



Serial No. 01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A. No. 40 of 2024

Date of Decision: 03.12.2025

Shri. Pynshailang Warjri
 Son of (L) D. Marwein
 Resident of Nongrah, Dongktieh,
 Shillong, East Khasi Hills District,
 Meghalaya.
 Currently lodged at District Jail, Shillong

..... **Appellant**

Vs.

1. The State of Meghalaya through the
 Superintendent of Police,
 East Khasi Hills District,
 Meghalaya.
2. Officer-in-Charge,
 Rynjah Police Station,
 East Khasi Hills District,
 Meghalaya.

..... **Respondents**

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s)	:	Mr. B. Deb, Adv. Ms. P. Kharmawshun, Adv.
For the Respondent(s)	:	Mr. N.D. Chullai, AAG with Mr. E.R. Chyne, GA.



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| i) | Whether approved for reporting in
Law journals etc.: | Yes/No |
| ii) | Whether approved for publication
in press: | Yes/No |
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JUDGMENT AND ORDER

1. Vide the impugned judgment and sentence dated 30.05.2024, the learned Special Judge (POCSO), East Khasi Hills, Shillong has detailed the facts of the case of the parties as well as the argument advanced in support of their respective contentions. Then on consideration of the facts of the case as well as the evidence adduced by the witnesses and other relevant materials on record, the verdict swung in favour of the prosecution, and consequently, the accused/appellant was accordingly convicted for the offence charged and was then sentenced to undergo rigorous imprisonment for 5(five) years with fine of ₹ 3000/- (Rupees three thousand) only.

2. The accused/convict being aggrieved by the said judgment and sentence, has accordingly approached this Court with this instant appeal seeking to have his conviction and sentence imposed to be set aside and quashed.

3. Mr. B. Deb, learned counsel for the accused/appellant has assailed the impugned judgment on several grounds terming the findings



thereof as unsustainable for having ignored key issues which, if properly looked into, would lead the Trial Court to come to a finding that no case is made out against the accused/appellant.

4. The first contention raised is the fact that it is clearly apparent that the FIR, though not a substantive piece of evidence, but the contents of the same having corroborative value, the fact that there is no explanation as to why it was lodged two days after the alleged incident, the date of the incident being given as 08.06.2017 while the FIR was lodged on 09.06.2017, but was registered on 10.06.2017, the next day. This, would by itself, cast a shadow of doubt about the authenticity of its contents, submits the learned counsel as the explanation given by the Informant that she had informed her aunt (maternal aunt) about the incident, and thereafter, they went to inform the village elder (Rangbah Dong) and then along with her relatives, she went to the police station on 09.06.2017. This is not a plausible explanation and cannot be accepted in law. The case of **Ramdas & Ors v. State of Maharashtra, (2007) 2 SCC 170**, para 24 as well as the case of **Jai Prakash Singh v. State of Bihar, (2012) 4 SCC 379**, para 12 was cited by the learned counsel to support his contention in this regard.

5. The learned counsel has also submitted that the Informant who has lodged the FIR was herself examined as PW-2, but in her deposition in



court, she has failed to corroborate whatever she has stated in the FIR. Although in the FIR, she has stated that she was an eye-witness to the incident, however, in her deposition in court, she revealed that she was informed of the same by the survivor. This has weakened the prosecution's narrative, further submits the learned counsel. In this respect, the case of **Dharmendra Kumar @ Dhamma v. State of Madhya Pradesh, AIR 2024 SC 4354**, para 38, 39 was referred to.

6. There is also a lack of coherent in the statement made by the PWs since there is no corroboration found as far as their respective evidence recorded in court is concerned, the discrepancies detected even in their individual deposition would render the case of the prosecution unsustainable, submits the learned counsel. Reference was made to the evidence of PW-1 (Survivor) who has stated that the incident happened at about 4.00 pm when she came from school, while PW-2, the alleged eye-witness has said that it was about 2.00 pm when the survivor returned from school. Again, PW-1 has stated that when she went to the washroom, it was bright, whereas PW-2 said that they reached Ganesh Das Hospital in the evening when it was starting to get dark. Hospital records, however shows that the party, including PW-1 and PW-2 reached the hospital at about 3.56 pm. Therefore, the exact time of the alleged incident cannot be certain and as such, there is



reasonable doubt as to the timing.

7. The learned counsel has referred to the alleged statement of the survivor/victim said to have been recorded under Section 164 Cr.P.C, which was exhibited in court as Exhibit-1 and has submitted that the same is inadmissible in law as on perusal of the same, the name of the recording court or the name of the recording Magistrate is not found marked. In this regard, even the provision of Section 26 of the POCSO Act was also not adhered to as there is no record that the survivor has got her statement recorded before the Magistrate in the presence of her parents or someone familiar with her. In this connection, the case of **Malay Kumar Ganguly v. Sukumar Mukherjee & Ors, (2009) 9 SCC 221**, para 37 as well as the case of **Firoz Khan Akbarkhan v. State of Maharashtra, AIR Online 2025 SC 212**, para 21 was cited.

8. The learned counsel has also submitted that there is a dispute as regard the age of the survivor, inasmuch as, there has not been placed on record, proof of her actual age at the time of the alleged incident. The prosecution has tried to prove the age of the survivor by producing a copy of her birth certificate as Papermark-1. However, when the same was introduced in court, it was not compared with the original as required under Section 63 of the Evidence Act, 1872, nor was a certified copy of the same



produced. As such, even, if it is considered secondary evidence, the mandate of Section 65 of the Evidence Act was not fulfilled.

9. Further, the learned counsel has submitted that the seizure witness, PW-3 in her deposition has stated that “...*I cannot say whether the original or the xerox copy of the birth certificate of the victim was seized on that day as I cannot differentiate between original and photo copy...*”. Thus, it can be said that the said photo copy of the birth certificate cannot be proved as authentic in the eyes of law, the same is to be discarded. The case of **Krishna Pradhan v. State of Sikkim, AIR OnLine 2019 SK 11**, para 13 & 14 was referred to by the learned counsel to say that the Sikkim High Court has clearly held that since under the POCSO Act, a reverse burden of proof is imposed upon the accused, therefore the requirement of proof of the age of the girl to establish her minority must be strictly complied with and cogently proved, which is not the case herein.

10. The learned counsel has also submitted that the prosecution, having failed to prove the foundational facts as regard the age of the alleged survivor, therefore, no case can be made out to sustain the conviction of the appellant under the POCSO Act. As such, the impugned judgment and sentence is required to be set aside and quashed as prayed for herein, asserts the learned counsel.



11. Mr. N.D. Chullai, learned AAG along with Mr. E.R. Chyne, learned GA, in reply on behalf of the State respondent, has maintained that the impugned judgment and sentence suffer from no infirmity in law or on facts and as such, the same may be upheld by this Court.

12. On the many contentions raised by the learned counsel for the appellant, one of which refers to the alleged contradiction in the FIR, vis-à-vis, the evidence of the prosecution witnesses in this regard, the learned AAG has refuted such contention by submitting that, it is well settled that the contents of the FIR does not constitute substantive evidence, but can only be used for contradiction by the defence or even the prosecution as is provided under Section 162 Cr.P.C. read with Section 145 of the Evidence Act, 1872 which allows such contradictions to be presented during the cross-examination of a witness. However, in this instant case, the accused/appellant has not raised or pointed out any such contradictions, if any, when the prosecution witnesses were cross-examined.

13. The appellant has stressed that there was a delay in filing of the FIR which has caused a dent in the prosecution's case. To this, the learned AAG has submitted that firstly, the incident occurred on 08.06.2017 and the FIR was filed on 09.06.2017, though it was registered by the police only on 10.06.2017. This cannot be seen as a delay in filing of the said FIR, which at



the most can be said to be delayed by only one day. Secondly, the fact that the offence involved is a case of sexual assault, facts on record, would show that the informant has first inform the maternal Aunt, then they approached the local Village Elder (Rangbah Dong) and other relatives, then they went to the local police station to file the FIR. Therefore, no delay has occurred in the process. The case of **Shri Mihkahtngen Surabai v. State of Meghalaya, Criminal Appeal No. 31 of 2023**, para 13 as well as the case of **Shri Hambiwell Paliar v. State of Meghalaya, Criminal Appeal No. 20 of 2024**, para 20 was referred to by the learned AAG to support his contention on this point, wherein this Court in such judgments, has cited relevant authorities of the Supreme Court where the issue of delay in filing FIR in cases involving sexual assault has been discussed.

14. The learned AAG has also submitted that the appellant has questioned the manner in which the statement of the survivor was said to have been recorded by the Magistrate under Section 164, which is not admissible in law since the name of the said Magistrate was not reflected in the “Form of Recording of Deposition”. However, the fact of the matter is that the statement was duly exhibited in court by the survivor as Exhibit-1 and her signature as Exhibit-1/1. Moreover, the signature of the recording Magistrate was also visible in the said exhibit. This fact was confirmed when



in her deposition she stated that “...*Previously I have come to the court to give my statement under Section 164 CrPC before the Magistrate. Exhibit 1 is my statement before the Magistrate and Exhibit 1/1 is my signature on the statement...*” The accused/appellant has not been able to contradict this piece of evidence, and as such, the same will stand, further submits the learned AAG.

15. As to the authenticity of the age of the survivor, the learned AAG has submitted that the survivor at the time when she had given her deposition before the court, she has stated her age as 12 years, and that she was studying in class IV then. This, read with the evidence of the I/O (PW-5) who has produced the Xerox copy of the birth certificate of the survivor as Paper Mark-1, wherein is shown the date of birth of the survivor as 04.04.2010, therefore, at the time of the incident, she was 7 years of age. It is also the contention of the learned AAG that the said Paper Mark-1 has not been objected to by the defence in cross-examination. Even the Doctor who has examined the survivor when the survivor was brought to the hospital on 10.06.2017, in her deposition in court as PW-4, she has stated that the survivor was below 12 years of age and about 7 years for which consent has to be sought from her guardian who is her aunt. The case of **Vinod Rai @ Bhullan v. State (NCT of Delhi) in Criminal Appeal No. 652 of 2024** was



referred to in this regard, wherein the Delhi High Court vide order dated 11.07.2025 at para 15, 18, 19 and 28 has discussed the issue of proof of age of the survivor therein, and has observed that since she was admitted in 1st grade in 2009, she cannot be more than 16 years of age at the time of the incident and on this premise, has held that the survivor is a child as defined under Section 2(d) of the POCSO Act.

16. This Court has duly and carefully given due consideration to the argument advanced by the respective parties in support of their cause. Facts of the case has been narrated hereinabove and need not be repeated except, if so warranted.

17. What is apparent is that the accused/appellant has questioned the propriety of the prosecution's case on the premise that there was a delay in the lodgment of the FIR which has vitiated the entire proceedings. To buttress his contention, the case of Dharmendra Kumar @ Dhamma (supra) was referred to, wherein at para 38 and 39, the Supreme Court has emphasised the importance of an FIR and the object of the same as regard the intimation to the Judicial Officer of the facts and circumstances of communication of an offence and the investigation which commences thereon. It was however reminded that an FIR is not a substantive piece of evidence and it can only be used to corroborate or contradict the version of



the informant.

18. On the issue of delay, the case of Ramdas (*supra*) was also cited by the appellant, particularly para 24 which is reproduced herein as:

“24. Counsel for the State submitted that the delay in lodging the first information report in such cases is immaterial. The proposition is too broadly stated to merit acceptance. It is no doubt true that mere delay in lodging the first information report is not necessarily fatal to the case of the prosecution. However, the fact that the report was lodged belatedly is a relevant fact of which the court must take notice. This fact has to be considered in the light of other facts and circumstances of the case, and in a given case the court may be satisfied that the delay in lodging the report has been sufficiently explained. In the light of the totality of the evidence, the court of fact has to consider whether the delay in lodging the report adversely affects the case of the prosecution. That is a matter of appreciation of evidence. There may be cases where there is direct evidence to explain the delay. Even in the absence of direct explanation there may be circumstances appearing on record which provide a reasonable explanation for the delay. There are cases where much time is consumed in taking the injured to the hospital for medical aid and, therefore, the witnesses find no time to lodge the report promptly. There may also be cases where on account of fear and threats, witnesses may avoid going to the police station immediately. The time of occurrence, the distance to the police station, mode of conveyance available, are all factors which have a bearing on the question of delay in lodging of the report. It is also possible to conceive of cases where the victim and the members of his or her family belong to such a strata of society that they may not even be aware of their right to report the matter to the police and seek legal action, nor was any such advice available to them. In the case of sexual offences there is another consideration which may weigh in the mind of the court i.e. the initial hesitation of the victim to report the matter to the police which may affect her family life and family's reputation. Very often in such cases only after considerable persuasion the prosecutrix may be persuaded to disclose the true facts. There are



also cases where the victim may choose to suffer the ignominy rather than to disclose the true facts which may cast a stigma on her for the rest of her life. These are case where the initial hesitation of the prosecutrix to disclose the true facts may provide a good explanation for the delay in lodging the report. In the ultimate analysis, what is the effect of delay in lodging the report with the police is a matter of appreciation of evidence, and the court must consider the delay in the background of the facts and circumstances of each case. Different cases have different facts and it is the totality of evidence and the impact that it has on the mind of the court that is important. No strait jacket formula can be evolved in such matters, and each case must rest on its own facts. It is settled law that however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. (See Pandurang v. State of Hyderabad, AIR 1955 SC 216). Thus mere delay in lodging of the report may not by itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the facts and circumstances in each case and is a matter of appreciation of evidence by the court of fact.”

19. In this instant case, admittedly, the FIR was lodged on 09.06.2017, but registered on 10.06.2017. It may also be reminded that the allegation made in the FIR concerns a case of sexual assault and even, if there is a delay in filing of the FIR, in the case of Mihkahtngen Sarubai (supra), this Court has referred to para 13 of the case of Himachal Pradesh v. Prem Singh, AIR 2009 SC 1010, wherein it was clearly observed that “... *So far the delay of lodging the FIR in question is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offence...*”. Therefore, there is always a concession given in cases involving sexual assault even, if there is a delay in filing the FIR. However, in the case



in hand, there is nothing to suggest that there was ever a delay in filing of the FIR, at most, the delay is only one day and that cannot by any stretch of the imagination be termed as delay. The stand of the prosecution in this regard is vindicated and the contention of the appellant cannot be accepted.

20. Another stand taken by the appellant is that there is contradiction in the evidence of PW-2, the informant and the contents of the FIR, when in the FIR, PW-2 has indicated that she was an eye-witness to the incident, whereas, in her deposition, she has stated that she had called out the name of the survivor, whereupon, the accused/appellant opened the door to led out the survivor. This stand taken by the appellant cannot be sustained as a perusal of the contents of the FIR read with the statement made by PW-2 in her deposition in court are not contradictory as far as the factual situation is concerned, that is, that when she realized that the survivor had taken a long time to come from the toilet, she called out her name and it was then that the appellant let her out of his house. This ground too has no legs to stand as far as the case of the appellant is concerned.

21. The appellant has also contended that the statement made by the survivor under Section 164 Cr.P.C., which was exhibited in court as Exhibit-1 has no evidentiary value as the same was not complete in all respect, the name of the Magistrate who has noted the statement was not mentioned in it.



Further, it is the contention of the appellant that the statement made by the survivor is contradictory to what she has deposed in court as PW-1. The prosecution has refuted this contention by submitting that there is no infirmity seen in Exhibit -1 and even so, the name of the recording Magistrate is noticed in such statement. Even in the related order sheet, the name of the Magistrate is clearly indicated. The fact that the accused/appellant has not raised any objection to the introduction of the same in court will only reaffirm its genuineness and therefore, would confirm to the provision of Section 80 of the Evidence Act.

22. On perusal of the evidence of PW-1, the survivor, on being cross-examined, has clearly stated that her statement made under Section 164 was recorded by a female Magistrate, who has put the questions to her in the khasi language. She was also made to read the statement after it was recorded. This can only testify to the fact that the said statement was indeed recorded by a competent authority, the Magistrate and as such, cannot be controverted as regard its contents. On consideration of the proposition put forth by the prosecution, this Court is in agreement with the stand taken and would hold that there is nothing wrong with the introduction of the said statement under Section 164 which will only further consolidate the story of the case as far as the survivor is concerned.



23. To bring home the accusation against the appellant for having committed an offence, more particularly coming under the purview of Section 9(m) of the POCSO Act, the prosecution has maintained that the survivor was about 7 years of age at the time of the incident. To prove this, the prosecution has brought proof of age through the Investigating Officer, who has produced copy of the birth certificate, seized by her during investigation and marked as Paper Mark-1, wherein the date of birth of the survivor was stated to be 04.04.2010.

24. The appellant has contradicted this piece of evidence by contending that the said document marked as Paper Mark- 1 is not admissible in evidence as the same is not a certified copy of the original nor was it compared with the original as is required under Section 63 of the Evidence Act. More so, even, if it was introduced as secondary evidence, the same can be admitted only as per the mandate of Section 65 of the Evidence Act, which has not been done so by the prosecution. Therefore, the age of the survivor has not been proved legally.

25. Before proceeding to decide on this issue, it would be not be out of place to look into the relevant provision of law where determination of age of a child has been spelt out, more particularly, Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. In this regard, nothing



can be more precise or succinctly explained than what has been held by the Supreme Court in the case of **Jarnail Singh v. State of Haryana reported in AIR 2013 SC 3467** at para 20 which is reproduced herein as follows:

“20. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

“12. Procedure to be followed in determination of Age. –
(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in Rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be



done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.”

Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply



Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical opinion.”

26. In the light of the above proposition of law, in this case, the age of the survivor has not been proved by either of the methods detailed in Rule 12 of the said Juvenile Justice (Care and Protection of Children) Rules, 2007. The survivor in her evidence has not given her age as 7 years or even below 12 at the time of the incident. Even her aunt, the informant who has deposed as PW-2 has not even said anything about the age of the survivor at the



relevant point of time. The only semblance of proof in this connection was produced by the I/O who was examined as PW-5. This witness has submitted that he has seized a Xerox copy of the birth certificate of the survivor and has introduced the same in court as Paper Mark-1. But, as has been contended by the defence counsel, this piece of evidence has no basis, if tested upon the provision of Sections 63 and 65 of the Evidence Act, 1872. Therefore, this Court can only come to the conclusion that the actual age of the survivor has not been proved. At most, on an overall appreciation of the available evidence, the survivor can be considered to a child as defined under Clause (d) of Sub-Section 1 of Section 2 of the POCSO Act, 2012.

27. In the midst of all this, what is required to be proved is whether the accused/appellant has committed the offence of Aggravated Sexual Assault as per Section 9(m) of the POCSO Act. The fact being that the testimony of the survivor as to what actually happened to her on the day of the incident when she stated in her deposition as “...*When I entered his house the accused put the ledge of the door both from up and down. Thereafter he took me to the bed and showed me the ABCD toy. The accused told me to kneel down on the bed and lefted (sic lifted) my frock.*” to which the accused/appellant in his defence has not been able to contradict this statement of fact even while the survivor was cross-examined by him. It is



also noticed that this statement of the survivor tallies with what she has stated in her statement under Section 161 CrPC before the I/O as well as in her statement under Section 164 Cr.PC, though there are minor discrepancies when the three statements are compared, but nevertheless, this does not change the fact that the meaning of what transpired at the house of the accused/appellant at the relevant point of time has been conveyed by the survivor.

28. In this context, it can be said that the survivor is a sterling witness, this term being succinctly explained in the case of **Rai Sandeep Alias Deepu v. State (NCT of Delhi), (2012) 8 SCC 21**, wherein at para 22, it was observed as follows:

“22. In our considered opinion, the “sterling witness” should be of a very high quality and caliber 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 everyone 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 similar such tests to be applied, it can 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.”

29. It may also be mentioned that the accused/appellant had brought in his witnesses to support his case, however, on perusal of the evidence rendered by such witnesses as DW-1 and DW-2 respectively, nothing can be established through their deposition to lend credence to the accused/appellant version as far as his innocence is concerned. The fact that these two witnesses were not present at the place of occurrence at the time when the incident happened, therefore, they could not specifically testify as to the manner in which the incident took place, as such, they are not eye-witnesses. Their evidence is therefore discarded for lack of substance.

30. In the light of the above, this Court is convinced that the



accused/appellant has indeed committed an act of sexual assault against the survivor herein and should be punished accordingly. However, considering the finding that there is no proof of the actual age of the survivor at the time when the offence was committed, more particularly that she is below 12 years of age at that time, the implication of the provision of Section 9(m) of the POCSO Act could not have been fastened upon the accused/appellant and the consequent punishment that follows.

31. In the considered opinion and finding of this Court, the accused/appellant have committed an offence of sexual assault as per the provision of Section 7 of the POCSO Act, the same which reads as follows:

“7. Sexual Assault. – Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

32. Section 8 of the Act prescribed the punishment to a person who have been found to have committed an offence described under Section 7, the same being imprisonment for a period which shall not be less than three(3) years, but which may extend upto five(5) years, with fine.

33. Considering the nature and manner in which the offence was committed, this Court hereby holds that, for the offence so committed, the accused/appellant is liable to be punished for the same and to undergo



imprisonment for a period of 3(three) years with fine. The original charge framed, tried and found guilty by the learned Trial Court, that is, under Section 9(m) of the Act is hereby converted to that under Section 7. The term of sentence as has been stated, will now stand reduced to 3(three) years instead of 5(five) as was imposed under the original sentence.

34. Under these circumstances, this Court would modify and alter the impugned judgment and sentence to the extent indicated hereinabove and the accused/appellant stands convicted for the offence under Section 7, punishable under Section 8. The period of incarceration already undergone by the convict will be taken into account while computing the total number of years he has to undergo imprisonment. The amount of fine already imposed will remain the same.

35. This appeal is hereby disposed of under the terms and conditions as cited hereinabove.

36. Trial Court's records to be sent back.

37. No order as to costs.

Judge