

GAHC020001372023



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

**Case No. : CRL.A(J)/3/2023**

SHRI. NANDU LAL KUMAR  
AGED ABOUT 41 YEARS,  
S/O NAN KUMAR,R/O NAINIJOR VILLAGE,  
DISTRICT - BUXAR, BIHAR,  
PRESENTLY RESIDING AT 8TH NAP, NALTOQA,  
ZUNHEBOTO - 798620, NAGALAND

VERSUS

THE STATE OF NAGALAND AND ANR  
REPRESENTED BY PUBLIC PROSECUTOR,  
NAGALAND

2:SHRI. ANKIT KUMAR  
S/O LATE LALAN THAKUR  
COMPLAINANT/INFORMANT  
PRESENTLY RESIDING AT 8TH NAP  
NALTOQA  
ZUNHEBOTO - 798620  
NAGALAND

**Advocate for the Petitioner : JOSHUA SHEQI**

**Advocate for the Respondent : P.P, NAGALAND**

Linked Case : I.A.(Crl.)/4/2023

SHRI. NANDU LAL KUMAR

AGED ABOUT 41 YEARS  
S/O NAN KUMAR  
RESIDENT OF NAINIJOR VILLAGE  
DISTRICT - BUXAR  
BIHAR

PRESENTLY RESIDING AT 8TH NAP  
NALTOQA  
ZUNHEBOTO - 798620  
NAGALAND

VERSUS

THE STATE OF NAGALAND  
REPRESENTED BY PUBLIC PROSECUTOR

NAGALAND

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Advocate for : JOSHUA SHEQI  
Advocate for : GOVT ADV NL appearing for THE STATE OF NAGALAND

**BEFORE**  
**HON'BLE MR. JUSTICE KALYAN RAI SURANA**  
**HON'BLE MR JUSTICE MRIDUL KUMAR KALITA**

**JUDGMENT**

**Date : 23-07-2024**

*(Mridul Kumar Kalita, J)*

1. Heard Mr. Joshua Sheqi, learned counsel for the appellant. Also heard Mr. Veto V. Zhimomi, learned Public Prosecutor, Nagaland, appearing for the State respondent No. 1 and Mr. Moa Jamir, learned counsel for respondent No. 2 (Informant).
2. This appeal under Section 374 of the Code of Criminal Procedure, 1973 has been filed by the appellant Shri Nandu Lal Kumar, impugning the judgment dated 13.03.2023, whereby learned

Special Judge, POCSO, Zunheboto, Nagaland convicted him under Section 4 and 6 of the POCSO Act, 2012 and under Section 376(2)(I) of the Indian Penal Code, as well as the order dated 15.03.2023 whereby the above-named appellant was sentenced to undergo rigorous imprisonment for a period of 20 years and to pay a fine of Rs. 20,000/- under Section 4 and 6 of the POCSO Act, 2012 read with Section 376(2)(I) of the Indian Penal Code and in default of payment of the fine amount to undergo rigorous imprisonment for another one year.

3. The facts relevant for consideration of the instant appeal in brief are as follows:

- i. On 06.06.2021, the Officer-in-Charge of Woman Police Station, Zunheboto, Nagaland, received an FIR lodged by one Ankit Kumar, *inter-alia*, alleging that his minor sister was raped on 05.06.2021 at about 1.00 pm to 3.00 pm by the appellant Mr. Nandu Lal at his residence at Naltoqa, Zunheboto.
- ii. It has been stated in the FIR that the date of birth of the victim girl is 15.01.2012 and she was minor when the alleged offence was committed.
- iii. On receipt of the said FIR, the Officer-in-Charge of Woman Police Station, Zunheboto, Nagaland registered W.P.S. Case No. 001/2021 under Section 376(2)(j)(I) of the Indian Penal Code read with Section 4 of the POCSO Act, 2012 and initiated

the investigation.

- iv. On the date of lodging of the FIR itself, i.e., 06.06.2021, the appellant was brought to the Women Police Station, Zunheboto, by Suruhoto police, and subsequently, he was arrested by the police. The victim was also brought to the police station on 06.06.2021, and thereafter, she was immediately rushed to the district hospital, Zunheboto, for medical examination.
- v. During the course of the investigation, the Investigating Officer recorded the statements of the victim, child witness, as well as the appellant under Section 161 of the Code of Criminal Procedure, 1973 and also arranged to record their statement under Section 164 of the Code of Criminal Procedure, 1973 by a Magistrate. As the victim was a deaf and dumb girl, her statements were recorded with the assistance of an interpreter, who happened to be her elder sister.
- vi. During the course of the investigation, the Investigating Officer also visited the place of occurrence of offence, and prepared the sketch map, as well as took the photographs of the place of occurrence. She recorded the statement of other witnesses and also collected the birth certificate of the victim. She had also seized the undergarment as well as wearing apparel of the victim from the crime scene.

- vii. After completion of the investigation, the Investigating Officer laid the charge sheet against the above-named appellant under Section 376(2)(j)(I) of the Indian Penal Code, read with Section 4/6 of the POCSO Act, 2012.
- viii. Since the date of his arrest, the appellant has been detained behind the bars, and he faced the trial while remaining in custody. On 22.10.2021, the learned Special Judge, POCSO, Zunheboto, after going through the materials available on record, framed the charges under Section 376(2)(I) of the Indian Penal Code, read with Section 4 and 6 of the POCSO Act, 2012 against the appellant. When the said charges were read over and explained to the above-named appellant, he pleaded not guilty and claimed to be tried.
- ix. To bring home the charges against the above-named appellant, the prosecution side examined as many as 13 prosecution witnesses. After completion of the recording of prosecution's evidence, the appellant was examined under Section 313 of the Code of Criminal Procedure, 1973, during which he pleaded his innocence and denied the truthfulness of the testimony of prosecution's witnesses. He had also stated that he was falsely implicated in this case as he failed to meet the demand of payment of money to the family members of the victim.
- x. However, after culmination of the trial, the Court of learned

Special Judge, POCSO, Zunheboto, by the judgment which has been impugned in this appeal, had convicted and sentenced the appellant in the manner as already described in paragraph No. 2 herein before.

4. Before considering the rival submissions made by learned counsel for both the sides, let us go through the evidence which is available in record.
5. Normally, in a criminal trial, the Investigating Officer is examined as the last prosecution witness so as to afford an opportunity to the defence side to confront the Investigating Officer with the contradictions which the defence side is able to bring out in the testimony of other prosecution witnesses. However, very surprisingly, in the instant case, the Investigating Officer was examined as the first prosecution witness.
6. The PW-1, namely, UBSI Kengbame, has deposed in her testimony that she is the Investigating Officer of the instant case and she was serving as the Officer-in-Charge of the Women Police Station, Zunheboto. She has deposed that on 06.06.2021 at around 9.17 pm, she received a written FIR from one Ankit Kumar, who is the brother of the victim. She has further stated that, it is stated in the FIR that the sister of the first informant, who is a deaf and dumb girl, was raped by Nandu Lal Ram, (above-named appellant), on 05.05.2021 at about 1.00 pm to 3.00 pm at his residence at 8<sup>th</sup> NAP Naltoqa. She has further stated that on 06.06.2021 itself, the

appellant and the victim girl was brought to the Zunheboto Women Police Station by Shuruhuto Police, accompanied by the guardians of the victim and thereafter, the victim was rushed to the district hospital Zunheboto for medical examination and thereafter, the appellant was arrested. She has also deposed that she recorded the statement of the victim under Section 161 of the Code of Criminal Procedure, 1973 with the help of an interpreter who was the elder sister of the victim girl. She also took the photographs of the crime scene and prepared the sketch map and also seized the underwear of the victim from the crime scene in presence of the witnesses. She has also deposed that, during his examination under Section 161 of the Code of Criminal Procedure, 1973 the appellant had confessed to his guilt. She has also deposed that during investigation she collected the birth certificate of the victim girl from which it was ascertained that her age was 9 years when the offence was committed. She has also deposed that on the basis of the evidence collected during investigation it was established that the appellant had committed rape and aggravated penetrative sexual assault on the victim, who is a deaf and dumb girl. She exhibited the apparels of the victim girl as Material Exhibit No. M-1. She also exhibited the FIR as Exhibit P-6 and the charge sheet as Exhibit P-10.

7. During cross-examination, PW-1 has deposed that the statement of the victim under Section 161 of the Code of Criminal Procedure, 1973 was taken at her residence with the assistance of her elder

sister Pooja and her friend Elivi. However, she has also deposed that no videography was done while recording the statement of the victim girl. She has also deposed that the white floral underwear and the blue coloured long pant were seized from the place of occurrence and same belonged to the victim girl and was identified by the victim girl at the place of occurrence. She has also stated that she does not remember as to whether the sample of vaginal swab and penile swab taken from the victim and the appellant respectively were given to her by the medical doctor who conducted the examination or not. She has also deposed that she did not send any seized article for forensic examination. She has also stated that in his statement recorded under Section 164 of the Code of Criminal Procedure, 1973 the appellant did not confess to his guilt. She has also stated that she is not aware of any monetary demands made by the victim's family to the present appellant.

8. PW-2 Ankit Kumar, who is the first informant of the case, has deposed that on the day of incident he received a telephonic call from one friend and thereafter, his sister Pooja called him and asked him to bring the compounder immediately and accordingly, he took the compounder to his home. He found no one at his home when he reached there and one of his friends told him that they have all left for the home of the appellant Nandu Lal. PW-2 has also deposed that thereafter, they reached the house of Nandu Lal and there his sister told him that the appellant Nandu Lal has raped his younger sister. As there was no doctor in Naltoqa, PW-2

requested the compounder to examine his sister and thereafter, the compounder examined the younger sister of the informant in presence of his sister Pooja and one aunty and told them that her younger sister has been raped. PW-2 has also deposed that thereafter, he lodged the FIR which is exhibited as Exhibit P-4. He also exhibited the long pant of his sister as Material Exhibit- 01 and the seizure list as Exhibit P-5.

9. During cross examination, he has stated that the age of the victim girl is 12-13 years and the victim girl is a good friend of Elivi. He has also deposed that he was told by his sister Pooja that Aunty Vitoli has informed her that his younger sister has been raped. He also deposed that they asked for monetary compensation from the appellant for a compromise, however no monetary compensation was given by the appellant side. He also deposed that his sister and her friend Elivi usually threw stones at Nandu Lal's place who used to scold them not to do so.
10. PW-3, who is the victim girl, was examined with the help of an interpreter, namely, Smt. Chubaienla, Special Educator from District Education Office, Mokokchung. The victim was examined in question-and-answer form and during her examination-in-chief, the victim had stated that she is 14 years of age and on the day of incident she was at her friend's house. She also stated that appellant Nandu Lal called her by waving his hand and thereafter, she went to his house. She has also stated that the appellant took

her to his bedroom, removed her pants forcefully and put his penis in her vagina which was little painful and she tried to shout but the appellant closed her mouth by his hands and she cried. Thereafter, he let her go. The PW-3 identified her black color jeans pant, which was exhibited as Material Exhibit M-1. To a question put to her that whether the appellant insert his penis inside her vagina, she answered that only a little and it was not so painful. She exhibited her signature on her statement recorded under Section 164 of the Code of Criminal Procedure, 1973 as Exhibit P/1 (D). She also identified the appellant.

11. During cross-examination, she has stated that she had started her mensuration period last year. She was asked whether the cream colored underwear produced in the Court belongs to her or not to which she answered that it does not belong to her. She also stated that she did not tell anyone about the incident. She also stated that she used to go to Nandu Lal's place and play with his mobile phone and she has also stated that she used to throw stones to Nandu Lal's place.
12. It is pertinent to mention herein that the victim PW-3 is admittedly a deaf and dumb girl. However, as to how her evidence was recorded, how she communicated to the Court through interpreter is not mentioned in any record of the Court. Same has not been mentioned either in the order sheet dated 05.07.2022 maintained in the Trial Court record, or in the form for recording deposition

where the testimony of PW-3 was recorded. It is also pertinent to mention herein that it is not clear from the form for recording deposition as to whom the oath was administered. Whether the oath was administered to the victim girl or not and whether the oath was administered to Smt. Chubaienla, the Special Educator who acted as an interpreter of the victim girl is not clear from record.

13. PW-4, Elivi Nzano Yanthan, who is the friend of the victim girl, was also examined in question-and-answer form in Sumi dialect which was translated in English by the Presiding Officer while recording the same. It also appears that though, the PW-4 was only 10 years of age, however, oath was administered to her and nowhere in the deposition form, it is mentioned that the said witness understood the nature of an oath and it appears that the mandate of the provisions contained in the proviso to Section 4 of the Oaths Act, 1969 was not duly followed by the Trial Court before recording the testimony of child witness Elivi Nzano Yanthan (PW-4), on oath. PW-4 has deposed that she reads in class 3 and she is 10 years of age. She has also stated that sometime she used to go to the house of Nandu Lal along with the victim girl and used to play with the Nandu Lal 's phone. When she was asked why did she left on the date of incident she answered that Nandu Lal told her to go. However, she did not leave the house and she peeped through the gap of the door and saw that Nandu Lal was lying on the top of the victim girl and they were doing bad things. She also deposed that

she saw the victim crying. She has also stated that as the door was not latched from inside, she pushed the door and went inside and saw Nandu Lal pulling up victim's long pant but her underwear was kept under the pillow. She saw that blood stains were there in victim's underwear. She has also stated that after pulling up victim's pant the appellant was lying down on his bed, she has also stated that thereafter, she left that place and after reaching home she narrated everything to her mother. She identified the appellant who was standing in the dock of the court as well as exhibited her signatures on her statement recorded under Section 164 of the Code of Criminal Procedure, 1973.

14. During cross examination, the PW-4 has deposed that she used to communicate with the victim girl through actions and the women police came to victim's house and asked her to narrate what she saw. She has also stated that she and the victim girl went to Nandu Lal's place themselves and he did not call them. She has also stated that she told her mother that there was blood in Priya's pant and her mother told her that maybe they have done bad things. She has also stated that thereafter, they went to their own houses.
15. PW-5, Vitoli Yanthan, has deposed that on the date of incident she went to Zunheboto and reached home at around 2.00 pm, her daughter Elivi told her that her friend (victim) had stain of blood on her pant and that's why she thought that victim and the accused might have had sex, so she went to the house of the sister of the

victim to report the matter, but she could not find her there. On the next day, she told the sister of the victim about the matter saying that her daughter had seen blood stain on the pant of the victim. She has also stated that on hearing about the blood stain in the pants of the victim, she immediately left for the house of the victim to inform her sister and next morning at about 7.00 am she went to the residence of the victim and told the sister of the victim that there was blood stain in long pant of the victim and after that the victim's sister went to the house of Nandu Lal. On enquiry Nandu Lal denied having any sexual activity with the victim. PW-5 also stated that she was told by the sister of the victim that they asked Nandu Lal to pay them an amount of Rs.2,50,000/-.

16. PW-6, Thepfukholie Angami, has deposed that he is presently serving as Nursing Assistant at Unit Hospital, Naltoqa. He further deposed that on 06.06.2021, the accused (appellant) along with victim's family was present and he was alleged to have committed rape on the victim girl. PW-6 has also deposed that he checked the victim's vagina and found that there was blood clot on her vagina. He has also deposed that when question was put to the victim's child she cried and pointed her finger straight at the accused. He has also deposed that the child is dumb and she cannot speak. He has also deposed that thereafter the appellant was kept under quarter guard and victim's family pursued the complaint against the appellant Nandu Lal.

17. During cross examination, PW-6 has deposed that on 06.06.2021, he was called by one Ankit to come to Nandu Lal's place to examine the victim girl in the case of rape. Thereafter, he physically conducted the medical examination of the alleged victim's private parts. He has also deposed that he is not competent and qualified to conduct the medical examination on a rape victim girl. He has also stated that there is one female nurse at the Unit Hospital, Naltoqa and at the time of incident, the female nurse was also present at Unit Hospital, Naltoqa.
18. During re-examination, PW-6 has deposed that he examined the victim girl on the request of the brother of the victim and he has also deposed that usually all first aid, stitching and other medical attentions is done by him at Unit Hospital, Naltoqa.
19. During re-cross examination, he has also stated that there is an In-charge of Unit Hospital, Naltoqa, who is a pharmacist named, Kahoshe. He has also deposed that he accompanied the brother of the victim girl without informing the In-charge of the hospital. He has also stated that administering first aid and conducting medical examination on victim's private part are different matters and there is a huge difference between two.
20. PW-7, Dr. Meyielhi Kapfo, has deposed that on 06.06.2021 at 11.30 pm, the victim was brought to the District Hospital, Zunheboto, where she was serving as Senior Specialist. She has deposed that after taking the history and consent of the guardian of the victim,

she proceeded to examine the victim in presence of Police Officer. She has deposed that on examination she found no injury marks on any part of her body. PW-7 has also deposed that the victim was not wearing any underwear. The jeans, which she was wearing, was stained with blood. PW-7 has deposed that the private part of victims was intact. The hymen was intact. There was no injury mark in any part. The blood stains were visible around her private part. She has also deposed that she has taken swab sample from the victim's private parts for examination. She has also deposed that the accused (the appellant) was also examined and no injury was found on his private part. PW-7 has also deposed that smegma was also present in the private part of the accused, smear was taken for forensic examination. She has exhibited the medical reports as Exhibit-P/18 and Exhibit-P/4 and her signatures thereon as Exhibit-P/18 (a) and Exhibit-P/4 (a).

21. During cross examination, PW-7 has deposed that blood stains were visible around the private parts of the victim were not fresh. She has also deposed that on internal examination of the victim, there was no tear or injury on the vaginal wall of the victim girl. She has also stated that she did not find any sign of recent sexual intercourse on vaginal examination of the victim girl. She has also stated that no evidence for penetrative sexual intercourse or non-penetrative sexual assault was found on examination of the victim girl. She has also stated that the vaginal swab and penile smear collected from the victim as well as the accused were handed over

to the investigating agency for forensic examination.

22. During re-examination of the PW-7, she has deposed that in the medico legal diagnosis, the remark is given only for penetrative sexual intercourse, which does not include non-penetrative sexual assault. To a question posed by the Court, PW-7 has deposed that there is a possibility of menstrual blood stain on the clothes and private parts of the victim girl.
23. PW-8, Tonivi Sumi has deposed that on the date of incident he received an information that one person has raped a minor girl and he along with his team went to Naltoqa and arrested the appellant Nandu Lal at 8th NAP BN Quarter Guard, Naltoqa. He has also deposed that he is the witness of the arrest of the appellant on 07.06.2021 and has appended his signatures in the arrest memo, which is exhibited as Exhibit-P/2, wherein his signatures are exhibited as Exhibit-P/2 (a).
24. PW-9, Hekuto Jakhalu has deposed that he is holding a post of B.H.M. at 8th NAP, Naltoqa and on 05.06.2021, he received a report that Nandu Lal was suspected of rape of a girl child. He has also deposed that on 06.06.2021 the accused was kept at Quarter Guard for interrogation and during interrogation, the accused admitted that he has touched the victim girl.
25. During cross examination, PW-9 has deposed that during initial interrogation of the accused he could not ascertain whether the

accused namely, Nandu Lal has committed the rape on minor girl or not.

26. PW-10, Ruzonuo Rita Rusta has deposed that she is working as DCPO in DCPU, Zunheboto at the time of incident and she got an information that the victim girl has been raped. She has also deposed that as soon as, she received the information she contacted the District Child Welfare Committee and informed them to do the needful. She has also deposed that since they don't have Sign Language Specialist in Zunheboto District, She contacted Disabled Commissioner, Kohima to provide one Special Interpreter for the child victim and thereafter, she forwarded the official contact number of the interpreter to CWC as well as to the Investigating Officer of the case. During cross examination, PW-10 has deposed that she got the information regarding the case on 07.06.2021. She has also deposed that the State Commissioner for persons with disability were ready to assist them with Interpreter/Special Educator.
27. PW-11, Nikuto Sumi. has deposed that on 05.06.2021, CWC received the information about the rape incident of the victim child, but due to covid pandemic there was movement restriction in the district and as such, they were unable to physically meet the victim at Naltoqa. She has also deposed that they contacted the brother of the victim girl from whom they came to know that the victim is a deaf and dumb and the appellant had raped her. She has also

deposed that the brother of the victim girl was requested to keep the victim girl in Child Care Institute, but he refused.

28. During cross examination, PW-11 has deposed that whatever he has stated in his examination-in-chief is based on hearsay. He has also stated that he never met the victim girl or her family members.
29. PW-12, Khrievonuo Seletsu, Judicial Magistrate 1<sup>st</sup> Class, Wokha has deposed that on 10.06.2021, a child victim was brought before her for recording her statement under Section 164 of the Code of Criminal Procedure, 1973. The statement of the child was interpreted by her sister, as the victim was deaf and dumb. PW-12 has deposed that she recorded the statement and explained to the victim what has been recorded in detail. She took the signature of the victim and thereafter, her own signature was appended to the statement which is exhibited as Exhibit-P/1(c). PW-12 has also deposed that she recorded the statement of child witness, who was 12 years old and after recording this statement she explained to the witness as to what was recorded in her statement and thereafter, appended her own signature on the said statement, which is exhibited as Exhibit P/1(a). PW-12 has also deposed that she also recorded the statement of the accused under Section 164 of the Code of Criminal Procedure, 1973 and obtained his signature thereon, and also appended her own signature on the same, which is exhibited as Exhibit P/1(d).

30. During cross-examination, PW-12 has deposed that oath was administered to the victim in usual way before recording the statement under Section 164 of the Code of Criminal Procedure, 1973, though, the victim was deaf and dumb. PW-12 has also deposed that the sign used by the victim to communicate was not recorded by her in her statement under Section 164 of the Code of Criminal Procedure, 1973. PW-12 has also deposed that the interpreter was the elder sister of the victim. She has also stated that the sign language used by the sister to communicate with the victim was common sign, which could be easily understood by any person. It is also stated by PW-12 that the statement of the victim was recorded virtually through WhatsApp video call and at the time of recording the statement of the victim, she was in the Chamber of Judicial Magistrate 1<sup>st</sup> Class, Zunheboto, while the Magistrate was at Wokha. PW-12 has also deposed that the medium of language used to communicate with the accused, child witness and the victim was Nagamese. She also deposed that no memorandum stating the substance, the language used in the examination of accused, child witness and victim was noted by her.
31. PW-13, Pooja Kumari, who is aged about 21 years, has deposed that she is the elder sister of the victim and she was informed by her aunty Vitoli who happens to be the mother of the friend of the victim that her daughter has seen the accused Nandu Lal raping her sister. She has further deposed that thereafter, aunty Vitoli and she went to the house of the appellant and asked him as to why he

has raped her younger sister. However, he denied the said allegation. PW-13 has also deposed that thereafter, she called the victim girl and asked her whether the appellant has raped her and she pointed her finger at the accused and said yes he raped me. Thereafter, she called up her brother Ankit and informed him about the incident, who reported the matter to higher-ups at 8th NAP Naltoqa. PW-13 exhibited the pants of the victim as Material Exhibit-1 and also exhibited her signature on the seizure list as Exhibit P/5 (b).

32. During cross-examination, PW-13 has deposed that she is the elder sister of the victim girl and her aunty Vitoli informed her that her sister might have been raped by the accused Nandu Lal and told her to check the sister's underwear. She has also deposed that on receiving the information she checked the underwear of her sister and found that she has already taken bath and washed her underwear, however, she found that her black color jeans pant was soaked with blood in the bathroom. She has also deposed that her sister is 14 years of age and she has started menstruation period since last year. She has also deposed that the police had seized black color jeans pant from her house and the underwear from the house of the appellant. She has also stated that the date of birth of the victim mentioned in the birth certificate is false. She has also stated that when she accompanied police to Civil Hospital, Zunheboto for medical examination of her sister the doctor did not tell her anything and one lady police personnel told her that

bloodstain which was in the black jeans pant is menstruation blood. She has also stated that all pensioners family were ordered to vacate the family quarters by Commandant 8th NAP Naltoqa, however, they were unable to leave for their native village due to lack of money.

33. During his examination under Section 313 of the Code of Criminal Procedure, 1973, the appellant has stated that as usual, on 06.06.2021, the victim and her friend Elivi came to his house at around 9.30 a.m. to play games in the mobile phones. He denied the truthfulness of the testimony of the prosecution witnesses, wherein they had incriminated him. While answering to question No.11 put to him during his examination, the appellant has stated that on 07.06.2021, the sister of the victim, namely Pooja Kumari, her aunt Vitoli and the victim came to his house at around 9 30 a.m. and accused him of raping the victim and demanded Rs.2,50,000/- from him failing which they stated that they will file a complaint against him. He has also stated that Smt. Vitoli had borrowed Rs. 20,000/- from him and has not returned it back. He has also stated that the brother of the victim Ankit Kumar also came to jail in July 2021 and asked for Rs.2,50,000/- from him for withdrawing the case against him but he did not give him the said money.
34. Mr. Joshua Sheqi, learned counsel for the appellant has submitted that the prosecution case is full of inconsistencies, irregularities,

contradiction and improbabilities and the Trial Court while coming to the finding of guilt of the appellant has ignored such inconsistencies and contradictions. It is submitted by learned counsel for the appellant that the statement of the prosecutrix/victim girl (PW-3) as well as the statement of the child witness (PW-4) are highly unreliable and filled with inconsistencies.

35. Learned counsel for the appellant has also submitted that the medical report dated 06.06.2021 of the victim clearly shows that the entire private part of the child was intact without any injury and there was also no injury on any part of her body. It is also submitted by learned counsel for the appellant that medical examination report clearly shows that the blood stain found on the victim were visible in the perineum area only and is not related to any sexual act. It is submitted by learned counsel for the appellant that the blood stain is due to menstruation blood of the victim as suggested by the doctor (PW-7) who examined the victim girl. It is also submitted by learned counsel for the appellant that the medical report of the victim clearly shows that there is no evidence of any infection, matting, redness, swelling, edema or bleeding from private parts due to injury, bruise, tears, abrasion and the blood stain, which is found is due to menstruation cycle and not related to any sexual act.
36. It is also submitted by learned counsel for the appellant that the medical examination report of the accused (appellant) also shows

that there was no injury on his private parts, neither any bruise, abrasion, redness and swelling was found on the private part of the appellant.

37. It is also submitted by learned counsel for the appellant that in his statement recorded under Section 164 of the Code of Criminal Procedure, 1973, the appellant never confessed his guilt of having sexual intercourse with the victim, rather, he had stated that on 06.06.2021, the victim came to his residence at 9.00 a.m. and was playing with his mobile and then after sometime her sister came to his house and took her back with her and later on, the sister of the victim accused the appellant of having raped the victim girl.
38. Learned counsel for the appellant has submitted that from the statement of the appellant recorded under Section 313 of the Code of Criminal Procedure, 1973, it appears that the victim girl had visited the house of the appellant on 06.06.2021 (Sunday) at about 9.00 a.m. and had she been raped on the previous day i.e., on 05.06.2021, she would not have gone again to the house of the appellant on the next day i.e., on 06.06.2021.
39. Learned counsel for the appellant has also submitted that though the victim girl statement was recorded by learned Judicial Magistrate 1<sup>st</sup> Class under Section 164 of the Code of Criminal Procedure, 1973, however, as she was deaf and dumb, her statement was recorded with the help of an interpreter who happened to be the sister of the victim namely, Pooja (PW-13). It is

submitted by learned counsel for the appellant that there is nothing on record to suggest even remotely that any oath was administered to the interpreter, who is the sister of the victim girl, when she interpreted the signs used by the victim to give her statement. Learned counsel for the petitioner submits that as no oath was administered to the interpreter, the statement of the victim recorded with the help of that interpreter becomes inadmissible in evidence as truthfulness of interpretation done by such interpreter itself become questionable.

40. Learned counsel for the appellant has also submitted that though the child witness PW-4 has deposed that she saw the appellant pulling up the victim's long pant and that he was lying on the top of the victim girl and that they were doing bad things and that she told everything to her mother after coming back home. However, the mother of PW-4 i.e. Smti Vitoli Yanthan who was examined as PW-5 did not state in her testimony that the PW-4 told her anything about sexual intercourse. The only thing which she deposed was that her daughter told her that the victim had stains of blood on her pants which is why she thought that the appellant might have had sex with the victim girl.
41. It is submitted by learned counsel for the appellant that the victim has also disowned the blood-stained underwear and categorically stated in her testimony that the said underwear does not belong to her.

42. It is also submitted by learned counsel for the appellant that the statement of the victim as well as child witness were recorded under Section 164 of the Code of Criminal Procedure, 1973 in a very casual manner and the provisions of the Oath Act, 1969 was not followed while recording their statement under Section 164 of the Code of Criminal Procedure, 1973. He has also submitted that no videography was done while the statement of the victim and the child witness was recorded.
43. Learned counsel for the appellant has also submitted that the PW-2, who is the complainant as well as brother of the victim, has deposed that it is her sister Pooja (PW-13) who told him over telephone that his minor sister was raped by the appellant. However, the sister of the victim (PW-13) came to know about the incident only from the PW-5 i.e., Mrs. Vitoli Yanthan, who was reported about the incident by PW-4, i.e., the friend of the victim and her daughter, namely, Elivi. However, during her cross-examination, PW-5 Vitoli had stated that her daughter Elivi did not tell anything about the rape incident, she only told regarding bloodstain in the underwear of the victim girl. It is submitted by learned counsel for the appellant that the testimony of PW-4 is contradictory to the testimony of PW-5, PW-2 and PW-13, hence, same is not reliable.
44. Learned counsel for the appellant has also submitted that the Trial Court did not consider the deposition of PW-7 who is the Senior

Specialist Doctor who examined the victim and who had stated that there is a possibility of menstrual bloodstain over the clothes and private part of the victim and on examination, no injury marks were found on the private parts and the evidence did not suggest any penetrative sexual intercourse on the victim girl.

45. Learned counsel for the appellant has also submitted that if as deposed by PW-3, the private part of the appellant was inserted inside the private part of the victim girl, there would have been some bruises, abrasions, swelling or redness which is absent in this case and therefore, the medical evidence does not corroborate the testimony of the child witness and hence the Trial Court came to a wrong finding by relying only on the testimony of the victim girl (PW-3) as well as the child witness (PW-4).
46. Learned counsel for the appellant has also submitted that the Judicial Magistrate 1<sup>st</sup> Class has not mentioned anywhere as to how the statement of the victim girl was recorded and as the same was recorded with the assistance of PW-13, unless oath is administered to PW-13 that she had interpreted the true version of the communications made by the victim girl, the statement of victim is not admissible in evidence.
47. Learned counsel for the appellant has submitted that there is evidence on record that the appellant was asked to pay Rs. 2,50,000/- to the family of the victim girl and on his failure to pay the same, a false case has been filed against the appellant.

48. Learned counsel for the appellant has also submitted that the testimony of PW-5 clearly shows that her daughter only told her that she saw blood stain on the victim's underwear and therefore, she thought that the victim was raped. However, the medical evidence does not support the prosecution case as the probability of menstrual blood in the wearing apparel of the victim has not been ruled out.
49. Learned counsel for the appellant has submitted that the finding of guilt of an accused may be based on sole testimony of the prosecutrix, provided her testimony is of sterling quality. However, in the instant case, it is submitted that there is no sterling witness so as to instill confidence on their uncorroborated testimony to come to the finding of guilt of the appellant in this case.
50. Learned counsel for the appellant has submitted that the child witness i.e. PW-4 and the victim PW-3 may not be regarded as sterling witness so that the Trial Court could have relied solely on the testimony of such witness to arrive at the finding of guilt of the appellant in this case. In support of his submission, learned counsel for the appellant has cited a ruling of the Apex Court in the case of "**Santosh Prasad Vs. State of Bihar**" reported in **(2020) 3 SCC 443** , wherein it was observed by the Apex Court as follows:

**5.4.2.** *In Rai Sandeep [Rai Sandeep v. State (NCT of Delhi), (2012) 8 SCC 21 : (2012) 3 SCC (Cri) 750] , this Court had an occasion to consider who can be said to be a "sterling witness". In para 22, it is observed and held as*

*under: (SCC p. 29)*

*"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against*

*him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."*

51. Learned counsel for the appellant has submitted that in this case the conviction of the appellant has been arrived by the Trial Court mainly on the basis of testimony of two child witnesses including the victim. However, their testimony is not reliable. He submits that the evidence of child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him or her to do and thus, a child witness is an easy prey to tutoring.
52. Learned counsel for the appellant has also submitted that though, oath was administered to both the child witnesses, however, there is nothing on record to show that the Trial Court did endeavor to find out as to whether the child witnesses had sufficient intelligence

and understanding of the obligation of an oath.

53. In support of his submission, the learned counsel for the appellant has cited a ruling of a Coordinate Bench of this Court in the case of **"Sriman Dev Sharma Vs. State of Assam and Andhra Pradesh"** reported in **2023 (4) GLT 701**, wherein the Coordinate Bench has cited a ruling of the Apex Court in case of **"Radheshyam Vs. State of Rajasthan"** reported in **(2014) 5 SCC 389** to emphasize the need for careful scrutiny of a child witness before relying on the said witness.
54. Learned counsel for the appellant has also submitted that the statutory presumption under Section 29 of the POCSO Act, 2012 would stand activated only if the prosecution side proves the foundational facts and then even if the statutory presumption is activated the burden of the accused is not to revert the presumption beyond reasonable doubt. Suffice if the accused is in a position to create a serious doubt about the veracity of prosecution case or the accused brings on record material to render the prosecution version highly improbable. It is submitted by the learned counsel for the appellant that the statutory presumption under Section 29 of the POCSO Act, 2012 has been rebutted by the medical reports of the victim and the appellant and the testimony of the doctor (PW-7) in this case.
55. It is submitted by learned counsel for the appellant that in the instant case the contradictions in the testimonies of the prosecution

witnesses as well as the manner in which the statements of child witnesses were recorded, itself creates doubt about the veracity of the testimony of said witnesses and therefore, it is submitted that the appellant is entitled to get benefit of doubt in this case.

56. On the other hand, Mr. V. Zhimomi, learned Public Prosecutor, Nagaland has submitted that the appellant has subjected the victim girl to penetrative sexual intercourse even though, the victim was a physically disabled girl being deaf and dumb, therefore, he has committed the offence of aggravated penetrative sexual assault under Section 5 (k) of the POCSO Act, 2012.
57. Learned Public Prosecutor, Nagaland has also submitted that the victim had no parents and she lived with her brother and sister and had no formal education, therefore, she may not give an accurate explanation of the incident in detail and said factor has to be considered while assessing her testimony and same has been correctly considered by the Trial Court. However, he has fairly pointed out that though no birth certificate has been exhibited in this case, the birth certificate of the victim collected during investigation contains wrong date of birth as has been stated by PW-13, who is the elder sister of the victim. Learned Public Prosecutor has also submitted that the victim girl herself has stated her age to be of 14 years and same has not been contested by the appellant side.
58. Learned Public Prosecutor has submitted that the Trial Court has correctly assessed the evidence on record and reached the finding

of guilt of the appellant of having committed aggravated penetrative sexual assault on the victim girl and has rightly convicted and sentenced the appellant and has submitted that the finding of the Trial Court does not warrant any interference by this Court.

59. On the other hand, Mr. Moa Zamir, learned counsel for the respondent No.2 (Informant) has submitted that the prosecution side was able to prove the guilt of the appellant beyond all reasonable doubt and the Trial Court was right in coming to the finding that appellant has committed offence under Section 376 of the Indian Penal Code read with Section 4 and 6 of the POCSO Act, 2012.
60. Learned counsel for the informant has submitted that the victim has made categorical statement that the appellant has committed penetrative sexual assault on her and in light of the categorical assertion made by the victim, the testimony of the doctor as well as the medical evidence to the effect that no injury was found on the private part of the victim or that her hymen was found to be intact is of no relevance.
61. Learned counsel for the informant has submitted that for committing offence under Section 376 of the Indian Penal Code as well as under Section 4 and 6 of the POCSO Act, 2012 the penetration need not to be complete penetration. Even the slightest penetration is sufficient for an offence to be committed under the

said sections and non-rupture of hymen or absence of injuries in private part would not belie the accusation made against the appellant in this case.

62. Learned counsel for the respondent No.2 has also submitted that that the opinion of doctor that no rape appears to have been committed is not of much relevance in view of the cogent and trustworthy evidence of the victim herself on record and to support his contention he has cited a ruling of the Apex Court in the case of **"Ranjit Hajarika Vs. State of Assam"** reported in **(1998) 8 SCC 635**.
63. Learned counsel for the informant has also submitted that it is well settled proposition of law that a conviction for the offence under Section 376 of the Indian Penal Code can be based on the sole testimony of the rape victim, if her testimony is found to be trustworthy by the Court. To buttress his submission he has cited a ruling of the Apex Court of India in the case of **"State of Rajasthan Vs. Om Prakash"** reported in **(2002) 5 SCC 745**, where in the Apex Court has observed that where the testimony of the prosecutor inspire confidence and is found reliable a conviction may be based on her uncorroborated testimony. The learned counsel for the complainant has also submitted that in a case of sexual molestation or rape the evidence of the victim should not be viewed with doubt disbelief or suspicion as it amounts to insulting the womanhood and adds insult to the injury and to support his submission, he has cited a ruling of the Apex Court in the case of state of **"Himachal**

***Pradesh Vs. Sanjay Kumar @ Sunny***” reported in ***(2017) 2 SCC 51.***

64. Learned counsel for the informant has also submitted that a child witness, if found competent to depose to the facts and if his testimony is found reliable, such evidence could be the basis of conviction, provided that the such a child witness is able to understand the questions and is able to give rational answers thereof. The only precaution which Court should bear in mind while assessing the evidence of child witness is that the witness must be reliable one and his demeanor must be like that of other competent witness and there is no likelihood of his or her being tutored. In support of his submission the learned counsel has cited a ruling of the Apex Court in the case of ***"Dattu Ramarao Sakari Vs. State of Maharashtra"*** reported in ***(1997) 5 SCC 341.***
65. The learned counsel for the informant has also submitted that in case of child witnesses, if they are subjected to lengthy cross examinations by defence there is every likelihood that some contradiction may creep in which has happened in the case of PW-3 and PW-4 and such contradictions may not be sufficient to discredit the witness, if it is otherwise found trustworthy. To buttress his submission learned counsel for the informant has cited a ruling of the Apex Court in the case of ***"Birbal Nath versus State of Rajasthan and Others"*** reported in ***2023 SCC online SC 1396.***
66. The learned counsel for the informant has also submitted that the testimony of prosecutrix stands on a par with that of a injured

witness and it is not necessary to insist for corroboration in such cases if her testimony inspire confidence and appears to be credible. Even if the doctor is not examined, it would not throw or completely discard the prosecution story. In support of his submission learned counsel has cited a ruling of the apex court in the case of "**Wahid Khan Vs. State of Madhya Pradesh**" reported in **(2010) 2 SCC 9**,

67. As regards the testimony of a deaf and dumb witness, the learned counsel for the informant has submitted that such a witness may give his or her evidence in any manner in which he or her can make it intelligible, as by writing or by signs the evidence given by signs is also admissible and is taken to be oral evidence. However, law requires that there must be some record of signs used by the witness and not only the interpretation of signs. To support his submission learned counsel for the informant has cited following rulings:

- i. "**Mesala Ramakrishna Vs. State of Andhra Pradesh**" reported in **(1994) for SCC 182**
- ii. "**State of Rajasthan Vs. Darshan Singh**" reported in **(2012) 5 SCC 789**

68. The learned counsel for the informant has ,therefore, submitted that the Trial Court has rightly convicted the appellant under Section 376 of the Indian Penal Code read with Section 4 and 6 of

the POCSO, Act, 2012 and it does not warrant any interference by this Court and has thus, prayed for dismissing the appeal.

69. We have considered the submissions made by learned counsel for the appellant, learned Public Prosecutor, as well as learned counsel for the informant, and have also scrutinized the evidence available on record meticulously. We have also gone through the rulings cited by the learned counsel for the rival parties.
70. On careful perusal of the impugned judgment, it appears that though the prosecution side has examined 13 prosecution witnesses, however, the Trial Court had mainly relied upon the testimony of the victim (PW-3) and the child witness (PW-4) to come to its finding of guilt of the appellant in this case.
71. It also appears that the doctor (PW-7) who had performed the medical examination of the victim girl as well as the appellant on 06.06 2021, i.e., one day after the incident, had opined that there is no evidence of any penetrative sexual intercourse on the victim girl, however, the Trial Court has chosen not to give much weightage to the testimony of the doctor (PW-7), as well as the medical examination reports rather it choose to rely on the testimonies of the child witnesses, i.e., PW-3 and PW-4.
72. Before scrutinizing the testimony of PW-3 and PW-4, let us examine the depositions of other witnesses, which are relevant to this case.

73. The criminal law in the instant case was set into motion by filing of the FIR by PW-2, Ankit Kumar, who happens to be the brother of the victim girl.
74. On perusal of the testimony of PW-2, it appears that he was informed about the incident of rape by his sister Pooja (PW-13) as well as his aunty Vitoli (PW-5) and he did not witness the incident himself, neither he was reported about the incident by the victim herself.
75. If we examine the testimony of PW-13, who is the elder sister of the victim girl, who is aged about 21 years, it appears that she also came to know about the incident from her aunty Vitoli (PW-5) at the first instance. The only incriminating part of her testimony is that PW-13 has also deposed that she called the victim girl to the house of the appellant and asked her as to whether he has raped her. Then, the victim pointed her finger at the accused and said, yes, he raped me. However, the fact remains that the victim girl is a deaf and dumb girl and as such she could not have said "yes, he raped me", though, she could have indicated the same by either gestures or signs. However, the same is not reflected in the testimony of the PW-13, as nowhere in her testimony she has mentioned anything about the gestures or signs showed by the victim girl.
76. Further, if we examine the testimony of PW-5, it appears that she was informed about the incident by her daughter, Elivi (PW-4), who

had told her that she saw stains of blood on the pant of victim girl. It is also relevant that the PW-5 has also deposed that as because her daughter told her that the victim had stains of blood on her pant, she thought that victim and accused might have had sex.

77. On perusal of the deposition of PW-5, it appears that nowhere she has stated that her daughter, Elivi (PW-4) had told her in detail about the incident and only fact discernible from her testimony is that her daughter only told her about the presence of stains of blood on the pants of the victim and that's why she thought that the victim and accused might have had sex. The other witnesses are only hearsay witnesses and have not seen the incident themselves.
78. Thus, the most important witnesses for the prosecution are the child witnesses namely the victim herself (PW-3) as well as PW-4 namely, Elivi. If we consider the testimony of PW-4 namely, Elivi Nzano Yanthan, who is the friend of the victim girl, it appears that her testimony was recorded during the trial on 17.11.2021 i.e., much after the date of alleged incident. Even her statement under Section 164 of the Code of Criminal Procedure, 1973 was also recorded on 10.06.2021 i.e., about 5 days after the incident and such a period is sufficient to tutor a child who is aged about only 10 years.
79. It also appears that though the oath was administered to PW-4 while recording her deposition during trial as well as when her

statement was recorded under Section 164 of the Criminal Procedure Code, 1973, however, there is no endorsement of the Trial Court or by the Magistrate recording the statement of the said witness under Section 164 of the Criminal Procedure Code, 1973 anywhere to show that the child witness understands the duty of speaking the truth and also understands the nature of oath and affirmation as provided in Section 4 of the Oaths Act, 1969. Therefore, it appears that oath was administered to the PW-4 in violation of the provisions of the Oaths Act, 1969.

80. Be that as it may, the fact remains that the PW-4 claims to have seen from a hole outside that Nandu Lal (appellant) was lying on the top of the victim's body and doing the bad things whereas in the trial, she has stated that she had peeped through the gap of the door that Nandu Lal was lying on the top of the victim. It is also pertinent to note that though the PW-4 has stated that she had stated everything to her mother i.e., PW-5 about the incident, however, her mother (PW-5) in her testimony has nowhere stated that her daughter told her about Nandu Lal lying on the top of victim girl inside the room. Rather, what was told is that her daughter noticed blood stains on the underwear of the victim girl. This discrepancy in the statements of PW-4 and PW-5, in the considered opinion of this Court, makes the evidence of PW-4, who is a child witness, unsafe for reliance to come to the finding of the guilt of the appellant.

81. Now, let us examine the testimony of the victim girl. It appears that the testimony of the victim girl was recorded during the trial as PW-3, on 05.07.2022, with the help of Smt. Chubaienla, a Special Educator from the District Education Office, Mokokchung, who acted as an interpreter, however, it also appears that no oath was administered to the said Special Administrator by the Court.
82. The Supreme Court of India, in the case of "***State of Rajasthan Vs. Darshan Singh***", reported in **(2012) 5 SCC 789**, has emphasized the requirement of administering oath to the interpreter, so that the truthfulness of the interpretation done by the interpreter may be assured. The Apex Court has observed as follows:

*"29. To sum up, a deaf and dumb person is a competent witness. If in the opinion of the court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath."*

83. Similarly, if we peruse the statement of the victim girl recorded under Section 164 of the Code of Criminal Procedure, 1973, it appears that same was recorded in a very casual manner, as same was recorded through whatsapp video call by the Judicial Magistrate First Class, Zunheboto, without there being any

indication, as to whether any oath was administered to the interpreter who happened to be the elder sister of the victim girl.

84. It also appears that the requirement of the second proviso to Section 164 (5A)(a) was not followed while recording the statement of the victim girl under Section 164 of the Code of Criminal Procedure, 1973. The second proviso of the aforesaid provision provides as follows:

*“Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person with the assistant of interpreter or a special educator shall be video graphed”.*

85. However, in the instant case, admittedly no videography of the recording of statement under Section 164 of the Criminal Procedure Code, 1973 of the victim girl was done.
86. Further, it also appears that while recording the statement of the victim girl under Section 164 of the Criminal Procedure Code, 1973 as well as while recording her testimony during the trial, neither the Judicial Magistrate First Class, Zunheboto, nor the Trial Court recorded anything about the gestures or signs made by the victim girl while answering the questions put to her. The law requires that there must be a record of signs and not the interpretations of signs. However, what has been recorded in the instant case by both

the Courts are the interpretation in English language by the interpreter without any indication as to what gestures or signs were used by the victim girl and how the interpreter arrived at the said interpretation.

87. In this regard, the observations made by the Supreme Court of India in the case of "***State of Rajasthan Vs. Darshan Singh***" (*Supra*) are very much relevant to the instant case, which is reproduced here under:

*"26. The object of enacting the provisions of Section 119 of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots. However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed. When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being*

*more satisfactory than any sign language. The law requires that there must be a record of signs and not the interpretation of signs."*

88. In the aforesaid judgment, the Supreme Court of India has also observed as follows:

*"28. Language is much more than words. Like all other languages, communication by way of signs has some inherent limitations, since it may be difficult to comprehend what the user is attempting to convey. But a dumb person need not be prevented from being a credible and reliable witness merely due to his/her physical disability. Such a person though unable to speak may convey himself through writing, if literate or through signs and gestures, if he is unable to read and write. A case in point is the silent movies which were understood widely because they were able to communicate ideas to people through novel signs and gestures. Emphasised body language and facial expression enabled the audience to comprehend the intended message."*

89. However, in the instant case, the testimony of PW-3 has been recorded in the manner as if she was herself speaking and stating the facts in English without describing as to how she gestured or what signs she used to communicate and give answers to the questions posed to her.

90. Further, though on of the testimony of PW-3 as well as her

statement recorded under Section 164 of the Code of Criminal Procedure, 1973, it appears that oath was administered to her, however, there is no indication to the effect that the said witness, being a deaf and dumb girl, understand the nature of oath or affirmation. Though, this in itself does not affect the admissibility of the evidence of PW-3, however, it does affect the credibility of such a testimony which is not recorded as per law.

91. It is also relevant to note that the appellant has stated during his examination under Section 313 of the Code of Criminal Procedure, 1973 that on 07.06.2021, the PW-13 and PW-5 came to his house along with the victim girl and accused him of raping the victim and demanded Rs.2,50,000/- from him, threatening him to lodge a complaint against him and it is only on 10.06.2021, the statement of the victim girl as well as the child witness were recorded by the Judicial Magistrate First Class, Zunheboto. During this intervening period, the possibility of tutoring the child witnesses may not be ruled out.
92. Further, if we consider the testimony of PW-3, wherein it appears that she had stated that the appellant had inserted his penis into her vagina, the said testimony does not corresponds to the medical evidence available on record. Rather, the medical evidence belies the accusation alleged to have been made by the victim girl.
93. It is pertinent to mention herein that during examination of the victim girl, the private part of the victim girl was found intact. Her

hymen was found intact. No injury marks was found around the private parts of the victim girl and the blood was found only in the perineum area of the victim girl, which is the space between the anus and the vagina. The PW-7 has categorically stated that she found no evidence for penetrative sexual intercourse on examination of the victim girl.

94. Though, it is true that complete penetration is not an essential ingredient of the offences with which the appellant has been convicted, however, from the testimony of the victim girl, it appears that she has accused the appellant of inserting his penis into her vagina, the fact which the medical evidence on record does not support.
95. Another relevant fact in this regard which is not taken care of by the Trial Court is that the appellant was also medically examined at 11.50 p.m. on 06.06.2021. During such examination, his private part (penis) was examined and smegma was found to be present in his penis.
96. Smegma is a white coloured, cheesy substance that can build up under the foreskin of the penis. The absence of smegma suggests that the person could have taken part in sexual intercourse or he has washed his glans penis recently. However, the presence of smegma in the penis strongly goes in favour of the accused as it suggests that he has not taken part in sexual intercourse recently. Moreover, no injury marks were seen on the private parts of the

appellant.

97. It is also relevant to note herein that though the penile swab of the appellant as well as vaginal swab of the victim was collected by the Investigating Officer, however same was not sent for forensic examination for any kind of cross matching. This may be regarded as a lapse on the part of the Investigating Officer.
98. PW-4 has stated that the underwear of the victim was kept under the pillow and was stained in blood, whereas, PW-13 has deposed that the victim had washed the underwear and the pants were kept in the bathroom soaked with blood. PW-7 has deposed that during her medical examination, the victim was not wearing any underwear. The victim, during her cross-examination, has also stated that the underwear produced in the court does not belong to her. Thus, the only inference which may be drawn is that the underwear. It also appears that none of the wearing apparels of the victims were sent for forensic examination. Hence, no forensic evidence is there on record to corroborate the testimony of the victim girl as well as the child witness.
99. Though, it is well settled proposition that in an offence under Section 376 of the IPC or under Section 4 or 6 of the POCSO Act, 2012, the conviction may be based on the sole testimony of the rape victim. However, for that the testimony of the victim has to be of sterling quality and has to be trustworthy and should inspire confidence and should rule out any possibility of any falsity or

tutoring in case of child witness. However in the instant case, the fact remains that the statement of victim as well as child witness were recorded after five days of the alleged incident and before that the family members of the victim had already demanded an amount of Rs. 2,50,000/- from the appellant which he had refused to pay. Hence, the possibility of false implication of the appellant and tutoring of the child witnesses may not be ruled out in this case.

100. Moreover, the manner in which oath was administered to the PW-3 and PW-4 coupled with the fact that no oath was administered to the interpreter i.e., the elder sister of the victim girl while recording her statement under Section 164 of the Code of Criminal Procedure, 1973 as well as to the Special Educator who acted as an interpreter while recording the testimony of PW-3 during trial, itself weakens the credibility of the testimony of PW-3.
101. For the above-mentioned reasons, we are of the considered opinion that the evidence of PW-3 and PW-4 may not be regarded as of sterling quality so as to instill confidence of the Court for arriving at the conclusion of guilt of the appellant only on the basis of such evidence. The nature of evidence on record clearly demonstrate that the prosecution side has failed to prove its case and the foundational facts against the appellant. As a result, we are of the considered opinion that the presumption under Section 29 of the POCSO Act, 2012 did not get triggered against the appellant in this

case. We, therefore, hold that the Trial Court was wrong in arriving at the finding of guilt of the appellant on the basis of aforesaid evidence. The impugned judgement, passed by the Trial Court, is, therefore, not sustainable and liable to be set aside.

102. Accordingly, this appeal is allowed and the impugned judgement and order is set aside. The appellant is acquitted under Section 4 and 6 of the POCSO Act, 2012 and under Section 376(2)(I) of the Indian Penal Code. The appellant shall be set at liberty forthwith unless required in connection with any other case.
103. As this judgment is pronounced from the Principal Seat of the Gauhati High Court, hence, the Registry of the Principal Seat is directed to transmit the case record of this case along with Trial Court record and a copy of judgment immediately to the Kohima Bench of the Gauhati High Court which shall send the same forthwith to the Trial Court.

Sd/-  
**JUDGE**

Sd/-  
**JUDGE**

**Comparing Assistant**