

**HIGH COURT OF TRIPURA
AGARTALA
CRL.A(J) NO.71 OF 2024**

Sri Matilal Bhowmik,
S/o-Lt. Ananda Bhowmik,
Of Khoyerpur, Jagannathpur,
P.S.- Budhjungnagar, District-West Tripura.

.....Appellant

VERSUS

The State of Tripura.

.....Respondents

For Appellant(s) : Mr. Samar Das, Advocate.
Mr. S. Pandit, Advocate.

For Respondent(s) : Mr. R. Datta, P.P.
Mr. R. Saha, Addl. P.P.

Date of hearing and delivery
of judgment and order : 10.02.2026.

Whether fit for reporting : YES/NO.

**HON'BLE JUSTICE DR. T. AMARNATH GOUD
HON'BLE MR. JUSTICE S. DATTA PURKAYASTHA**

JUDGMENT & ORDER (ORAL)

Dr. T. Amarnath Goud, J

1. This present appeal under Section 374 of the Criminal Procedure Code 1973 has been filed against the order of conviction and sentence passed by learned Special Judge (POCSO), in Case No. SPECIAL (POCSO) 38/2019 vide Judgment dated 22.03.2023 which learned Trial Court convicted and sentenced the appellant-petitioner to suffer RI for 20 (Twenty) years and to pay fine of Rs. 30,000/- only under Section-6 of the POCSO Act, in default of payment of fine, the convict shall suffer simple imprisonment(SI) for further six months

2. The brief fact of this case is that on 20.07.2019, at about 11.30 hours, while the informant was engaged in cooking in her kitchen room, at that time her minor daughter aged about 4½ years went to the room of her grandfather namely Matilal Bhowmik, and after sometime when the informant called her daughter, she noticed that her daughter was crying and blood was oozing out from her private part. Thereafter, the informant understood that the said convicted accused namely Matilal Bhowmik has committed rape upon her minor daughter. The complainant (mother of the victim) lodged the FIR against the accused Matilal Bhowmik before the officer in charge of Budhjungnagar police station, West Tripura on 20.07.2019 and the said complaint was registered as 2019/BJN/057 under Section 376(2)(f) of The Indian Penal Code, 1860 (IPC) and Section 4 of the Protection Of Child from Sexual Offence Act, 2012 (POCSO). And the same was endorsed to SI Tapash Malakar for investigation.

3. After conclusion of investigation the I/O filed Charge Sheet in this case vide Budhjungnagar PS Charge Sheet No.48/2019, dated 15.10.2019, under Section 376(2)(f) of The Indian Penal Code, 1860 (IPC) read with section 6 of the Protection Of Child from Sexual Offence Act, 2012 (POCSO) against the accused person namely Matilal Bhowmik only for trial before the Court.

4. The charges was framed against the accused under Section 376(2)(f) of The Indian Penal Code, 1860 (IPC) read with section 6 of the Protection Of Child from Sexual Offence Act, 2012 (POCSO). On 15.10.2019 and the accused pleaded not guilty after the charge was read over to the convict appellant in Bengali.

5. The prosecution adduced as many as 17 witnesses and also exhibited several other evidences in the form of documents, as well as material objects were also adduced by the prosecution starting from Exbt.-1 to 17/1 and Exbt.MO1, Exbt.MO.2 series and after closure of the Prosecution evidence, the convict appellant person was examined by the trial court under Section 313(1) (b) of Cr.P.C on 27.07.2022 No D.W.S were adduced from the side of the accused.

6. After hearing both the sides and after perusal of the prosecution witnesses the Learned Special judge POCSO, West Tripura Agartala convicted the petitioner namely Sri Matilal Bhowmik as stated here-in-above.

7. Being aggrieved and dissatisfied with the conviction and sentenced passed by learned Special judge POCSO, West Tripura, Agartala vide No. SPECIAL(POCSO)38/2019 the petitioner preferred this present criminal appeal to set aside the impugned Judgment of conviction and sentence dated 22.03.2023.

8. Heard Mr. Samar Das, learned counsel appearing for the appellant as well as Mr.R. Datta, learned P.P., and Mr. R. Saha, learned Addl. P.P., appearing for the respondent.

9. Mr. Samar Das, learned counsel appearing for the appellant, submits that the allegation against the appellant herein is a false allegation. The entire prosecution evidence is based upon the evidence of P.Ws.-1 and 2. To prove the case, there is no medical evidence to support the claim of the prosecution. There is no biological stain on the private part of the victim as per the medical evidence. The statement of the victim under Section 164 Cr.P.C. and the P.W. statement of the victim are developed version. There was no discussion about blood in her statement made under Section 164 Cr.P.C., but in her statement as prosecution witness (P.W.-2) there is mention of blood and related things. Therefore, the same is a improved version. All other witnesses are hearsay witnesses.. The Medical Officers also contradicted the allegation of the prosecution that there was any injury involved.

10. Pointing out the above-stated arguments, learned counsel on the point that whether, on the basis of a sole witness, conviction can be given on the basis of presumption, learned counsel cited the following judgments in this regard:—

10.1. ***Para-28*** of the Judgment passed by the Division Bench of this Court in Case No. ***CRLA(J) No.34 of 2019*** dated ***01.04.2021*** titled as ***Sri Lalimalsom Kaipeng Vs. The State of Tripura:-***

28. To say more comprehensively, the presumption to be drawn under Sections 29 and 30 of the POCSO Act do not absolve the prosecution of its duty to establish the foundational facts. Prosecution has to establish a prima facie case beyond reasonable doubt. Only when the fundamental facts are established by the

prosecution, the accused will be under obligation to rebut the presumption that arise, by adducing evidence with standard of proof of pre-ponderance of probability. The insistence on establishment of fundamental facts by prosecution acts as a safety guard against misapplication of statutory presumption. Foundational facts in POCSO Act include:-

- (i) the prove that the victim is a child;*
- (ii) that alleged incident has taken place;*
- (iii) that the accused has committed the offence; and*
- (iv) whenever physical injury is caused, to establish it with supporting medical evidence.*

10.2. Paras-11, 15, 26 and 27 of the Judgment passed by the Division Bench of this Court in Case No. **CRLA(J) No.29 of 2024** dated **05.12.2025** titled as **Sri Babul Das Vs. The State of Tripura:-**

“11. In the written augments submitted by the learned counsel for the appellant, on the point that trustworthiness of the witness statement, the appellant-side relied upon the para-9-13 of the Hon’ble Apex Court Judgment titled as (GNCT of Delhi Vs. Vipin@ lalla reported in 2025 SCCONLINE SC 78. The same is produced here:-

“...9. We have gone through the order of the Trial Court as well as the High Court. The only worthwhile evidence which has been produced before the Court by the prosecution is the deposition of the prosecutrix herself. Although the age of the prosecutrix is 16 years and four months which has not been seriously disputed (accused was about 20 years of age at the time of the incident). Nevertheless the fact remains that the medical examination which was conducted on 18.09.2014 revealed that no injuries were detected on the body of the prosecutrix. Though it was stated in the medical report that her hymen was torn. Definitely the prosecutrix in her examination-in-chief as well as in cross-examination has stuck to the fact that she was raped by the accused but the fact remains that she has contradicted her statement at more than one place.

Moreover she has said in her statement under Section 164 CrPC she had hit the accused on her head by Danda whereas in her examination-in-chief she stated that she hit the accused on his foot. When the accused had surrendered on 10.10.2014 none of these injuries were noticed on the body of the accused.

10. Although it is absolutely true that in the case of rape, conviction can be made on the sole testimony of the prosecutrix as her evidence is in the nature of an injured witness which is given a very high value by the Courts. But nevertheless when a person can be convicted on the testimony of a single witness the Courts are bound to be very careful in examining such a witness and thus the testimony of such a witness must inspire confidence of the Court.

The testimony of the prosecutrix in the present case thus has failed to inspire absolute confidence of the Trial Court, the High Court and this Court as well.

11. It is not believable that when the prosecutrix was caught by the accused who is known to the prosecutrix, she went with him quite a distance in the Bazaar and then to a shop, she never raised any alarm. The only reason she gave is that there was a knife with accused and he had threatened her that if she raises an alarm her brother and father would be killed.

12. In any case as we have already stated above that the testimony of the prosecutrix does not inspire confidence, under these circumstances, we are not inclined to interfere with the well considered order of the Trial Court and the High Court...”

15. On the point that solely based on the testimony of the victim, the accused can be punished, the learned P.P., referred to paras-3, 10 and 11 of the Hon'ble Supreme Court Judgment reported in (2022) 2 SCC 74 dated 1st December, 2021 titled as *Phool Singh Vs. State of Madhya Pradesh*:-

“3. The prosecutrix sent the information to her parental house. Thereafter, her uncle and others came to her matrimonial house and the prosecutrix told them about the incident. They took her to parental house. Thereafter, an FIR was lodged on 12.08.1999. She was sent for medical examination. After completion of the investigation, charge-sheet was filed against the accused for the offence punishable under Section 376 IPC. The case was committed to the learned Court of Sessions. Accused pleaded not guilty and therefore he came to be tried for the aforesaid offence.

3.1. In order to prove the charge against the accused, prosecution examined six witnesses including the doctor who examined the prosecutrix on 12.08.1999, prosecutrix-PW3 and the Investigating Officer-PW6. One of the witnesses Rajaram-PW2 did not support the prosecution story and he was declared hostile. The accused took the plea of alibi and according to him he had gone to Indore on the day of incident and he was not in the village on that day. He examined the defence witness as DW1. The learned trial Court did not believe the plea of alibi and DW1 by giving cogent reasons. That thereafter after appreciating the evidence on record, by judgment and order dated 31.07.2000, the learned trial Court convicted the accused for the offence under Section 376 IPC and sentenced the appellant as mentioned hereinabove.

3.2. Feeling aggrieved and dissatisfied with the judgment and order of conviction and sentence passed by the learned trial Court, the appellant herein-accused preferred an appeal before the High Court. By the impugned judgment and order, the High Court has dismissed the said appeal. Hence, the present appeal is at the instance of the accused.

10. 5.4 In the case of *Sham Singh v. State of Haryana*, (2018) 18 SCC 34, it is observed that testimony of the victim is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of the victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is further observed that seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. In paragraphs 6 and 7, it is observed and held as under:-

“6. We are conscious that the courts shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations or sexual assaults. [See *State of Punjab v. Gurmit Singh* [*State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384] (SCC p. 403, para 21).] 7. It is also by now well settled that the courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case

*or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. (See **Ranjit Hazarika v. State of Assam** [Ranjit Hazarika v. State of Assam, (1998) 8 SCC 635].”*

11. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and as observed hereinabove, we see no reason to doubt the credibility and/or trustworthiness of the prosecutrix. She is found to be reliable and trustworthy. Therefore, without any further corroboration, the conviction of the accused relying upon the sole testimony of the prosecutrix can be sustained.

26. Considering the cumulative effect of these factors, material contradictions in witness statements, the unreliability of the sole testimony of the victim, the lack of corroborative medical evidence, inconsistencies in the alleged timeline, non-examination of natural witnesses, and the motive for false implication, a reasonable doubt arises in the prosecution’s case. In a criminal trial, such doubt must be resolved in favor of the accused.

27. Upon a careful and comprehensive appraisal of the entire evidence, this Court finds that the prosecution’s case suffers from fatal infirmities, making a conviction unsafe. The inconsistencies in the testimonies of PW-1, PW-2, and PW-3, combined with the improbabilities in the narrative, render the victim’s solitary, uncorroborated testimony insufficient to sustain a conviction. Consequently, the benefit of doubt is extended to the accused. Further the Judgments as cited by the learned P.P., herein is not relevant to the fact of this case.”

11. Stating thus, learned counsel urged this Court to allow this appeal and quash and set aside the impugned Judgment and order of conviction.

12. On the other hand, learned Addl. P.P., appearing for the State-respondents vehemently opposed the submission of the learned counsel appearing for the appellant and submitted that the victim girl is only aged about four and half year and conviction can be given only based upon the sole statement of the victim. On the point of regarding the absence of medical evidence, to support his case, learned Addl. P.P., relied upon the following Paras of Judgment of the Hon’ble Supreme Court titled as **Deepak Kumar Sahu V. State of Chhattisgarh** arising out of **SLP(Crl.)(D) No.(s)26453 of 2025:-**

*“5.5 In cases of offences committed under Section 376, IPC, when the story of the victim girl as told in the evidence is found credit-worthy, the apparent insufficiency of medical evidence pitted against acceptable testimony of the victim, the latter would prevail. In **State of Punjab vs. Gurmit Singh** [(1996) 2 SCC 384] it was observed:*

In the absence of injury on the private part of the prosecutrix, it cannot be concluded that the incident had not taken place or the sexual intercourse was committed with the consent of the prosecutrix. The prosecutrix being a small child of about nine years of age, there could be no question of her giving consent to sexual intercourse. The absence of injuries on the private part of the prosecutrix can be of no consequence in the facts and circumstances of the present case.

5.5.2. This Court observed that if the evidence of the victim does not suffer from any basic infirmities and the factor of probability does not render it unworthy evidence, the conviction could base solely on the evidence of the prosecutrix. It was further observed that as a general rule there is no reason to insist on the corroboration except in certain cases, it was stated.

5.5.3 The medical evidence may not be available in which circumstance, solitary testimony of the prosecutrix could be sufficient to base the conviction.

"The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law; but a guidance of prudence under the given facts and circumstances. Minor contradictions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix."

5.5.6 The credible and reliable evidence of prosecutrix could not be jettisoned for want of corroboration including the corroboration by medical report or evidence. The Court observed in Manga Singh (supra) that "in absence of injury on the private part of the prosecutrix, it cannot be concluded that the incident had not taken place or the sexual intercourse was committed with the consent of the prosecutrix". It was stated that it is well settled that in the cases of rape it is not always necessary that external injury is to be found on the body of the victim.

5.6.1 It was further asserted that corroboration is not an essential requirement for conviction in the cases of rape. It is well settled by a catena of decisions of the Supreme Court that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence. As a general rule, there is no reason to insist on corroboration except from medical evidence. However, having regard to the circumstances of the case, medical evidence may not be available. In such cases, solitary testimony of the prosecutrix would be sufficient to base the conviction, if it inspires the confidence of the court.

5.6.4 From a recent decision in Raju alias Umakant vs. State of Madhya Pradesh, (2025 SCC OnLine SC 997), following observations could be noticed: "a woman or a girl subjected to sexual assault is not an accomplice but a victim of another person's lust and it will be improper and undesirable to test her evidence with suspicion.

13. Heard learned counsel appearing for both the parties.
14. Let us examine some important witnesses and well as evidence on record.

15. P.W.-1, who is the informant of this case and the mother of the victim deposed that, she lodged this case against the accused who is her uncle-in-law and identified the accused who was present before the court on that day. PW-1 continued to depose that, on 20th July, 2019 around 11.30 am, she was cooking in their kitchen at that time, her daughter, aged about 4 and ½ years was outside their dwelling house and when the informant called her, then her minor daughter came out from the room of accused. PW1 further deposed that, blood were oozing and were lying down from her private part and she was crying. This witness also stated that, on her asking, her minor daughter told her that the accused pushed his penis into her vagina. PW-1 continued to state that, immediately she raised alarm and on hearing her alarm her neighbours rushed to their house and then she washed out the blood which were oozing from the private part of her daughter. This witness again deposed that, thereafter, she along with her sister-in-law took her daughter to the GB Hospital for treatment and at the hospital, her daughter was treated by the medical officers. Thereafter, she went to Bodhjunnagar PS along with her daughter and her sister-in-laws Sarbani Bhowmik and Kaberi Dey. PW-1 further deposed that, she also lodged a complaint in writing with the PS and the complaint was prepared by as per her dictation and she put her signature on the written complaint. P.W.-1 also deposed that, on the day of lodging complaint police visited their house and seized the wearing pant of her daughter and photocopy of Birth Certificate of her daughter. P.W.-1 further stated that, during investigation of this case she herself and her daughter were also produced in a Court wherein her statement and the statement of her daughter were recorded.

When subjected to cross-examination, PW 1 stated that on the day of incident police visited her house around 12.30 to 1.00 pm. This witness also deposed that, at the time of lodging the complaint her daughter was also present in the PS and she was examined at the PS and her daughter was also examined by the police. PW-1 in her cross-examination also deposed that, their family and the family of accused comprising of his wife, son, wife of his son have been residing in the same house and on the day of alleged incident her mother was also present in their house. PW 1 denied the fact that the Exhibit-MO.1 was not the wearing pant of her

daughter. This witness further denied the fact that she was not cooking on the alleged day and time or that her daughter was also not outside their dwelling house or that she did not call her or that her daughter also did not come out from the room of accused or that no blood was oozing or coming down from the private part of her daughter or that her daughter was also not crying or that her daughter never told her that the accused pushed his penis into the vagina of her daughter. PW 1 further deposed that, she stated to the Magistrate that on the alleged day and time she was cooking and that when she called her she came out from the room of accused and that on hearing her alarm neighbouring people rushed to their house (attention of the witness being drawn to the statement recorded by Magistrate, the witness admits that such statements were not there). PW 1 further denied the fact that, they have a land dispute with the accused or that, therefore, they implicated accused falsely in this case or that she tutored her daughter to depose falsely against the accused. In her cross examination, PW 1 also denied the fact that she made false statement before the Magistrate or that the written complaint was not prepared as per her dictation.

The said PW-1 was re-examined on 29th April, 2022 and she stated to have submitted the original birth certificate of her victim-daughter by way of firstly before the Court. She also stated that the Xerox copy of birth certificate was seized on 20.07.2019. The date of birth of her victim-daughter is 09.03.2015 and on her identification the original birth certificate was marked as Exhibit-14 (subject to objection by the defence).

Accordingly, PW1 faced re-cross-examination by the defence. During her cross-examination she denied the suggestion of the defence that the birth certificate submitted by her is not genuine one or it is subsequently manufactured. She also denied the suggestion that the date of birth of her victim daughter as stated by her is not true. Witness in her cross-examination further stated that at the time of alleged incident, her daughter was a student of Nursery KG-1 of Maa Sarada Sishu Niketan School. Again the witness denied the suggestion given her by the defence that her daughter while playing either in the school or at home used to get abrasions and swelling. Further the witness stated that she accompanied her daughter to the PS

when she was examined by the police, as well as, while her statement was recorded by the Magistrate.

16. P.W.-2, who is the victim in the instant case deposed that, accused Matilal Bhowmik is her grandfather and earlier he was very good. This witness continued to depose that one day in the day time her mother was taking meal when she went to Varanda of their house and at that time, her grandfather called her and took her to their kitchen. PW2 further deposed that, the accused laid her down in the bed in the kitchen and put off her wearing pant and thereafter pushed his 'Pakhi' to her 'Pakhi'. (*The witness uttered the word 'Pakhi' indicating her private part*) and as a result, she suffered pain and blood started oozing from her 'Pakhi'. PW2 identified the accused when his picture was shown to her through the Mobile Phone of Bench Clerk. PW 2 further stated that, earlier she came to the Court and one aunty asked her about the incident and accordingly, she narrated the incident.

When confronted with cross-examination, PW2 denied the fact that accused never called her and took her to the Kitchen or that he also did not lay her down in the bed or that he also did not put off her wearing pant or that he also did not push any part of his body to her 'Pakhi' or that she also did not suffer pain or that blood never was oozing from her 'Pakhi'. PW2 further denied the fact that she made statement under Section 164(5) Cr.P.C, as well as, before this Court on being tutored by her mother. This witness also deposed that, she could identify police on the basis of their dress and after the incident she had conversation with police having their dress and she went to the PS after the incident. PW2 also further denied the fact that her parents had quarrel with the accused.

17. PW 11 being the Medical Officer in this case deposed that, on 20.07.2019, she was posted as the Assistant Professor, AGMC & GBP Hospital, Agartala and on that day, she examined the victim who was, 4 years 5 months female in connection with Budhjungnagar PS Case No.2019/BJN/057 who was brought before the hospital with an alleged history of rape. PW11 continued to depose that, on examination, she had found her conscious, well oriented and physical structure at par her age but, however, during examination of her private

parts, the hymen is found intact and the vaginal opening reddish in colour inflamed and swollen. This witness further deposed that, the victim also experienced pain while parting her thigh apart and Vulval and vaginal swab of the victim was collected for forensic examination and on receipt of the reports, she could finally opined that presence of seminal stain/spermatozoa/ blood stain in the samples were 'negative'. PW11 also stated that, on examination of the genital area of the victim, attempted vaginal penetration by adult erected penis/finger or like objects cannot be ruled out.

Being confronted with cross-examination, PW11 deposed that, on her examination, she did not find any sign of complete penetration through the vagina of the victim nor there was any sign of bleeding.

18. PW15, being the another medical officer of this case, deposed that, on 20-07-2019, she was posted as Medical Officer at Ranirbazar PHC and on that day, at about 7 p.m., she examined the accused person namely Matilal Bhowmik who was brought by SI of police, in connection with Bodhjunggagar PS Case No. 2019/BJN/057 for giving his potency test report. PW15 further deposed that after examination of the accused on the same day, she had collected penile swab, blood sample, urethral swab and urine sample and handed over the same to the police who seized it by preparing a seizure list dated 20-07-2019. PW15 also put her signature on the forwarding. This witness also stated that, on 26-07-2019, she submitted her preliminary report whereupon, she opined that, there is nothing to suggest that the alleged accused was incapable of doing sexual intercourse and on identification the report was marked as Exbt. 12 and the signatures on the said report on identification were marked as Exbt. 12/1 and 12/2 respectively.

PW 15 continued to depose that, finally, she had submitted her final report after obtaining the SFSL report dated 28-09-2019 and the result of her examination was: (1) seminal stain/spermatozoa/blood stain of human origin could not be detected in the Exhibits A,B,C,D,E,I,GI and G2, (2) vaginal Epithelial cell could not be detected in the Exhibits- E and F and after examination, she finally opined that, Seminal stain/spermatozoa/blood stain of human origin could not be

detected but recent sexual intercourse could not be ruled out. The report was prepared by her in her handwriting and she put her signature.

When confronted with cross examination, PW15 denied the fact that she did not enquire about the age of the accused being about 54 years and also she had not conducted any medical examination to determine the age of the accused or that she opined that, there was nothing to suggest that the alleged accused was incapable of doing sexual intercourse or that due to the old age of the accused, he was incapable of performing any sexual act.

19. The relevant statement made by the victim under Section 164(5) of Cr.P.C. are as follows:-

“Two days back, grand-father put me on bed, and rubbed his private part on my private part(pakhi). The body part through which I pass urine is ‘pakhi’. Grand-father pressed my mouth for which I could not raise voice. I told my mother. Grand father stays at our resident along with us. I was in a lot of pain.”

20. This Court has carefully considered the entire evidence on record, the impugned judgment of conviction and sentence, the submissions advanced by the learned counsel for the appellant, as well as the learned Addl. Public Prosecutor appearing for the State.

21. The victim, was aged about four and half years at the time of occurrence, in her statement made under Section 164 Cr.P.C., she clearly described the act committed upon her by the appellant. Her version, though narrated in child-like expression, indicates inappropriate sexual conduct by the appellant. During her deposition before the Court, she reiterated the core allegation. It is true that in her deposition she mentioned bleeding, which is not reflected in the medical report. However, this Court is of the view that such variation constitutes only an embellishment and not a material contradiction going to the root of the prosecution case. Minor inconsistencies are natural when a child of tender years recounts a traumatic incident.

22. The medical evidence assumes significance. P.W.-11, the Medical Officer, stated that upon parting the thighs of the child, she cried due to pain and there was reddish inflammation/swelling over the genital area. Although the hymen was found intact and no spermatozoa or seminal stain was detected, the

Doctor opined that attempted vaginal penetration by an adult erected penis, finger, or similar object could not be ruled out. Thus, the medical findings do not negate the prosecution case; rather, they confirm that some form of sexual assault had indeed taken place.

23. It is settled law that absence of rupture of hymen or absence of semen does not *ipso facto* disprove sexual assault. Penetration, even to the slightest extent, is sufficient to constitute the offence. However, in the present case, the medical evidence does not conclusively establish completed penetrative sexual assault. The injuries noted are suggestive of sexual assault but do not definitively prove full penetration.

24. Having regard to the totality of circumstances, this Court is of the considered view that while the prosecution has successfully established the foundational facts that the appellant subjected the minor victim to sexual assault, the evidence falls short of proving completed aggravated penetrative sexual assault beyond reasonable doubt. The facts proved would appropriately fall within the ambit of attempt to commit aggravated penetrative sexual assault.

25. Accordingly, while maintaining the finding of guilt, the conviction of the appellant under Section 6 of the POCSO Act is altered to one under Section 18 read with Section 6 of the POCSO Act.

26. It is not in dispute that the occurrence took place on 20.07.2019, prior to the amendment to Section 6 of the POCSO Act which came into force on 16.08.2019 vide Act 25 of 2019. At the time of commission of the offence, the punishment prescribed under Section 6 was rigorous imprisonment for a term not less than ten years, which could extend to imprisonment for life. Section 18 of the POCSO Act provides that whoever attempts to commit any offence punishable under the Act shall be punished with imprisonment which may extend to one-half of the imprisonment for life or one-half of the longest term of imprisonment provided for that offence. Applying Section 18 to the pre-amended punishment under Section 6, the maximum sentence that may be imposed would be one-half of ten years, i.e., five years of rigorous imprisonment.

27. Therefore, the sentence of rigorous imprisonment for twenty years imposed by the learned Special Judge is modified. The appellant is sentenced to undergo rigorous imprisonment for five years. The fine amount and default stipulation imposed by the trial Court shall remain unaltered. The period of detention already undergone by the appellant during investigation, trial, and pendency of this appeal shall be set off. The appellant shall be released forthwith upon completion of five years of imprisonment, if not required in connection with any other case.

28. The appeal stands allowed in part to the extent indicated above. Stay if any stands vacated. Pending application(s), if any, also stand disposed of.

S. DATTA PURKAYASTHA, J

DR. T. AMARNATH GOUD, J

Suhanjit

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