourse with her again. The prosecutrix further stated that when on the following morning, her friend named P.T. [name abbreviated] came to

her house, she disclosed about the incident to P.T. The prosecutrix stated to have told about the incident thereafter, to her mother's elder sister [P.W.4]. P.W.1 further stated that her father went out of the house in the morning hours. It was in the evening of the following day, the prosecutrix stated to have informed about the incident to her mother [P.W.2] over phone. Since a *bandh* was declared in Karbi Anglong on that day, her mother [P.W.2] could not come immediately and her mother [P.W.2] came back home only on 07.04.2015. It was thereafter, her mother [P.W.2] lodged the FIR at the Police Station. P.W.1 further stated that the Police got her statement recorded in the court and the said statement was exhibited by her as Ext.-1 with her signatures thereon as Ext.1[1] and Ext.1[3] respectively.

14.1. In her cross-examination, the prosecutrix reiterated that the accused is her father. She further stated that she read up to Class-IX; that her father was a tailor; and that her mother [P.W.2] was a house-wife. She further stated that her father used to consume liquor and also used to bring liquor to their house. Her father did not consume liquor on the night of the incident. Her father sent her mother [P.W.2] to the house of her elder sister. Prior to the occurrence, her father never ogled her. The prosecutrix stated that there were two rooms in their house with a wall in between the two rooms and in one of the two rooms, she was sleeping on that night. Her father was sleeping in the other room.

15. P.W.5 in his testimony, had deposed to the effect that on 13.03.2015, he was attached at the Diphu Civil Hospital as the Senior Medical & Health Officer. It was on 13.03.2015, he examined the prosecutrix in reference to Kheroni Police Station Case no. 32/2015. As per the brief history provided to him, the

prosecutrix was sexually assaulted by her father in their own home at around 12-30 p.m. on 04.03.2015. P.W.5 deposed that on external examination, no mark of injury was noticed on the person of the prosecutrix. On local examination, the hymen of the prosecutrix was found torn. On examination of the vagina, tenderness was noticed. P.W.5 further stated that as per the radiological examination and x-ray report, the age of the prosecutrix was below 18 years. On investigation, spermatozoa was not seen in the vaginal swab. He stated that after thorough medical examination and investigation, he was of the opinion that history of sexual intercourse against the will of the prosecutrix was present. He also stated that on examination of the genital, hymen was found torn but on genital swab examination, P/V was not seen. P.W.5 exhibited the Medical Examination Report as Ext.2 with his signature thereon as Ext.2[1].

15.1. The defence declined to cross-examine P.W.5.

16. P.W.2 who is the mother of the prosecutrix and the wife of the accused, was the informant—P.W.2 had, in her examination-in-chief, stated that on the date of the incident which took place in the year 2015, she was not in the house as she went to the house of her elder daughter situated at Sildubi. P.W.2 stated that on the date of the incident, her husband, the prosecutrix and two of her minor children were present in the house. On the day following the date of the incident, the prosecutrix over telephone requested her to come back to home immediately for some urgent matter. As on that day there was a *bandh* [strike] which disrupted plying of motor vehicles, she could not come back on that day. It was only thereafter, she could come back home. It was after reaching home, the prosecutrix told her that on the night of the incident, the

accused made sexual intercourse forcibly with the prosecutrix when she was sleeping in her room. Though after reaching home, P.W.2 found her husband in the house but he fled from the house thereafter. P.W.2 further stated that it was on the request of the prosecutrix, she lodged the written FIR at Kheroni Police Station. At the time of occurrence, the prosecutrix was 16 years old. P.W.2 further deposed that the medical examination of the prosecutrix was done with the assistance of police. The I.O. of the case also got the statement of the prosecutrix recorded in the court. After the occurrence, the family fell into financial crisis. P.W.2 testified to the effect that at the time of evidence, she was maintaining the family by doing *hazira* [daily labour].

16.1. In her cross-examination, P.W.2 mentioned that the marriage between her and the accused was solemnized about 22 years earlier. Prior to the incident, she did not find the accused involved in such kind of case.

17. P.W.4 is an elder sister of P.W.2—informant. P.W.4 is related to both the prosecutrix and the accused. Narrating about the incident, P.W.4 stated that the occurrence took place on one night in the month of March. She was informed about the incident by P.T. who is a friend of the prosecutrix. P.W.4 stated that she was informed by P.T. that on that night, the accused committed forcible sexual intercourse with the prosecutrix. P.W.4 further stated that when she asked the prosecutrix, the prosecutrix informed her that her father, that is, the accused made sexual intercourse with her forcibly at night. P.W.4 further stated that her husband [P.W.3] was not at the residence on that day and when he came back home after three days, the incident was intimated to him.

17.1. P.W.3 in his deposition-in-chief, stated that the incident took place on the night of 04.03.2015. That night he was not present in his residence and he returned back after three days. When he returned home after three days from the date of incident, his wife [P.W.4] informed him that the prosecutrix had informed her that on the night of the incident, the accused showing a *dao*, forcibly made sexual intercourse with the prosecutrix. P.W.3 stated that his residence was near to the house of the accused. When he asked the friend of the prosecutrix with whom the prosecutrix shared about the incident, the said friend of the prosecutrix informed him that the prosecutrix had informed her that the accused forcibly made sexual intercourse with the prosecutrix. P.W.3 stated that he visited the residence of the accused but he could not find the accused in his house. He stated to have learnt that the accused had fled from his house after occurrence of the incident. When after about a month the accused came back to his residence, Police was informed and the accused was arrested.

17.2. In his cross-examination, P.W.3 stated that during the night of the incident, he was in the house of his sister at Naojan. He stated that he was not informed about the incident by his wife [P.W.4] over phone. In her cross-examination, P.W.4 had stated that the informant [P.W.2] was his sister and therefore, she knew the accused since solemnization of marriage between P.W.2 and the accused. P.W.4 stated that prior to the incident, the accused was not found involved in such kind of incident. P.W.4 further stated that she came to know about the incident only in the following morning and she informed her husband [P.W.3] about the incident when he returned home.

18. P.W.6 is a co-villager, who knew both the informant and the accused. P.W.6 stated that after the incident which occurred in the year 2015, the uncle of the prosecutrix convened a village meeting at his house on one Sunday where he and other villagers were present. In the said village meeting, the prosecutrix informed them that her father keeping a *dao* on her neck, raped her, in the absence of his wife, that is, the mother of the prosecutrix, who had gone to the house of her another daughter on social visit. The prosecutrix also stated at the village meeting that after the incident, the accused had fled away from his house. After hearing the version of the prosecutrix, the villagers who were at the meeting, asked the mother of the prosecutrix [P.W.2] to file a police case against the accused. P.W.6 further stated that the villagers managed to apprehend the accused after about one month of the incident and the accused was thereafter, handed over to police.

19. P.W.7 was another co-villager, whose house situate near the house of P.W.3. Stating that the incident took place in the year 2015, P.W.7 stated that P.W.3 had convened a meeting at his house after the incident and in the said meeting, he and other villagers were invited. In the said meeting, he came to know from the prosecutrix that the accused had sexually assaulted her taking advantage of the situation when her mother was not in the house. The prosecutrix also informed that on that night, two of her siblings – one minor brother and one minor sister – were in the house. P.W.7 further stated that noticing the gravity of the crime, the villagers advised the mother of the prosecutrix [P.W.2] to inform the Police.

19.1. The two prosecution witnesses – P.W.6 and P.W.7 – were cross-examined

by the defence in a limited manner. In his cross-examination, P.W.6 stated that he knew the accused since about 8 years and prior to the incident, the accused was not found involved in any such kind of incident. In his cross-examination, P.W.7 stated that he knew the accused since about 5-6 years and he did not hear anything odd against the accused till the date of occurrence. Other than the above, P.W.6 and P.W.7 were not cross-examined on any other aspect. They were not asked anything about the village meeting they had referred to in their evidence-in-chief.

20. P.W.8-the I.O. of the case stated that on receipt of the FIR on 12.03.2015, the case, Kheroni Police Station Case no. 32/2015 was registered and she was entrusted with the investigation. On that day, the informant and the prosecutrix came to the Police Station and their statements were recorded on that day itself. P.W.8 also stated that the medical examination of the prosecutrix was accordingly done at the Diphu Government Hospital. P.W.8 exhibited the Sketch Map of the place of occurrence as Ext.-3. P.W.8 stated that Ext.-3, Sketch Map was prepared after visiting the place of occurrence. The prosecutrix was forwarded to the Court at Hamren for recording of her statement. P.W.8 stated that the accused was arrested on 19.04.2015 and after collecting a copy of the statement of the prosecutrix from the court and the Medical Examination Report from the Diphu Government Hospital, the charge-sheet was submitted. P.W.8 exhibited the Charge-Sheet as Ext.-4.

20.1. The defence cross-examined P.W.8 in a limited manner. In cross-examination, P.W.8 stated that the statement of the prosecutrix was recorded at the Police Station and at that time, she was in police uniform as she did not

know the age of the prosecutrix then.

21. In the case in hand, the FIR was lodged on 12.03.2015 by the informant-P.W.2, who is the mother of the prosecutrix. As per the FIR, the alleged incident had occurred on 04.03.2015. Thus, there was a delay of 8 [eight] days in reporting of the alleged incident to Police. It has been contended that no direct explanation was offered in the FIR as regards the period of delay of 8 [eight] days in reporting the alleged incident to Police. It is settled that a First Information Report [FIR] is a report relating to the commission of an offence given to Police and recorded under Section 154, CrPC. A First Information Report [FIR] is not considered as a substantive piece of evidence and it can be used to corroborate or contradict the informant's evidence in Court as the information when recorded, becomes the basis of the case set up by the informant and against the accused. There is no statutory prescription which can be applied to determine the effect of delay in lodging of the FIR and the issue is to be considered on the facts and circumstances of the given case. In this connection, the following observations made by the Hon'ble Supreme Court of India in ***Ramdas and others vs. State of Maharashtra***, reported in **[2007] 2 SCC 170**, in connection of lodging of the FIR can be referred to :-

24. Counsel for the State submitted that the delay in lodging the first information report in such cases is immaterial. The proposition is too broadly stated to merit acceptance. It is no doubt true that mere delay in lodging the first information report is not necessarily fatal to the case of the prosecution. However, the fact that the report was lodged belatedly is a relevant fact of which the court must take notice. This fact has to be considered in the light of other facts and circumstances of the case, and in a

given case the court may be satisfied that the delay in lodging the report has been sufficiently explained. In the light of the totality of the evidence, the court of fact has to consider whether the delay in lodging the report adversely affects the case of the prosecution. That is a matter of appreciation of evidence. There may be cases where there is direct evidence to explain the delay. Even in the absence of direct explanation there may be circumstances appearing on record which provide a reasonable explanation for the delay. There are cases where much time is consumed in taking the injured to the hospital for medical aid and, therefore, the witnesses find no time to lodge the report promptly. There may also be cases where on account of fear and threats, witnesses may avoid going to the police station immediately. The time of occurrence, the distance to the police station, mode of conveyance available, are all factors which have a bearing on the question of delay in lodging of the report. It is also possible to conceive of cases where the victim and the members of his or her family belong to such a strata of society that they may not even be aware of their right to report the matter to the police and seek legal action, nor was any such advice available to them. In the case of sexual offences there is another consideration which may weigh in the mind of the court i.e. the initial hesitation of the victim to report the matter to the police which may affect her family life and family's reputation. Very often in such cases only after considerable persuasion the prosecutrix may be persuaded to disclose the true facts. There are also cases where the victim may choose to suffer the ignominy rather than to disclose the true facts which may cast a stigma on her for the rest of her life. These are cases where the initial hesitation of the prosecutrix to disclose the true facts may provide a good explanation for the delay in lodging the report. In the ultimate analysis, what is the effect of delay in lodging the report with the police is a matter of appreciation of evidence, and the court must

consider the delay in the background of the facts and circumstances of each case. Different cases have different facts and it is the totality of evidence and the impact that it has on the mind of the court that is important. No strait jacket formula can be evolved in such matters, and each case must rest on its own facts. It is settled law that however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. [See : - AIR 1956 SC 216 : Pandurang and others vs. State of Hyderabad]. Thus mere delay in lodging of the report may not by itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the facts and circumstances in each case and is a matter of appreciation of evidence by the court of facts.

22. It has been observed in **Ramdas** [supra] that there may be cases where there is direct evidence to explain the delay and even in the absence of direct explanation, there may be circumstances appearing on record which might provide a reasonable explanation for the delay. In the FIR of the case in hand, the informant-P.W.2 while stating that the alleged incident had occurred on 04.03.2015, stated that on the said date, the informant-P.W.2 was not at her home as she had gone out to the house of her elder daughter at Sildubi and she returned back to her home after a few days. In her testimony before the Court, the informant-P.W.2 deposed to the effect that the prosecutrix-P.W.1 requested her, over telephone, to come back to home immediately for some urgent matter. The informant-P.W.2 stated that as there was a *bandh* call which disrupted plying of motor vehicles, the informant-P.W.2 could not return to her residence immediately. The informant-P.W.2 could come back only after the date following the date of *bandh*. The fact of absence of the informant-P.W.2 at the residence received corroboration from the testimony of the prosecutrix-P.W.1 as the

prosecutrix-P.W.1 in her testimony, had stated that her mother, that is, the informant-P.W.2 was not at home on the date of the alleged incident and she further deposed that she informed about the incident to the informant-P.W.2 over phone in the next evening. The prosecutrix-P.W.1 also deposed that due to the *bandh* declared, her mother [the informant-P.W.2] could not come back immediately and her mother [the informant-P.W.2] returned back to home only on 07.03.2015. Though it has not emerged from the evidence of P.W.3 and P.W.4, but it has emerged from the evidence of P.W.6 and P.W.7 that a village meeting was convened at the house of P.W.3 called at his behest, wherein they were present. In the said village meeting, the prosecutrix-P.W.1 and the informant-P.W.2 were present and in the said meeting, they had disclosed that the act of forceful rape on the prosecutrix-P.W.1 was committed by the accused during night hours on the alleged date of incident when the informant-P.W.2 was not at home and only the minor sister and the minor brother of the prosecutrix-P.W.1 were present along with the accused. Both P.W.6 and P.W.7 stated that in the village-meeting, the villagers told the prosecutrix-P.W.1 and the informant-P.W.2 to report the incident to the Police. The above circumstances emerging from the records, in our considered view, have provided a reasonable explanation for the delay in lodging the FIR. The prosecutrix-P.W.1 had suffered from sexual assault from the accused, who is her father. It is only natural from the prosecutrix-P.W.1 to wait for the return of her mother [the informant-P.W.2] to disclose the entire incident as in such situation, the mother could be the most trusted person to rely upon. It cannot be said that non-institution of an FIR despite disclosure made to P.T. and P.W.4 immediately after the incident, has dented the prosecution case in any manner. Hesitation on the part of P.T. or P.W.4 to make public the allegations of rape, in

the absence of the mother of the prosecutrix at home at the relevant point for a few days, cannot be said to be unnatural. It is only natural that in such situation, the prosecutrix could muster courage to allege about sexual assault, that too, against her own father, only with the support of her mother as there is every possibility of meeting failure in the absence of support from her own mother. Thus, in our considered view, the delay in lodging the FIR has not dented the case of the prosecution in any adverse manner, as there is ample evidence on record, which reasonably explained why the delay in lodging the FIR had occurred.

23. In her testimony, the prosecutrix-P.W.1 had deposed that at the time of giving evidence, she was 18 [eighteen] years of age. The evidence of the prosecutrix-P.W.1 was recorded on 25.09.2017. In the FIR, the age of the prosecutrix-P.W.1 was mentioned as 16 years. In her testimony, the informant-P.W.2 had stated that at the time of occurrence, the age of her daughter [the prosecutrix-P.W.1] was 16 [sixteen] years of age. The Senior Medical & Health Officer, Diphu Civil Hospital [P.W.5] who medically examined the prosecutrix-P.W.1 on 13.03.2015 had, on the basis of the x-ray report and radiological examination, had deposed that the age of the prosecutrix-P.W.1 was below 18 years. None of the afore-mentioned three prosecution witnesses were confronted by the defence on the issue of age of the prosecutrix-P.W.1 on the date of occurrence. The accused is the father of the prosecutrix-P.W.1 and as parents, it is the informant-P.W.2 and the accused who were in the best positions to know the date of birth and the age of their daughter, that is, the prosecutrix-P.W.1. Not confronting the afore-mentioned three prosecution witnesses by the defence on the aspect of age of the prosecutrix-P.W.1, goes to

indicate that the position that the prosecutrix-P.W.1 was a minor on the date of the incident is not a disputed one.

24. In her testimony, the prosecutrix-P.W.1 had categorically stated that on the night of the incident, the accused had committed sexual assault on her forcibly when she was sleeping with her minor sister in one of the two rooms of their house. The accused was sleeping in the other room of the two-room house with the minor brother of the prosecutrix-P.W.1. It was by putting the prosecutrix-P.W.1 under threat the accused had committed forcible sexual intercourse with her. There was abject failure on the part of the defence to bring any circumstance to infer any motive on the part of a minor daughter to bring such kind of allegation against her own father. Similarly, there was no motive alleged, even by way of suggestion, on the part of the informant-P.W.2, that is, the mother of the prosecutrix-P.W.1 and the wife of the accused, to implicate the accused falsely. It has been urged by the learned Legal Aid Counsel that there was embellishment on the part of the prosecutrix-P.W.1 in that before the Court, the informant-P.W.1 deposed that on the date of the incident, she was sexually assaulted by the accused on two occasions whereas in her previous statement, recorded under Section 164 of the Code, she had stated that she was sexually assaulted only once and such sexual assault was committed by threatening her with a *dao*, which fact was not disclosed before the Court. Though the previous statement of the prosecutrix-P.W.1, recorded under Section 164 of the Code, was exhibited as Ext.-1, the defence had not proved such alleged embellishments as contradictions by confronting the prosecutrix-P.W.1 with her such previous statement in the manner required under the law. In the absence of any legally established contradictions, such contentions advanced by the

learned Legal Aid Counsel does not deserve acceptance.

25. The law is settled as to how the testimony of a prosecutrix is to be treated. A prosecutrix complaining of having been a victim of sexual assault is not to be treated an accomplice. A prosecutrix stands at a pedestal even higher than an injured witness for the reason that in the later case, there is injury in the physical form but in the case of a prosecutrix, there is injury in both physical form and in psychological and emotional form. There is no rule of law that the sole testimony of the prosecutrix cannot be acted upon without corroboration in material particulars. It has been held consistently that conviction for an offence of sexual assault can be based on the sole testimony of the prosecutrix/victim.

25.1. In *State of Maharashtra vs. Chandraprakash Kewalchand Jain*, reported in [1990] 1 SCC 550, the Hon'ble Supreme Court of India has observed as under :-

16. 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 alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled 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 Evidence Act similar to Illustration [b] to 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 shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose 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.

25.2. The Hon'ble Supreme Court of India in the case titled ***State of Rajasthan vs. N.K. [Accused]***, reported in ***[2000] 5 SCC 30***, has observed in the following manner :-

11. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the Court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her

testimony. Assurance, short of corroboration as understood in the context of an accomplice would do. Reference may be had to a long chain of decisions some of which are Rameshwar v. State of Rajasthan, AIR 1952 SC 54; Sidheswar Ganguly v. State of West Bengal, AIR 1958 SC 143; Madhoram v. State of Uttar Pradesh, [1973] 1 SCC 533; State of Maharashtra v. Chandraprakash Kewalchand Jain, [1990] 1 SCC 550; Madam Gopal Kakkad vs. Naval Dubey, [1992] 3 SCC 204; State of Rajasthan vs. Narayan, [1992] [3] SCC 615; Karnel Singh vs. State of Madhya Pradesh, [1995] 5 SCC 518; Bodhisattwa Gautam vs. Subhra Chakraborty, [1996] 1 SCC 490; and State of Punjab vs. Gurmit Singh [1996] 2 SCC 384. We may quote from the last of the abovesaid decisions where the rule for appreciating the evidence of the prosecutrix in such cases has been succinctly summed up in the following words :-

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.

26. On consideration of the testimony of the prosecutrix-P.W.1, we have found such testimony trustworthy and credible. The defence has not been able to prove any kind of embellishment, inconsistency or contradiction in the testimony of the prosecutrix-P.W.1 either by way of cross-examination or by adducing any defence evidence on material particulars. It has been sought to urge that the

ocular testimony of the prosecutrix-P.W.1 was at variance with the medical evidence. It has been sought to contend that in view of absence of marks of violence in the private parts of the prosecutrix-P.W.1, the charge of sexual assault has not been proved. Such contention advanced on behalf of the accused is not found merited. As per the Medical Examination Report [Ext.-2], when the prosecutrix-P.W.1's vagina and cervix was examined on 13.03.2015, tenderness in those parts on the person of the prosecutrix-P.W.1 was found, though no marks of injury was seen externally. Such tenderness was found present during P/V examination. The Senior Medical & Health Officer, Diphu Civil Hospital [P.W.5] who examined the prosecutrix-P.W.1 on 13.05.2015, that is, after 9 days from the date of incident, had deposed to the effect that on the genital examination, her hymen was found torn and there was tenderness when vagina of the prosecutrix-P.W.1 was examined. P.W.5 exhibited the Medical Examination Report as Ext.-2. The defence did not cross-examine P.W.5.

26.1. It is already found that there was delay of eight days in lodging of the FIR and the said period of delay is found to be sufficiently and possibly explained. The delay in lodging of the FIR had resulted into the delay in medical examination of the prosecutrix-P.W.1. The sexual assault was made with the threat of cut and such threat had been received by the prosecutrix-P.W.1 from her own father. The incident had happened during night and inside the confine of a room when there was none including her mother, at near vicinity, to help the prosecutrix-P.W.1 in any manner. Her minor brother and minor sister were asleep. The injuries, if any, which the prosecutrix suffered or might have suffered in resistance, albeit feeble in nature, would have healed in the natural course in a period of nine days. The absence of visible marks of injuries from

sexual assault on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not been a victim of sexual assault. Absence of marks of external injuries, expected in the case of forcible sexual assault, on the person of the prosecutrix-P.W.1, who was examined after nine days of the incident is not to be accepted with a finding that there was no forcible sexual assault.

27. At this stage, it is apposite to refer to Section 29 of the POCSO Act, 2012 which provides for presumption as to certain offence. As per Section 29, where a person is prosecuted for committing or abetting or attempting to commit any offence under Section 3, Section 5, Section 7 and Section 9 of the POCSO Act, 2012, 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. Section 3 has provided for the definition of '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 the 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. The provisions contained in Section 5 have provided for incidents when 'penetrative sexual assault' becomes 'aggravated penetrative sexual assault'. As per sub-clause [n] of Section 5,

whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child, is said to commit 'aggravated penetrative sexual assault'. As per Section 2[d] of the POCSO Act, 2012, '*child*' means any person below the age of eighteen years.

28. Ordinarily, unless it is irrebuttable presumption, no presumption is absolute and every presumption is rebuttable. The presumption under Section 29 of the POCSO Act, 2012 is a rebuttable presumption. Such a presumption gets operational when the necessary foundational facts are established by the prosecution by leading evidence. The burden of proof ordinarily lies with the prosecution and does not lie on the accused. In such situation, it is for the prosecution to establish the foundational facts first in order to bring the statutory presumption under Section 29 into operation so as to shift the onus to the accused to prove the contrary. In the case in hand, the prosecution by leading the evidence had established the foundational facts that on the date of the incident, the prosecutrix had to suffer penetrative sexual assault at the hand of the accused. As a result, the presumption under Section 29 of the POCSO Act, 2012 got activated against the accused. Consequently, the onus shifted to the accused to prove the contrary. The defence did not adduce evidence during the trial. As have emerged from the discussion above, the prosecution witnesses were confronted in a limited manner and they were not confronted even with a suggestion that the alleged act of penetrative sexual assault did not occur on the alleged date of incident.

29. It has been urged on behalf of the appellant that there were contradictions in the testimonies of the prosecution witnesses. It is settled that only contradictions in material particulars and not minor contradictions can discredit the testimony of the witnesses. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of a witness. The omission in the previous statement by itself does not necessarily make the testimony of a witness unreliable. It has been observed in ***State of Punjab vs. Gurmit Singh and others***, [1996] 2 SCC 384, to the effect that the court 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. On meticulous examination of the entire evidence on record, more particularly, of the testimony of the prosecutrix, the testimony of the prosecutrix is found to be consistent and credible inspiring confidence. The testimony of the prosecutrix also found corroboration from the testimonies of the other prosecution witnesses. Thus, the contention raised on behalf of the appellant as regards inconsistencies in the prosecution case, when on analysis are found to be not on material particulars, does not deserve acceptance.

30. One of the contentions raised on behalf of the appellant is on the sentence imposed. It has been submitted that the learned trial court has convicted the accused-appellant for the offence under Section 4 of the POCSO Act, 2012 and he has been sentenced to undergo life imprisonment and to pay a fine of Rs. 5,000/-, with default stipulation. Since the alleged incident had occurred on

04.03.2015, it is contended that the sentence imposed is harsh. Prior to the amendment carried out w.e.f. 16.08.2009, a person guilty of an offence under Section 3 was punishable under Section 4 with imprisonment of either description for a term which should not be less than seven years but which could have extended to imprisonment for life, and shall also be liable to fine. It is, thus, contended that the accused has been given the harshest sentence of life imprisonment under Section 4. The offence of aggravated penetrative sexual assault, as defined in Section 5, is punishable under Section 6 and prior to its amendment by way of substitution w.e.f. 16.08.2019, an accused found guilty of committing aggravated penetrative sexual assault is to be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life and shall also be liable to fine. An offence under Section 3 which is punishable under Section 4, is considered to be a minor one to the offence under Section 5 which is punishable under Section 6.

31. The charge framed against the accused during the trial was in the following terms : *'that you on 04.03.2015 at night at 'place' under Kheroni Police Station caused penetrative sexual assault to 'the prosecutrix' aged 16 years under threat at this house and thereby committed an offence punishable under Section 6 of the POCSO within my cognizance'*. Save and except at one place, there is no mention of Section 4 in the impugned Judgment and Order of the learned trial court. If a trial court after completion of trial, decides to convict the accused for an offence, which is minor to the offence for which the accused was charged with, there should be atleast some reason recorded as to why it has decided to

convict the accused for a minor offence than the offence with which he was initially charged with. No reason has been assigned in the impugned Judgment and Order of the learned trial court as to why it has decided to hold the accused guilty for the offence under Section 4 and not under Section 6 of the POCSO Act, 2012. It *prima facie* appears that the same could be a typographical error. Be that as it may. As per Article 20[1] of the Constitution of India, no person shall be convicted of any offence except for violation of a law enforced at the time of commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.

32. A plea has been advanced to the effect that it has emerged from the evidence that the accused-appellant had no history of committing an offence of the nature involved herein and as such, he should be imposed a lenient penalty. In view of the fact situation obtaining in the case in hand, as have been discussed above, this Court does not find itself in agreement with such plea. A deviant behavior is one which departs from usual or accepted standards, falling far outside of the civil society's norms especially in social or sexual behavior. It demonstrates depravity of mind, which is morally debased, corrupt and perverted. The offensive act committed by the accused-appellant herein indisputably falls under Section 5[n] of the POCSO, Act, 2012 and the Legislature finding such offensive act as an aggravated one, has provided for a stringent punishment which includes imprisonment for life. The accused-appellant herein has not been imposed a penalty greater than what was allowed by law existing on the date of commission of the offence. Therefore, we are not persuaded to reach a view that there should be an interference with the

sentence imposed on the accused-appellant. When the offence was found to be committed on 04.03.2015, a sentence of life imprisonment can be imposed both under Section 4 and Section 6 of the POCSO Act, 2012.

33. In view of the discussions made above, and for the reasons assigned therein, the instant criminal appeal is found bereft of any merits. Consequently, the criminal appeal is dismissed.

34. The records of the learned trial court are to be sent forthwith.

JUDGE

JUDGE

Comparing Assistant