

GAHC010282072019



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

Case No. : CRL.A(J)/107/2019

PINTUS DUNG DUNG
SIVASAGAR, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR. A K GUPTA, LEGAL AID COUNSEL,

Advocate for the Respondent : PP, ASSAM,

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

Date of hearing : 25.07.2024

Date of Judgment & Order : 04.10.2024

JUDGMENT & ORDER (CAV)

Heard Mr. A. K. Gupta, learned Legal Aid Counsel for the appellant. Also heard Mr. K. K. Parasar, learned Additional Public Prosecutor for the State respondent.

2. This jail appeal, under Section 374(2) of the Code of Criminal Procedure, 1973, is preferred against the judgment & order dated 27.11.2018, passed by the learned Special Judge, Charaideo, Sonari in Special (P) Case No. 47/2017, under Section 376(2)(i) of the Indian Penal Code *read with* Section 4 of Protection of Children from Sexual Offences Act, 2012, whereby the accused/appellant has been sentenced to undergo Rigorous Imprisonment for 10 (ten) years along with a fine of Rs. 1,000/- (Rupees one thousand) only and in default to undergo Simple Imprisonment for 2 (two) months for the offence under Section 376(2)(i) of the Indian Penal Code.

3. The prosecution case, in brief, is that on 24.09.2017, one Shri Prahlad Teli lodged an F.I.R. before the Officer-In-Charge of Sapekhati Police Station alleging that on the previous day, i.e. on 23.09.2017, at around 3.30 p.m., the accused-

Pintus Dungdung induced his minor daughter to go with him to play with his granddaughter and thereafter raped her inside his house. Upon receipt of the said F.I.R., the Officer-In-Charge, Sapekhati Police Station registered a case, being Sapekhati P.S. Case No. 84/2017, under Section 4 of POCSO Act, and started investigation.

4. During investigation, the I.O. visited the place of occurrence, drawn the sketch map, recorded the statement of the witnesses available at the place of occurrence and forwarded the victim for her medical examination and also collected the MLC report. The victim was also produced before the Magistrate for recording her statement under Section 164 Cr.P.C. The accused was also arrested and forwarded for judicial custody.

5. Thereafter, on completion of investigation, the I.O. laid Charge-Sheet against the present accused/appellant under Section 4 of POCSO Act, vide Charge-Sheet No. 46/2017, dated 30.10.2017, before the Court of learned Special Judge, Charaideo, Sonari. Accordingly, learned Special Judge, after considering the materials available on record and also finding *prima facie* case, framed charge against the present accused/appellant under the aforesaid Section. The charges were read over and explained to the accused/appellant, to which he pleaded not guilty and claimed to be tried.

6. During the trial of the case, the prosecution examined as many as 8 (eight) numbers of witnesses including the informant, victim, Doctor and Investigating Officer. The accused was also examined under Section 313 Cr.P.C. Thereafter, the learned Special Judge, Charaideo, Sonari, after hearing the parties and on perusal of the materials available on records, vide judgment &

order 27.11.2018, in Special (P) Case No. 47/2017, convicted the accused/appellant under Section 376(2)(i) of the Indian Penal Code and sentenced him, as aforesaid.

7. On being aggrieved and dissatisfied with the aforesaid impugned judgment & order dated 27.11.2018, passed by the learned Special Judge, Charaideo, Sonari in Special (P) Case No. 47/2017, under Section 376(2)(i) of the Indian Penal Code, the present appeal has been preferred by the accused/appellant from jail.

8. Mr. A. K. Gupta, learned Legal Aid Counsel for the appellant, submitted that the learned Special Judge did not consider the evidence on record in its true perspective and thus arrived at a wrong decision convicting the accused/appellant under Section 376(2)(i) of the Indian Penal Code and accordingly sentenced him to undergo Rigorous Imprisonment for 10 years along with a fine of Rs. 1,000/-. He further submitted that the false case is lodged against the present accused/appellant only due to previous grudge as he did not allow the informant to sell liquor from his house. More so, he submitted that the medical evidence also does not support the case of the prosecution and in the same time, the independent witnesses also did not support the prosecution case, rather it is stated by the PW-4 that she did not believe the allegation leveled against the accused/ appellant by the mother of the victim. Furthermore, there is no other eye witness to the incident and the learned Trial Court below had convicted the accused/appellant only on the basis of sole testimony of the prosecutrix, who was a minor girl of 6-7 years at the relevant time of incident. He further submitted that the evidence of a child witness

cannot be believed without any further corroboration as they can be easily tutored. More so, as per the medical report also, the Doctor did not find any injury on the private parts of the victim nor found any recent penetrative sexual assault on the victim at the time of her examination. But, without considering all those aspects of the case, the learned Special Judge convicted the accused/appellant which is bad in law and liable to be set aside and quashed.

9. On the other hand, Mr. Parasar, learned Additional Public Prosecutor, submitted that the evidence of the minor victim is found consistent and there is nothing to disbelieve the minor victim. The defence could not substantiate the plea that only due to some previous grudge the false and concocted allegations are being brought against the present accused/appellant. The learned Special Judge had passed the judgment and order after proper appreciation of evidence on record and considering all aspects of the case. More so, the age of the victim is also not disputed who was aged about 6-7 years old at the relevant time of incident and it is a settled position of law that conviction can be based on sole testimony of the prosecutrix if it inspires confidence of the Court. He further submitted that the Doctor may not found any injury on her private parts at the time of examination as the victim girl was brought for examination after 2 (two) days of the incident. But, from the ocular evidence and other supporting prosecution witnesses, it can be safely accepted that the minor victim was subjected to penetrative sexual assault by the accused/appellant. Thus, he submitted that the medical evidence cannot be the only ground to disregard the evidence of the victim. More so, the evidence of the other witnesses also supports the case of the prosecution to the extent that the victim girl reported about the penetrative sexual assault on her before her parents and on immediate examination of her private parts, both the father and mother of the

victim found redness on her private parts which cannot be disbelieved only on the ground that at the time of medical examination, no injury was found on her private parts. In that context, he also relied on a decision of Hon'ble Apex Court reported in **(2013) 11 SCC 688 (Radhakrishna Nagesh Vs. State of Andhra Pradesh)**. Accordingly, Mr. Parasar submitted that there is no reason to make any interference in the judgment & order dated 27.11.2018, passed by the learned Special Judge, Charaideo, Sonari in Special (P) Case No. 47/2017.

10. After hearing the submissions made by the learned counsels appearing on behalf of the parties, it is seen that as per the prosecution case, the accused/appellant committed penetrative sexual assault on the minor daughter of the informant, who was aged about 6-7 years at the relevant time of incident. On the other hand, it is the case of the defence that he has been falsely implicated in this case only due to previous grudge and enmity.

11. So, before arriving at any decision, let us scrutinize the evidences of the prosecution witnesses.

12. PW-1 is the informant of this case/father of the victim. He deposed in his testimony that the accused is their neighbor. On the day of incident, i.e. on 23.09.2017, at about 1.30 p.m., while his minor daughter, aged about 6 years, was playing at the veranda of their house and went missing, he and his wife searched for her by shouting her nick name. At that time, they saw their daughter coming out from the house of the accused and on being asked, she told them that the accused called her to his house to play and thereafter the accused opened her pant and put his susu (penis) in her susu (vagina). Upon

hearing the same, they called the accused to come out, but he denied. Then he opened the pant of the victim and on examination of her private parts, he, along with his neighbors, saw that her vagina was become reddish for the injury sustained there. Thereafter he again went to the house of the accused, but he absconded. Accordingly, on the next day, he lodged the F.I.R.

13. In his cross examination, he deposed that the house of the accused and their house are adjacent to each other and the accused lives with his three sons, one daughter in law and two grand children. At the relevant time of incident, he along with his family members was at their house. While searching the accused, few neighboring ladies also accompanied them. He denied when suggested that the accused restrained him from selling liquor in his house and for which he disliked him. He also denied when suggested that he had falsely instituted the case upon tutoring of his daughter.

14. PW-2 is the mother of the victim and she also narrated the same story corroborating the evidence of PW-1. As per her also, the victim was subjected to penetrative sexual assault by the accused/appellant and she also found redness in the private part of their daughter.

15. In her cross-examination, she denied when suggested that she stated before the police that the accused has simply touched his susu (penis) on the susu (vagina) of her daughter and also denied that the accused restrained her to sell liquor in her house and for which they have grudge with him.

16. The victim examined herself as PW-3 and she deposed that on the day of incident, while she was playing in the veranda of their house with a fishing rod,

the accused, who is her neighbor, called her to his house and there he opened her pant as well as his pant and put his susu (penis) in her susu (vagina). After returning home, she informed the entire incident to her parents. Thereafter the police came to their house and she was taken to Hospital for medical examination and was also produced before the Magistrate for recording her statement.

17. During her cross-examination, she deposed that on the day of incident, she was playing running game with one Dhun at the courtyard and did not enter the house. On being called by her mother, she returned home. She denied when suggested that the accused did not commit any misdeed with her and she deposed on being tutored by her mother.

18. PW-4 is the neighbor of the informant as well as the accused. She deposed that on the day of incident, i.e. on 23.09.2017, at about 2-3 p.m., while she was at her house, she heard hue and cry of the wife of the informant and when she came out, she heard that the accused has committed misdeed to the victim. She also deposed that she had seen the victim playing at the residence of the accused with the granddaughter of the accused while she was in her house.

19. In her cross-evidence, she deposed that she heard the cry of the mother of the victim after about 30 minutes she saw the victim at the house of the accused. She also deposed that she did not see the accused in his house while she saw the victim at the house of the accused. At that time, the sons and daughter-in-law of the accused were not present in their house as they went for

work. She saw the victim in good health while she was going with her mother. After the alleged incident, the victim continued to play with other village girls. However, she cannot say while the victim was playing, other children of the accused were present there or not. At the time of taking the victim from the house of the accused, no other family member of the accused was present in the house except the youngest granddaughter, aged about 2 years, of the accused with whom the victim was playing at the house of the accused. She also deposed that she does not believe the allegation leveled by the mother of the victim.

20. PW-5 also deposed that on the day of incident, i.e. on 23.09.2017, at about 2.00 p.m., while he was at her house, she heard hue and cry of the wife of the informant and when she came out, she heard that the accused has committed misdeed with the victim.

21. In her cross-evidence, she deposed that she cannot say as to whether the informant and his wife were under the influence of liquor while making hue and cry. She also deposed that though the informant was present with his wife, but he did not utter any word. As per her, the case is false and she never heard anything against the accused for such kind of incident.

22. PW-6 is the VDP President and he testified that on the next day of incident, the informant along with his wife and daughter came to him and complained that the accused has committed rape on the victim at this house. On being asked, the victim told him that the accused had committed rape on her. Accordingly, he took them to the Police Station and arranged for lodging the

F.I.R.

23. In his cross-evidence, he deposed that though he was informed about the incident over phone on the same day, but the accused was absconding.

24. PW-7 is the doctor who examined the victim. In his testimony, he deposed that on 25.09.2017, while he was working at Sonari Sub-Divisional Civil Hospital as Medical & Health officer-I, at about 11.30 p.m. on police requisition, he examined the victim. On examination of the victim, he found the following:

<i>"Development of Genitalia</i>	-	<i>Not developed.</i>
<i>Pubic hair</i>	-	<i>Absent.</i>
<i>Forchette</i>	-	<i>Intact.</i>
<i>Clitoris</i>	-	<i>Normal.</i>
<i>Labia Manora and minora</i>	-	<i>Normal.</i>
<i>Hymen</i>	-	<i>Not intact.</i>
<i>Vagina</i>	-	<i>Normal, injury none.</i>
<i>Discharge and stain</i>	-	<i>None."</i>

25. Accordingly, he testified that as per his opinion, (i) no evidence of recent penetrative sexual assault, (ii) no injury marks seen on her private parts, and (iii) age is between 7 to 8 years.

26. PW-8 is the I.O. of the case and he deposed that on 24.09.2017, while he

was posted as Officer-In-Charge at Sapekhati Police Station and upon receipt of an F.I.R., he registered Sapekhati P.S. Case No. 84/2017, under Section 4 of POCSO Act, and took up the investigation. During investigation, he visited the place of occurrence, drawn sketch map of the P.O. and also examined the witnesses found at the P.O. On the next day, the accused was apprehended by local public and handed over to police. The accused was accordingly arrested and forwarded to Court for remand. He also sent the victim for medical examination and also produced her before the Magistrate for recording her statement under Section 164 Cr.P.C. He also seized the birth certificate of the victim, wherefrom it revealed that the date of birth of the victim is 30.12.2011. After completion of investigation, he submitted the charge-sheet against the accused under Section 4 of POCSO Act.

27. In his cross-evidence, he deposed that he has not requested the medical officer for checking the mental status of the accused while sending him for medical examination. He also deposed that he did not seized any wearing apparel of the victim or the accused, nor he seized the gunny beg on which the victim was alleged to have been laid. He denied when suggested that he has furnished the charge-sheet against the accused without having sufficient material.

28. On the question put by the Court, he deposed that PW-2/mother of victim has stated before him that the accused has simply touched his susu (penis) on the susu (vagina) of her victim daughter.

29. So, from the above testimonies of the prosecution witnesses, it is seen

that the PW-1 is the informant/father of the victim and he lodged the F.I.R. when his daughter/victim reported before him about the incident as to how the accused/appellant invited her to his house and committed penetrative sexual assault on her. PW-2, who is the mother of the victim, also narrated the same story and as per her also, when the girl was found missing from their courtyard, they were searching for her by shouting her nickname and at that time, they saw their daughter coming out from the house of the accused and then, on being asked, she narrated the entire incident before the PWs-1 & 2, i.e. the father and mother of the victim. PW-4 is the neighbor, who heard about the incident from PW-2 that the accused committed misdeed with the victim. However, in her cross-evidence, she stated that she saw the victim in the house of the accused and after the incident also, she was playing with other children in the courtyard. But, from her evidence, it reveals that at the relevant time of incident, no family members of the accused were present in the house of the accused except his 2 year old granddaughter with whom the victim was playing. PW-5 is also the neighbor of the victim and she also heard about the incident from the PW-2, but as per her, the informant might have brought some false allegation as they never heard against the accused/appellant prior to the said incident. Further it is seen that the PW-6 is the VDP President and he also testified that he came to know about the incident from the informant that the accused/appellant committed rape on his minor daughter. But, from his evidence, it is seen that the accused was found absconding after the alleged incident.

30. Thus, it is seen that there is no eye witness to the prosecution case, but both the PWs-1 & 2, who are the parents of the victim, saw her while she was

coming out of the house of the accused and reported about the incident before them. On their examination, they found redness on her private parts. The victim also deposed that while she was playing in the house of their veranda, the accused/appellant called her inside his house and then he opened her panty and also opened his pant and put his penis (susu) into her vagina (susu) and thereafter, while she returned home, she narrated the entire incident to her parents. She also stated in her cross-evidence that at the relevant time of incident, she was playing with one "Dhun" at the courtyard and she came when her mother called her. But she denied when suggested that the accused did not commit any misdeed with her and also denied when it was suggested that she was tutored by her mother to depose before the Court in the manner she narrated the incident. Thus, it cannot be said that the victim was tutored by her parents as she herself narrated the entire story of penetrative sexual assault on her by the accused before her parents. In the same time, her parents, i.e. PWs-1 & 2, also found redness on her vaginal area when their daughter reported about the incident before them. As per both PWs-1 & 2, the neighbors, i.e. PWs-4 & 5, also saw the redness in the vaginal area, but at the time of their testimonies, they did not say anything about the redness in the vaginal area of the minor victim. However, from their evidence, it is seen that after the incident, the matter was immediately reported before them and they also heard hue and cry of the mother of the victim, who accordingly narrated the incident before them. In the same time, it also reveals from the evidences of the other prosecution witnesses that the accused was found absconding after the incident. It is a fact that PWs-4 & 5 did not believe the allegation brought against the accused/appellant as they never heard about such character of the accused/appellant prior to the incident. But, their evidence corroborates the

prosecution version to the extent that they heard about the incident from the parents of the victim on the day of incident when they came out hearing hue and cry from the parents of the victim. This part of their evidence supports the prosecution version, though they never heard anything against the accused/appellant prior to the said incident. More so, from the evidence of the PW-4, the neighbor of the victim, it is also seen that at the relevant time of incident, no family members of the accused/appellant was present except his 2 (two) years old granddaughter. Thus, the accused alleged to have been committed the said incident taking advantage of the absence of his family members.

31. On the other hand, it is the case of the defence that out of previous grudge, the informant had lodged the false and concocted case against him as he restrained the informant to sell liquor from their house. But the said plea of the accused/ appellant was denied by the PWs-1 & 2, nor the defence could substantiate the plea by cross-examining the other witnesses of the prosecution. The defence also could not substantiate the plea of previous grudge/enmity either by adducing any evidence or by rebutting the prosecution witnesses. More so, while recording his statement under Section 313 Cr.P.C., the accused did not take the plea of previous grudge or enmity. Rather from his statement, it is seen that on the day of incident, the victim went to his house and was playing with his granddaughter and as per him, she also opened her cloths and took bath in his house. Thus, though he denied the allegation brought against him, but from his own evidence, it is seen that he admitted the fact that the victim went inside his house when he was alone with his granddaughter. He further stated in his statement under Section 313 Cr.P.C. that after return of the victim,

both the informant and his wife came to his house and started to quarrel with him and also physically assaulted him who were under intoxication. But the question arises as to why and on what ground both the parents of the victim came to his house to quarrel with him or assault him if he has not committed any offence. It is not the case of the defence that on earlier occasion also, the informant and his wife used to quarrel with him. Rather, on the day of incident, after the victim left his house, both the parents of the victim came and started quarrelling with him. Thus, this version of the defence/accused also supports the prosecution case to the extent that the victim was in his house at the relevant time of incident.

32. From the cross-evidence of the I.O., it reveals that he did not seize any wearing apparels of the victim or the accused nor seized they gunny bag on which the victim was alleged to have been laid. Further it reveals from his cross-evidence that the PW-2/mother of the victim stated before him that the accused had simply touched the vagina of the victim with his penis on the day of incident, but the same was denied by the PW-2/mother of the victim in her evidence. That apart, the I.O. was not confronted with any other contradiction of the other witnesses.

33. Coming to the medical evidence of the Doctor, it is seen that at the time of examination of the victim, he did not find any injury mark on the private parts of the victim and also did not find any evidence of recent penetrative sexual assault on her. However, from his report, it is seen that the hymen was not intact at the time of examination, which is contradictory with his findings. However, it is a fact that the examination of the victim was done after 2 (two)

days of the occurrence and by that time, she changed her cloth. Moreover, the wearing apparels of the victim and the accused were also not seized by the police during investigation and thus, it is quite possible of not finding any spermatozoa in the smear of the victim. But no other explanation has been made by the Doctor in regards to the rupture of hymen which was found not intact at the time of her examination. Thus, it is seen that though the Doctor may not find any injury mark on the private part of the victim, but as per PWs-1 & 2 they found redness in the vaginal area of the victim immediately when they examined the victim after the said incident.

34. As relied by the learned Additional Public Prosecutor in the case of **Radhakrishna Nagesh** (supra), the Hon'ble Apex Court has held in paragraph No. 15 of the said judgment that "*settled principle of law that a conflict or contradiction between the ocular and the medical evidence has to be direct and material and only then the same can be pleaded. Even where it is so, the Court has to examine as to which of the two is more reliable, corroborated by other prosecution evidence and gives the most balanced happening of events as per the case of the prosecution.*" Paragraph Nos. 18 & 19 of the said judgment reads as under:-

"18. In order to establish a conflict between the ocular evidence and the medical evidence, there has to be specific and material contradictions. Merely because, some fact was not recorded or stated by the doctor at a given point of time and subsequently such fact was established by the expert report, the FSL Report, would not by itself substantiate the plea of contradiction or variation. Absence of injuries on the body of the prosecutrix, as already explained, would not be of any advantage to the accused.

19. In any case, to establish a conflict between the medical and the ocular evidence, the law is no more res integra and stands squarely answered by the recent judgment of this Court in the case of Dayal Singh and Others v State of Uttaranchal

[(2012) 7 SCALE 165]"

35. Here in the instant case also, only due to non-availability of any injury mark on her private part at the time of her medical examination, the entire testimony of the victim cannot be disbelieved as there is no reason for the minor victim to speak against the accused/appellant who is like his granddaughter and at the time of incident, she was playing with the granddaughters of the accused/appellant. More so, the defence could not substantiate the plea of previous grudge or enmity with the informant who brought such a nasty allegation against a person who is like a grandfather of the victim.

36. It is a settled law that the degree of penetration does not matter if it is established that there was a penetration of male organ into the private parts of the victim, anus or even into the mouth of the prosecutrix.

37. Section 3 of POCSO Act reads as under:

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

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

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

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the

child to do so with him or any other person; or

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

38. So, from the entire discussions made above, it is seen that there is no reason to disbelieve the prosecutrix, whose evidence goes unrebutted and remain consistent in every stages. It is also a settled law that the victim of a sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence if her sole testimony inspires confidence and trustworthy.

39. The Hon'ble Apex Court in the case of **Moti Lal Vs. State of M.P. [(2008) 11 SCC 20]** has held in paragraph Nos. 7 & 9 as under:

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

9. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a

competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge leveled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix. There is no rule of law or practice incorporated in the Indian Evidence Act, 1872 (in short Evidence Act) similar to illustration (b) of Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is own to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. This position was highlighted in State of Maharashtra v. Chandraprakash kewalchand Jain (1990 91) scc 550)."

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

requires no corroboration. The Court may convict the accused on the sole testimony of the prosecutrix.

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

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

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

44. In a landmark judgment reported in **2020 (3) GLT 403 (Bhupen Kalita Vs. State of Assam)**, this Court had discussed the legal position concerning

the provision of POCSO Act, 2012, and paragraph No. 71 of the said judgment reads as under:-

"71. In the light of the discussions above, the following legal positions emerge in any proceeding under the POCSO Act.

(A) The prosecution has to prove the foundational facts of the offence charged against the accused, not based on proof beyond reasonable doubt, but on the basis of preponderance of probability.

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

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

(D) However, because of legal presumption against the accused, it may not suffice by merely trying to discredit the evidence of the prosecution through cross-examination, and the defence may be required to adduce evidence to dismantle the legal presumption against him and prove that he is not guilty. The accused would be expected to come forward with more positive evidence to establish his innocence to negate the presumption of guilt."

45. Here in the instant case, from the discussion made above, it is seen that the prosecution has been able to prove the foundational facts of the case to discharge the burden. As per Section 29 of the POCSO Act, the burden of rebutting the presumption is upon the accused and he could not discharge his

burden by adducing any rebuttal evidence. Section 29 of the POCSO Act mandates legal presumption against the accused for offence under Sections 3, 5, 7 & 9 of the POCSO Act, 2012. Unlike other criminal prosecution wherein it is first presumed that an accused is innocent until proven guilty under Sections 29 & 30 of the POCSO Act, 2012, there is an adverse presumption of certain offence and culpable mind against the accused and the accused has to discharge that burden. It also empowers the Special Judge to have presumption about the guilt of an accused and the doctrine of reverse burden is applicable in such cases.

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

"29. Presumption as to certain offences.—Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

30. Presumption of culpable mental state.—(1)In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2)For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

47. So, from the entire discussions made above, it is seen that the prosecution could establish the case against the accused/ appellant that he sexually

assaulted the minor victim, who was aged about 6-7 years at the relevant time of incident, and thus, it is seen that the learned Special Judge has rightly passed the impugned judgment and order convicting the accused/appellant. More so, it is also not disputed that the victim was below 16 (sixteen) years of age at the relevant time of incident and thus, the learned Court below rightly held that the case is established under Section 376(2)(i) of the Indian Penal Code *read with* Section 4 of the POCSO Act. Further it is seen that at the time of passing the sentence, the POCSO Act was not amended and hence, complying the provision under Section 42 of the POCSO Act, the accused/appellant was convicted under Section 376 (2)(i) IPC and sentenced him accordingly, wherein the degree of punishment is greater than the punishment prescribed under Section 4 of POCSO Act, 2012. More so, considering the nature and gravity of offence committed by the accused/appellant, who was not even 10 (ten) years old at the relevant time of incident and was contemporary age of his granddaughter, I find that the learned Special Judge had rightly passed the term of sentence which requires no interference of this Court.

48. More so, it is seen that the learned Special Judge, while sentencing the accused/appellant, has rightly considered the views of the Hon'ble Apex Court expressed in the cases of **Alister Anthony Pareira Vs. State of Maharashtra [(2012) 2 SCC 272]**; **State of M.P. Vs. Bablu Natt [(2009) 2 SCC 272]**; and **State of Punjab Vs. Prem Sagar & Ors. [(2008) 7 SCC 550]**.

49. In view of above, I find no merit in this appeal and accordingly the same stands dismissed. Consequently, the judgment & order dated 27.11.2018,

passed by the learned Special Judge, Charaideo, Sonari in Special (P) Case No. 47/2017, under Section 376(2)(i) of the Indian Penal Code, stands upheld.

50. Before parting, I put on record the appreciation for the valuable assistance rendered by Mr. A. K. Gupta, learned Legal Aid Counsel for the appellant, and I recommend that he is entitled to a fee, as per the notified rate, to be paid by the State Legal Services Authority.

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

52. Send back the case record of the Trial Court along with a copy of this judgment and order.

JUDGE

Comparing Assistant