

GAHC030003092023



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

Case No. : CRL.A(J)/16/2023

Sh. Lalhriatzuala
S/o C. Lalhmingthanga
R/o S. Khawbung

VERSUS

The State of Mizoram and Anr
Aizawl2:Sh. C Lallawmzual

Advocate for the Petitioner : Mr C Lalfakzuala (Amicus Curiae)

Advocate for the Respondent : P.P./Addl.PP, Mizoram

BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA
HONOURABLE MRS. JUSTICE MITALI THAKURIA

JUDGMENT & ORDER (CAV)

Date : 21-06-2024

(M. Thakuria, J)

Heard Mr. C. Lalfakzuala, learned Amicus Curiae for the appellant. Also heard Ms. Linda L. Fambawl, learned Additional Public Prosecutor for the State respondent No.1 and Mr. J. L. Tochwawng, learned Amicus Curiae for the respondent No.2.

2. This is an appeal from jail preferred by the accused/appellant against the judgment and order dated 29.03.2023, passed by the Court of the Presiding Officer, Fast Track Special Court (POCSO), Champhai, Mizoram in Case No. FTSC (CPI) POCSO 51/2022 arising out of CrI. Trl. No. 255/2022, whereby, the appellant, namely, Sh. Lalhriatzuala was convicted under Section 4 of the POCSO Act *read with* Section 376(3) of the Indian Penal Code and sentence him to undergo Rigorous Imprisonment for 20(twenty) years and to pay a fine of Rs.5,000/- and in default of payment to undergo further Simple Imprisonment for 1(one) month.

3. The Prosecution Case projected is that; a written FIR was received in Dungtlang Police Station on 04.10.2022 alleging that the daughter of the informant (13 years age) was raped thrice and sexually assaulted by one C. Lalhriatzuala on the night of 02.10.2022 at Tourist Lodge, Khawbung village. Hence, the Dungtlang P. S. Case No. 16/2022 under Section 4 of the POCSO Act *read with* Section 376 (3) of IPC was registered and thereafter, investigation proceeded. During the course of investigation, the Investigating Officer recorded the statements of the complainant, victim, accused and the other witnesses. Accordingly, the accused was arrested and the victim was sent for medical examination and her statement was also recorded under Section 164 of Cr. P.C. by the learned Chief Judicial Magistrate, Champhai. After completion of the investigation, the case was charge-sheeted under Section 6 of the POCSO Act *read with* Section 376(3) of Indian Penal Code against the present accused/appellant.

4. After filing of the charge-sheet, the case was registered as FTSC (CPI) POCSO Case No. 51/2022. Thereafter, hearing the matter on consideration of

charge, charges framed under Section 4 (2) of POCSO Act against the accused/appellant, which was read over and explained to the accused/appellant, to which he pleaded not guilty and claimed to be tried. The prosecution examined 7 witnesses as per charge-sheet to prove the case. The accused/appellant pleaded not guilty while recording his statement under Section 313 of Cr. P.C. and further he adduced 2 Nos. of defence witnesses to substantiate his plea. After closure of the prosecution and defence witnesses, the learned Presiding Officer, Special Court (POCSO) heard the arguments put forwarded by the learned counsels for both sides and delivered the judgment and order by convicting the present accused/appellant under Section 4 (2) of POCSO Act and thereby, sentenced him to undergo Rigorous Imprisonment for 20(twenty) years and to pay a fine of Rs.5,000/- and in default of payment to undergo further Simple Imprisonment for 1(one) month.

5. Being aggrieved and dissatisfied by the judgment and order passed by the Court of the Presiding Officer, Fast Track Special Court (POCSO), Champhai, Mizoram in Case No. FTSC (CPI) POCSO 51/2022, the present appeal has been preferred by the accused/appellant through jail authority.

6. Mr. C. Lalfakzuala, learned Amicus Curiae for the appellant has submitted that the learned Trial Court did not appreciate the evidence on record in its true perspective and thus, arrived at a wrong decision by convicting the accused/appellant and thus, the same is liable to be set aside and quashed. There is no eye witness to the case and the entire prosecution case is based only on the statement made by the victim, which is found not of sterling quality to believe or to convict the accused/appellant. As per the victim, she first narrated the incident to one Rinchhani (victim's friend), but, as per the PW-

2/mother of the victim, she narrated the incident first before her when she reached home. But, surprisingly, the prosecution did not examine the victim's friend Rinchhani, who came to pick her from one Nu Zovi's house and before whom, the victim had first narrated the incident.

7. The learned Amicus Curiae further submitted that no DNA profiling was done by the prosecution which is required under Section 53A of Cr. P. C. especially in the case of rape/POCSO. He also submitted that no report of semen was submitted along with the charge-sheet though it has been stated that the semen was collected for examination. From the evidence of the Doctor i.e. the PW-4, it is seen that he did not collect any vaginal swap from the private parts of the victim and he further stated that the cause of rupture of the hymen of the victim could not be ascertained only from her medical examination. Thus, the medical report also does not support the prosecution case.

8. In support of his contention, learned Amicus Curiae relies on the decision of the Apex Court reported in **(2011) 7 SCC 130 (Krishan Kumar Malik vs. State of Haryana)** and stressed upon paragraph Nos. 31 and 32 of the said judgment, which emphasized that;

“31. To hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality, but, in case, if the evidence of the prosecutrix, shows several lacunae, her evidence does not fall in that category and cannot be relied upon to hold the accused guilty of the said offences and that if there are several significant variations in material facts in her [Section 164](#) statement, [Section 161](#) statement ([Cr.P.C.](#)), FIR and deposition in Court, then, it is necessary to get her evidence corroborated independently.”

9. Mr. C. Lalfakzuala, learned Amicus Curiae for the appellant submits that there is no evidence that she tried to resist the accused/appellant on the night

of the incident. More so, her evidence is not consistent to consider her as a witness of sterling quality to believe her statement and thus, the accused/appellant cannot be convicted only on the basis of the sole testimony of the prosecutrix. He further submitted that the mandate of Section 24 (2) of the POCSO Act was not followed in this case which is a mandatory provision and is required to be followed in offences relating to POCSO.

10. He also submitted that while recording the statement of the victim under Section 164 of Cr. P.C. as well as while recording her evidence, the learned Trial Court did not put the preliminary questions to judge the capacity of understanding of the child witness. Section 4 (1) of the Oaths Act provides that unless satisfaction as required by the proviso is recorded, an oath cannot be administered to a child witness below 12 years. Further, he relies on the decision passed by the Co-ordinate Bench of this Court, in the case of **C. Vanramnghaka vs. State of Mizoram & Anr.** in **Crl.A.12/2023**, wherein, the Court relied upon the case of **Pradeep vs. State of Haryana** reported in **AIR 2023 SC 3245**, wherein, “the Apex Court has considered Section 4 of the Oaths Act, 1969 and discussed the duty of the Trial Court while administering Oath on a child witness below 12 years and ensure that the child not only understand that he has to speak the truth, but, also he understand the nature of oath or affirmation. The Trial Judge has to make a proper preliminary examination of the minor to ascertain whether the minor is capable of understanding the question put to him and is able to give reasonable answers”.

11. In paragraph 8 of the judgment in the case of **Pradeep** (*Supra*), the Apex Court held that “*it is a well-settled principle that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child*

witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The Court must make careful scrutiny of the evidence of a child witness. The Court must apply its mind to the question whether there is a possibility of the child witness being tutored. Therefore, scrutiny of the evidence of a child witness is required to be made by the Court with care and caution".

12. Further reference is made to another decision of the Apex Court reported in **(2012) 8 SCC 73 [K. Venkateshwarlu Vs. State of Andhra Pradesh]**, wherein, the Apex Court emphasized on paragraph 9 of the judgment that;

“9. The evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if the court comes to the conclusion that the child understands the question put to him and he is capable of giving rational answers (see [Section 118](#) of the Evidence Act) as the child witness, by reason of his tender age, is a pliable witness and can be tutored easily either by threat, coercion or inducement, for which the court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon if the court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of truth. It is safe and prudent to look for corroboration for the evidence of a child witness from the other evidence on record, because while giving evidence a child may give scope to his imagination and exaggerate his version or may develop cold feet and not tell the truth or may repeat what he has been asked to say not knowing the consequences of his deposition in the court. Careful evaluation of the evidence of a child witness in the background and context of other evidence on record is a must before the court decides to rely upon it.”

13. According to the learned Amicus Curiae, the prosecution could not establish the case against the accused/appellant beyond reasonable doubt and the learned Trial Court passed the order of conviction without considering the entire aspect of the case and thus, the same is liable to be set aside and quashed.

14. Per contra, Ms. Fambawl, learned Additional Public Prosecutor has

submitted that the Court of the Presiding Officer, Fast Track Special Court (POCSO), had passed the order after proper appreciation of evidence on record and as such there is no infirmity in the judgment of the learned Trial Court convicting the accused/appellant under Section 4 of the POCSO Act *read with* Section 376(3) of IPC. She further submitted that the accused/appellant himself admitted the fact that he booked a room at the tourist lodge in Khawbung village and he gave a sum of Rs. 750/- to the victim girl to go to Aizawl and apart from that it is also admitted by him that he was under intoxication. She also submits that there was a rupture of the hymen of the victim at the time of her examination by the Doctor. There might not be any eye witnesses to the case as the victim was alone at the time of the said incident with the accused/appellant inside the room at tourist lodge which was booked by him and wherein, the victim was kept confined and sexually assaulted by the accused. And, the entire evidence of the victim is consistent and there is nothing to disbelieve her evidence.

15. Further, she submitted that from the evidence of the PWs itself, it is seen that the accused/appellant was a good friend of victim's family and there was no enmity or personal grudge between the parties and thus, the question of lodging false cases against the accused/appellant does not arise. She also submits that the victim girl was of 13/14 years of age at the time of the incident and thus, she was not a girl of 5 or 6 years requiring the learned Trial Court to put preliminary questions to the victim to assess her capacity of understanding or to assess as to whether she is able to give rational answers.

16. In support of her submission, she relies on the decision passed by the Apex Court reported in **(2020) 10 SCC 573 [Ganesan vs. State**

represented by its Inspector of Police] and she relied on paragraph Nos. 10.1 and 10.2 of the said judgment, which read as under;

“10.1. Whether, in the case involving sexual harassment, molestation etc., can there be conviction on the sole evidence of the prosecutrix, in the case of Vijay alias [Chinee](#) (supra), it is observed in paragraphs 9 to 14 as under:

“9. In [State of Maharashtra v. Chandraprakash Kewalchand Jain](#), (1990) 1 SCC 550 this Court held that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Court observed as under: (SCC p. 559, para 16)

"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.....

10.2. In the case of [Krishan Kumar Malik v. State of Haryana](#) (2011) 7 SCC 130, it is observed and held by this Court that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient, provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

17. On the other hand, Mr. Tochwang, learned Amicus Curiae appearing on behalf of the respondent No.2/informant submitted that her entire evidence is consistent since beginning and the defence could not rebut her evidence to disbelieve the statement made by the victim. It is a fact that there was no eye

witness to the prosecution case, but, the evidence of the victim cannot be disbelieved and the sole testimony of the prosecutrix is sufficient to convict the accused/appellant.

18. In support of his submissions, he relies on the decision passed by the Apex Court reported in **(2017) 2 SCC 51 [State of Himachal Pradesh vs. Sanjay Kumar Alias Sunny]**, and relying on the said judgment, he submits that the minor discrepancies can be ignored. Paragraph No.32 of the said judgment which read as under;

“32. From the evaluation of the prosecution.....”66. The statement of prosecutrix inspires confidence even though a child witness since while deposing in the Court her demeanor appeared like that of competent witness and no likelihood of tutor. I find her testimony reliable since she was found competent to depose after preliminary inquiry as she understood questions and to give rational answers. I have gone through her statement with extra caution and full of circumspection. Therefore, I have no hesitation to believe her statement.”

19. Rival submissions of the learned counsels have been heard. The case record alongwith the trial Records have been carefully perused.

20. Before proceeding to arrive at any point of determination, the evidence of the prosecution as well as the defence it is felt necessary to discuss and the same are reproduced as follows:-

21. PW-1 is the complainant/father of the victim who deposed that on 02.10.2022 his daughter was missing and on the morning of 03.10.2022 one cousin of his wife dropped his daughter in his house and on being asked by his wife, the victim narrated the entire story as to how she was forcibly taken by the accused/appellant to the tourist lodge at Khawbung village and forced to consume alcohol and committed penetrative sexual assault for three times and thereafter, on the next day morning, the accused/appellant dropped the victim

to one of her friend's house and asked her to go to Aizawl and gave her a sum of Rs. 750/-. Thereafter, the complainant discussed the matter with other family members and lodged the FIR.

In his cross-examination, he stated that the accused/appellant is their family friend and used to visit their house frequently.

The PW-1, is the complainant of this case who is also the step father of the victim and he also narrated the entire story reported to him by his daughter/victim as to how by forcing her to consume liquor, the accused had committed penetrative sexual assault for three times inside the rented room. He denied when suggested that his step daughter had love affairs with another boy and also spend some night with him. From his cross-examination also seen that the accused is one of his family friend.

22. PW-2 is the mother of the victim and her testimony is that the victim narrated the same story before her and stated that the accused/appellant committed penetrative sexual assault on her for three times at the tourist lodge.

In her cross examination, she admitted that at the time of the seizure, police seized the photo-copy of the birth certificate of the victim as the original birth certificate was with her biological father. She also admitted that the accused/appellant was the family friend and she heard about the incident from her daughter.

23. PW-4 is the Doctor who examined the victim on 04.10.2022 at around 2 PM when she was brought by the police for examination. During examination, he found that the hymen of the victim was ruptured.

In his cross-examination, he stated that he did not collect vaginal swap of the victim and did not find presence of any semen on the private parts of the victim and that no DNA profiling was done by him.

24. PW-5 is the victim of this case, who deposed that on the day of the incident she visited the house of her friend Rinchhani and while she was returning back home, she met the accused/appellant who is the friend of her father and he promised her to drop in her residence. But, instead he took the vehicle to the tourist lodge and forced her to get inside the tourist lodge, where, he had booked a room and he forcefully took her inside the room No.206, where, he forced her to consume liquor and then, she was force to lie down on the bed and the accused removed her pant and when she tried to resist him, he covered her mouth. The accused removed his pant and underwear and inserted his penis inside her vagina. He repeatedly committed the same for three times and she spent her night at the tourist lodge. She was so scared to go home. Knowing her fear, the accused/appellant asked her to go to Aizawl and gave her a sum of Rs. 750/-. In the early morning at around 3 AM, she went to her friend's house and after sunrise she searched for Sumo service and however, there was no Sumo service at that time and then, she went to one Nu Zovi's Place, where, her friend Rinchhani came and picked her from there. She narrated the entire story to her friend Rinchhani and after reaching home she also narrated the same incident to her parents.

In her cross examination, she admitted that the accused/appellant is her family friend and he used to visit in their house. But, she denied to the suggestion put to her that she was romantically attached with the accused person and also denied when suggested that the accused/appellant had not committed any

offence of sexual penetration.

25. PW-6 is the receptionist of that tourist lodge and her evidence is that she received a phone call from the accused/appellant asking as to whether any room is available or not and she informed him about the availability of room No.206. Later, she came to know that the accused had already occupied the said room and stayed in the said room. But, she could not say as to whether the victim accompanied with the accused/appellant or not, as because she was not present at the time of their arrival at tourist lodge. And on the next day, at around at around 3:00 A.M, the accused appellant asked her to come in the room No. 206 and paid her Rs.500/- as a room rent.

From her cross examination, it is seen that she did not see the victim in the premises of the tourist lodge on the night of the incident nor she saw any other person in the night of the incident in room No.206.

26. PW-7 is the investigating officer who recorded the statement of the victim when she was brought to the police station. She also deposed that the victim narrated the entire story as to how she was taken at the tourist lodge and how the accused/appellant had committed penetrative sexual assault on her. Apart from that she also submitted that in the early morning the accused/appellant gave the victim a sum of Rs. 750/- and told her to go to Aizawl.

In her cross-examination, she stated that there was no sign of sexual assault upon the victim and also she did not find the victim to be stressed or anxious. Further, she had no idea about the medical report of the victim.

27. PW-9 is the IO of the case, who after investigating the case, recorded the statement of the victim and he found a prima facie case and accordingly, he

filed the charge-sheet under Section 6 of the POCSO Act *read with* Section 376 (3) of IPC. He also deposed about the accused/appellant having paid a sum of Rs.500/- to the receptionist of the tourist lodge as a room rent.

In his cross-examination, he admitted that there was no eye witness who heard about the aforesaid incident and he also admitted that no DNA profiling was conducted to prove the guilt of the accused. Apart from that he also deposed in his cross examination that there was no evidence to prove the sexual assault upon the victim in the light of the medical examination report. Further, he denied the suggestion that the guilt of the accused was not proved.

28. The defence also examined the two witnesses in support of his case;

28.1. The DW-1 is the mother of the accused/appellant and as per her, the victim narrated the story under the threat of her mother, who make her bound to narrate the allegation of commitment of penetrative sexual assault on her by the accused/appellant.

But, in her cross-examination, she stated that she does not know as to whether her son had committed sexual assault on the victim or not.

28.2. The DW-2 is the friend of the accused/appellant, who deposed that he along with the accused and uncle of the victim along with another person went to Khuangleng after dinner he returned back home at Khawbung on the same night.

He deposed in his cross examination that he has no knowledge that the accused had any sexual intercourse with the victim or not.

29. In his statement under Section 313 of Cr.P.C., the accused/appellant

admitted the fact that he had booked a room at the tourist lodge and giving of Rs. 750/- to the victim as she had asked for the money, but, denied the allegation of penetrative sexual assault on the victim.

30. So, the issue to be determined as to whether the prosecution has been able to prove the case without D.N.A profiling and non-examination of vaginal swab of the victim and on the basis of the sole testimony of the prosecutrix who was admittedly a minor at the relevant time of the incident.

31. From the evidence adduced as discussed above, it is seen that the accused/appellant booked a room at the tourist lodge in the night of the incident and gave a sum of Rs.750/- to the victim to go to Aizawl, which is there in the evidence of the victim that she was taken to the room No.206 at the tourist lodge and on the next day she was given Rs.750/- by the accused appellant to go to Aizawl.

32. The fact that the accused/appellant booked a room i.e room No.206 is proved from the evidence of PW-6/receptionist, who received a phone call from the accused/appellant for a room and on the next day morning at around 3:00 A.M, the accused/appellant paid her room rent of Rs.500/-. Her statement with regards to the payment of room rent is also corroborated by the I/O (PW-9). PW-6 did not find the victim inside the room when she went to take the room rent as the evidence of the victim is of that she was asked to leave the room in the morning hour at around 3:00 A.M. Accordingly, the victim left the room of the lodge after receiving Rs.750/- from the accused/appellant and thereafter, she went out in search of sumo service. So, before PW-6 went to the room No.206 to take the rent, the victim had already left the room, as per the instruction of the accused/appellant.

33. Thus, from the evidence of the receptionist as well from the evidence of the I/O and as admitted by the accused in his statement recorded under Section 313 of Cr.P.C., prosecution version to the extent of booking of a room at the tourist lodge and paying room rent of Rs. 500/- to the said receptionist is established. Furthermore, the accused/appellant admitted of paying of Rs. 750/- to the victim on that morning to go to Aizawl in his statement under Section 313 of Cr.P.C.. So, the question arises, as to why, the accused/appellant paid Rs.750/- to the victim in the early morning of 03.10.2023 to go to Aizawl, if the victim was not with him in the night of the incident. Further, there is no other reason for the accused being the local person to book a room in the said tourist lodge in the night of the incident.

34. Coming to the medical evidence of the Doctor, it is seen that no DNA profiling was conducted and he did not collect the vaginal swab of the victim at the time of her examination as well as he did not find any semen in the private parts of the victim. From the medical evidence, it is seen that the incident of the night of 02.10.2022 and the victim was medically examined on 4.10.2022 at around 2:00 P.M, and being so, the probability of finding the presence of semen on the private part of the victim is very less. But, the evidence of the Doctor (PW-4) is that he found the hymen of the victim ruptured, which supports to the prosecution case regarding the commitment of penetrative sexual assault on the victim.

35. It is also not the case Projected that for the previous enmity which existed between the accused and the victim's family, the informant lodged the false case against the accused/appellant. Rather, from the evidence of the PWs and the DWs, it is seen that the accused/appellant was a good friend of the victim's

father and he is known by other family members of the victim. Though, the defence adduced two numbers of witnesses, but it could not rebut the evidence of the prosecution specially the victim. Another point raised by the learned Amicus Curiae on behalf of the appellant is that while recording the evidence of the victim, the preliminary questions were not put to her to assess her maturity of understanding. But, it is seen that the victim is not a girl of 4/5 years of age nor below the age of 12 years to put the preliminary questions to assess the capacity of understanding of the victim. It is seen from the evidence that the victim was 13/14 years of age at the relevant time of the incident and matured enough to understand as to what she was speaking and for which it is not essential to put the preliminary questions to the victim before the recording the statement under Section 164 of Cr. P. C. as well as for recording her evidence.

36. Being so, the judgments of the Supreme Court in the case of *Pradeep (Supra)* and *K. Venkateshwarlu (Supra)* do not go in favour of the accused appellant. *Kewalchand Jain (Supra)* and *(2011) 7 SCC 130 (Krishna Kr. Malik vs. State of Haryana)*. Another relevant case law in this regard is *Moti Lal vs. State of Madhya Pradesh* reported in *(2008) 11 SCC 20, 2008/AIR 2008 SC (Supp) 882*.

37. So from the entire evidence prosecuted by the prosecution, it is seen that the testimony of the victim is trustworthy and reliable and the other prosecution witnesses has corroborated and supported the testimony of the victim including the medical evidence. It is a settled law that the victim of sexual assault is not treated as an accomplice and as such her evidence does not require corroboration of any other evidence if her sole testimony inspires confidence and appears to be trustworthy. Reference in this regard is made to **(1990) 1**

SCC 550 [State of Maharashtra vs. Chandra Prakash].

38. In **State of Himachal Pradesh v. Raghubir Singh, (1993) 2 SCC 622; 1993 SCC (Cri) 674**, the Apex 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 Supreme Court in the case of *Wahid Khan v. State of Madhya Pradesh (2010) 2 SCC 9; AIR 2010 SC 1*, placing reliance on an earlier judgment in *Rameshwar vs. 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.

39. As per Section 29 of the Act, the burden of rebutting the presumption is upon the accused and he cannot discharge this burden by simple denial or explanation. Section 29 of the POCSO Act mandates legal presumption against the accused for offences under Sections 3, 5, 7 and 9 of the POCSO Act, 2012. Unlike other criminal prosecution wherein it is first presumed that an accused is innocent until proven guilty (presumption of innocence of accused) under Section 29 and 30 of POCSO Act, 2012, there is an adverse presumption of certain offences and culpable state of mind against the accused and the accused has to discharge that burden.

40. 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.”

41. Here in the instant case, it is seen that prosecution is able to prove the foundational fact of the case. Though, the accused/appellant adduced the evidence of two witnesses to discharge his burden and to disprove the prosecution case, but, these DWs failed to discredit the prosecutrix and rather they are not aware as to whether sexual assault on the prosecutrix was committed by the accused/appellant or not instead of asserting complete denial of any such offence by the accused. DW-1 has only deposed that the victim girl was threatened by her mother to make allegation against the accused. But, what for the mother of the victim will do, DW-1 is silent. No any reason attributed against the victim or her parents to falsely implicate the accused/appellant. And DW-2's evidence is not believable in view of the evidence of PW-6 and the statement of the accused appellant recorded under Section 313 of Cr.P.C. From the entire discussion made above it is seen that the prosecution has been able to prove that the accused/appellant had committed offence of penetrative sexual assault on the victim, who was minor at the time of the incident.

42. Summing up the discussions made above and considering the evidence on record vis-a-vis entire facts and circumstances of the case, we are of the opinion that the learned Court below rightly passed the order of conviction against the accused/appellant for offences under Section 4 of the POCSO Act *read with* Section 376 (3) of IPC and imposed a justified sentence and hence, we find that the judgment and order dated 29.03.2023, passed by the Court of the Presiding

Officer, Fast Track Special Court (POCSO), Champhai, Mizoram in Case No. FTSC (CPI) POCSO 51/2022 arising out of CrI. Tr. No. 255/2022, requires no interference of this Court and accordingly, the same stands affirmed.

43. Resultantly, the appeal stands dismissed.

44. We sincerely acknowledge the service rendered by the learned Amicus Curiae. The Registry shall pay the remuneration to them as per their entitlement, on production of copy of this judgment and order.

45. Send down the record of the learned Court below immediately with a copy of this judgment. The Registry shall serve a free copy of this judgment and order to the appellant through the jailor concerned.

JUDGE

JUDGE

Comparing Assistant