GAHC010221342022

2026:GAU-AS:11936-DB

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

Case No. : Crl.A./284/2022

MD. MAJIB ALI
S/O MD. YUNUS ALI,
VILL.- SANTIPUR (DEOSUNGA)
P.S.- GORESWAR,
DIST.- BAKSA, ASSAM.

VERSUS

THE STATE OF ASSAM AND 2 ORS.
REP. BY PUBLIC PROSECUTOR.

2:MADAN BARO
S/O DHUWA BORO

VILL.- DEOSUNGA

P.S.- GORESWAR

DIST.- BAKSA, ASSAM.

3:ANJALI BORO
D/O KATIRAM BORO

VILL.- DEOSUNGA

P.S.- GORESWAR

DIST.- BAKSA, ASSAM

Advocate for the appellant : Mr. A.R. Bhuyan, Sr. Adv.
Mr. S. Abdullah, Adv.

Advocates for the respondent : Mr. R. R. Kaushik, Addl. P.P., Assam.
Ms. M. Barman, Legal Aid Counsel (R/2).

:::BEFORE:::
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE SHAMIMA JAHAN

Date on which judgment is reserved : **19.08.2026**

Date of pronouncement of judgment : **21.08.2026**

Whether the pronouncement is of the operative part of the judgment ? : N/A

Whether the full judgment has been pronounced? : Yes

JUDGMENT & ORDER (CAV)

(M. Zothankhuma, J)

1. Heard Mr. A.R. Bhuyan, learned senior counsel assisted by Mr. S. Abdullah, learned counsel for the appellant. Also heard Mr. R.R. Kaushik, learned Addl. PP, Assam, appearing for the State and Ms. M. Barman, learned Legal Aid Counsel, for the respondent no. 2.

2. This is an appeal under Section 374(2) Cr.P.C. against the impugned judgment dated 27/09/2022, passed by the learned Special Judge (POCSO),

Baksa, in Special (POCSO) Case No. 04/2020, arising out of Goreswar PS Case No. 122/2019, by which the appellant has been convicted under Section 4 of the POCSO Act and sentenced to undergo rigorous imprisonment for 20 years, with a fine of Rs.20,000/-, in default, to undergo rigorous imprisonment for 6 months.

3. The brief facts of the case is that the informant, who is the Prosecution Witness-1 (PW-1) submitted an FIR dated 10/10/2019 to the in-charge of the Suagpur Police Outpost, Baksa, stating that at about 5.20 pm of the same day, his granddaughter aged about 15 years, had gone to a thicket located on the eastern side of the house to defecate. However, the appellant, who was lying in wait, took the victim across the Deosunga river and raped her. The FIR also stated that PW-4 and PW-6 had witnessed the rape. The FIR was forwarded by the Suagpur Police Outpost to Goreswar Police Station, wherein Goreswar PS Case No. 122/2019 under Section 376 IPC read with Section 4 of the POCSO Act was registered.

4. After the victim was examined by a Doctor and her statement recorded under Section 164 Cr.P.C, the Investigating Officer (PW-8) submitted the charge sheet, on having found a *prima facie* case established against the appellant under Section 376 IPC read with Section 4 of the POCSO Act, 2012.

5. The learned Trial Court thereafter framed two charges against the appellant, under Section 376 (1) IPC and Section 4 of the POCSO Act, 2012, to which the appellant pleaded not guilty, and claimed to be tried. The learned Trial Court, thereafter, examined 8 (eight) Prosecution Witnesses and after the appellant was examined under Section 313 Cr.P.C, the learned Trial Court came to a finding that the appellant had committed an offence punishable under

Section 4 of the POCSO Act. It accordingly convicted the appellant under Section 4 of the POCSO Act and sentenced him accordingly. The learned Trial Court did not make any finding against the appellant under Section 376(1) IPC and remained silent on that score.

6. The evidence adduced by the Prosecution Witnesses Nos.1 & 3 (PW-1 and PW-3), is basically to the effect that they had heard from the victim (PW-2), that the victim had been raped by the appellant. The evidence of PW-5 is to the effect that while he was returning home from the bazaar and was walking along the road, he was called by PW-4 and PW-6 and on going towards them, he saw the appellant being held by PW-4 and PW-6. However, the appellant managed to free himself and fled from the place. On enquiry, he came to learn that the appellant had raped the victim. He also stated that the victim was around 14 years of age at the time of alleged occurrence of the crime.

7. The evidence of PW-2 (victim) is to the effect that on the fateful day, at around 4.30-5 pm, in the year 2019, she had gone to the river to fetch water. While returning home, the appellant suddenly came and caught her from behind and dragged her into the jungle. After opening her lower clothing, the appellant raped her. The victim then shouted with all her might, due to which her aunt came to the place of occurrence and slapped the appellant. The appellant then ran away from the place of occurrence. She also stated that she sustained injuries in her private parts. On returning home, the victim informed her grandparents about the incident, due to which PW-1 (informant) lodged the FIR. PW-2 also stated that besides her medical examination being conducted, her statement under Section 164 Cr.P.C. was recorded by the Police. She also stated that she was 14 years of age at the time of occurrence.

In her cross-examination, the victim denied that she was 18 years of age at the time of the occurrence. There is discrepancy in the testimony of the victim, inasmuch as, she had stated in the earlier part of her examination-in-chief that she knew the appellant. However, the same was contradicted in the latter part of her examination-in-chief and in her cross-examination, when she stated that she had not seen the appellant earlier and did not know the appellant.

8. The evidence of PW-4 is to the effect that on the fateful evening at about 5 pm, when she went to fetch water from the river, where the victim had earlier gone to fetch water for drinking, she saw the appellant raping the victim near the river bank. The appellant had no clothes on, while the victim was also not wearing any clothes on the lower half of her body. PW-4 further stated that the appellant, on seeing her, pushed her away and fled. PW-4 then gave the victim clothes to wear and brought her home. She also stated that she did not notice injuries on the body of the victim.

In her cross examination, PW-4 denied the suggestion that the victim and the appellant were having a love relationship at the relevant time or that due to the appellant being a Muslim boy, they had lodged a false case against the appellant.

9. The evidence of PW-6 is to the effect that on the relevant date at about 5 pm, when she had gone to bring back the cows which were tethered near the rivers, she heard the cries of someone. When she went near the source of the said cries, she saw the appellant raping the victim. PW-6 then held the appellant and gave support to the victim. However, the appellant fled. Thereafter, PW-6 took the victim back to her house. PW-6 stated that the victim was around 14

years of age at the time of the occurrence. In her cross examination, PW-6 stated that she did not know the exact date of birth of the victim, but she knew the victim since her birth, as the victim was her niece.

10. The evidence of PW-7, i.e. the Medical and Health Officer, who examined the victim on 11/10/2019, is to the effect that there was a tear at 6 o'clock position in the victim's hymen and it was oozing blood. PW-7 further stated that there was no evidence of injury on the body or private parts of the victim. Also, vaginal smears had been taken on glass for laboratory investigation. The radiological investigation report of the victim showed that the age of the victim was between 14 to 16 years. In the opinion of PW-7, there was evidence of penetration on the private parts of the victim which was less than 48 hours. In his cross-examination, PW-7 stated that the injury on the hymen was within 48 hours.

11. The evidence of PW-8, who was the Investigating Officer, is to the effect that he had made GD entry no. 173 dated 10/10/2019 pursuant to the FIR and he had examined the witnesses and seized the wearing apparel of the victim. He had also seized the Birth Certificate and School Certificate of the victim. He had also sent the victim for medical examination and forwarded her to the Court for recording her statement under Section 164 Cr.P.C. He had also submitted the charge sheet.

12. The Section 164 Cr.P.C statement of the victim is as follows :

"*My name, age and address, as stated above, are true and correct.*

At around 5:00 p.m. on 10-10-2019, I went to the thicket situated on the backside of my house to defecate. After relieving myself, I went to the

Deosunga River, which is close to the thicket, to wash my hands and face. At that time, a youth named Majib Ali came from behind, caught hold of my hands, gagged me and then dragged me into the thicket. After taking me into the thicket, said Majib Ali forcibly committed sexual intercourse with me and at that time my Mami (maternal aunt) Alaishri Boro witnessed the incident. Though my Mami (maternal aunt) tried to apprehend the said boy by catching hold of his hand, the boy ran away. I have this much to say."

13. The examination of the appellant under section 313 Cr.P.C. shows that there was a blanket denial made by the appellant in respect of the incriminating evidence that had been adduced against him by the Prosecution Witnesses. His only answer to the questions put to him, was a terse "false".

14. The learned counsel for the appellant submits that the victim is not a credible witness, inasmuch as, the victim had stated in her evidence that she knew the appellant. However, in the latter part of her examination-in-chief and in the cross-examination, the victim stated that she did not know the appellant. The learned counsel for the appellant further submits that while the victim in her testimony had stated that she had gone to the river to fetch water, in her statement under Section 164 Cr.P.C, the victim had stated that she had gone to defecate, prior to she being raped. The learned counsel for the appellant further submits that the evidence of PWs- 4, 5 and 6 are contradictory to one another, inasmuch as, PW-6 does not speak of PWs-4 and 5 being present at the place of occurrence, while PW-5 speaks of PWs- 4 and 6 being present at the place of occurrence.

15. The learned counsel for the appellant further submits that as the age of the victim has not been proved by the Prosecution, it cannot be said that the

age of the victim was 14 or less than 18 years of age, especially when the appellant had made suggestions while cross-examining the Prosecution Witnesses, that the appellant was over 18 years of age. He further submits that there is no finding made by the Trial Court against the appellant, in relation to the charge framed against the appellant under Section 376(1) IPC. He further submits that when the PWs- 4, 5 and 6 are the relatives of the victim, their evidence would have to be taken with a pinch of salt and cannot be relied upon, as they are interested witnesses.

16. The learned APP and the Legal Aid Counsel for the respondent no. 2, on the other hand, submit that the evidence of the victim has been corroborated, not only by 2 (two) eye witnesses, i.e. PW- 4 and PW-6, but also by the evidence of the Doctor. They also submit that there is no reason to doubt the evidence of the victim as the same is akin to an injured witness. The Counsels for the respondents further submit that there is no explanation given by the appellant with regard to his presence at the place of occurrence and as such, there is no reason to doubt the prosecution case made out against the appellant. The learned counsels for the respondents submit that though the School and Birth Certificate of the victim has not been exhibited in the learned Trial Court, the seizure list, on the basis of which the School and Birth Certificate of the victim had been seized, had been exhibited as Ext- 5. As the victim's age, as per the seized School and Birth Certificate was 01/02/2006, as reflected in the seizure list and the rape having occurred on 10/10/2019, the victim was only 13 years at the time of the incident. As such, there was no infirmity with the decision of the learned Trial Court in convicting the appellant under section 4 of the POCSO Act.

17. We have heard the learned counsels for the parties.

18. As can be seen from the evidence of the victim, which has been corroborated by the two eyewitnesses, i.e, PWs-4 and 6, the appellant had raped the victim near the river. Further, PW-5 had also seen the appellant, being initially restrained by PWs-4 and 6 but had subsequently managed to flee from the place of occurrence. The testimony of the victim that she had been raped has been corroborated by the evidence of PW-7, the Doctor, who testified that the victim's hymen was torn at 6 o'clock position and blood was oozing out. The Doctor had also stated that the evidence of penetration of the private parts of the victim and injury on the hymen, had occurred within 48 hours of examination of the victim. The above evidence, in our view, clearly proves that the appellant had raped the victim.

19. Though the appellant's counsel had submitted that there was discrepancy in the testimony of the victim, where she had given conflicting statements with regard to her knowing the appellant, we find that the said discrepancy is minor and does not go to the root of the matter. On perusing the 161 Cr.P.C statement of the victim, we find that the victim had stated that she had gone outside her house to defecate and thereupon she was waylaid by the appellant and raped. Similarly, in her statement under Section 164 Cr.P.C, the victim has also stated that she had gone to defecate before being raped. However, in her testimony before the learned Trial Court, the victim had stated that she had gone to fetch water before she had been raped. Though there is a discrepancy with regard to her statements made under 161 Cr.P.C and 164 Cr.P.C vis-à-vis her testimony, with regard to her going to defecate and her

fetching water before being raped, we find that the factum of rape committed by the appellant upon her, has remained consistent. Further, the above discrepancy is minor and also does not go to the root of the matter. Accordingly, we are of the view that the discrepancy being minor, the same can be ignored in the facts of the present case, especially when there are eyewitnesses to the rape of the victim by the appellant. Further, fetching water and defecating can also be done at the time of going towards the river, which was behind the house of the victim.

20. In the case of ***Narender Kumar Vs. State (NCT of Delhi),*** reported in ***(2012) 7 SCC 171,*** the Supreme Court held that once the statement of the prosecutrix inspires confidence and is accepted by the court as such, conviction can be based on the solitary evidence of the prosecutrix and no corroboration would be required, unless there are compelling reasons, which necessitate the court to corroborate her statement. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable Prosecution case.

21. On perusing the evidence of PWs-4, 5 and 6, we do not find any discrepancy or contradictions in their testimony. The evidence of PWs-4, 5 and 6 when read as a whole, shows that when PW-4 had gone to the river to fetch water, she saw the appellant raping the victim. The appellant had no clothes on, while the victim's bottom half was not covered with any cloth. Similarly, PW-6 had heard the cries of the victim when she was near the river bank, where she had gone to bring back her tethered cows. PW-6 then saw the appellant raping the victim. There is nothing in the evidence of PWs-4 and 6 which contradicts

each other. The evidence of PW-4 that he had seen both PWs-4 and 6 at the place of occurrence holding the appellant who thereafter managed to flee, also does not contradict the evidence of PWs-4 and 6. As such, there is nothing to show that there was any contradiction or discrepancy in the statements made by PWs-4 to 6.

22. With regard to whether the age of the victim had been proved, we find that no School or Birth Certificate of the victim had been exhibited by the learned Trial Court, nor do we find copies of the School/Birth Certificate in the records. The seizure list, by which the School Certificate and Birth Certificate of the victim had been seized, has been exhibited as Ext.5. Ext.5 speaks of seizure of the School Certificate of the victim from Bholajhar Bangalipara M.E. School and Birth Certificate No.0642312 issued by Bhergaon M.P.H.C, Udalguri, Assam, wherein the date of birth of the victim in both the documents is 01/02/2006.

23. Though the seizure list had been exhibited as Ext.5, the contents of the seizure list had not been proved by the Prosecution witnesses. None of the witnesses have stated in their evidence that the School Certificate and Birth Certificate mentioned in the seizure list (Ext.5) shows that the date of birth of the victim is 01/02/2006. As stated earlier, the said School Certificate and Birth Certificate have not been exhibited in the learned Trial Court. Neither are they available in the Trial Court records.

24. In the case of ***Malay Kumar Ganguly Vs. Sukumar Mukherjee & Ors ,*** reported in ***(2009) 9 SCC 221,*** the Supreme Court has held that a document becomes inadmissible in evidence, unless the author thereof is

examined. The contents thereof cannot be held to have been proved unless he is examined and subjected to cross-examination in a Court of law. The document which is otherwise inadmissible cannot be taken in evidence, only because no objection to the admissibility thereof was taken. In the present case, the question of examination of the author of the School/Birth Certificate does not arise, when the said two documents which have been allegedly seized, vide the seizure list (Ext.5), has not been produced in the Court or exhibited. The exhibition of the seizure list as Ext.5 does not *per se* prove the contents of the seized School/Birth Certificate of the victim.

25. The evidence of the Doctor (PW-7) is to the effect that as per the Skiagram No.74854 dated 11/10/2019, which is a report of the radiological investigation done on the epiphysical union bones around the elbow joint, shoulder joint, wrist joint and the hip joint of the victim, shows her age to be between 14 to 16 years.

26. In terms of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as 'the 2015 Act'), unless the age of the victim is proved, Section 94 of the 2015 Act would have to be applied for determining the age i.e. by seeking evidence by obtaining-

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a

panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board.

However, the above test has not been done during trial and the Doctor's evidence is only to the effect that the radiological examination of the victim shows that she is between the age of 14 to 16 years.

27. In the case of ***Pawan Kumar Vs. State of U.P.,*** reported in ***(2023) 15 SCC 683,*** the Supreme Court has held that the bone ossification test is not an exact science that can provide the exact age of the person, but the radiological examination leaves a margin of two years on either side of the age range as prescribed by the test, irrespective of whether the ossification of multiple joints is conducted. The courts in India have accepted the fact that after the age of thirty years the ossification test cannot be relied upon for age determination. It is trite that the standard of proof for the determination of age is the degree of probability and not proof beyond reasonable doubt.

28. In the case of ***Akula Raghuram v. State of A.P.***, reported in ***(2025) 4 SCC 209,*** the Supreme Court held that even in a case of ossification test, to determine the age of the victim child, there could be a difference of two years either way on the age determination made by the Doctor. In the present case, when the radiological examination undertaken by the Doctor is to the effect that the victim was between 14 to 16 years of age, we would have to give the

benefit of the age difference of two years in favour of the accused. As such, the benefit of two years on the victim's age, determined by the Doctor to be between the range of 14 to 16 years, would require adding the benefit of another two years to the victim's upper 16 year range. Accordingly, we would have to hold that the victim was 18 years of age at the time of the incident. Consequently, the provisions of the POCSO Act 2012 would not apply to a person who has attained the age of 18 years. However, in the present case, the charge under Section 376(1) IPC has also been framed against the appellant by the learned Trial Court.

29. On considering the fact that the evidence of the Prosecution Witnesses proved that rape has been committed upon the victim by the appellant and as the appellant has been examined with regard to the incriminating evidence of rape committed by him, during his examination under Section 313 Cr.P.C, we hold that the Prosecution has been able to establish the guilt of the appellant for committing an offence punishable under Section 376(1) IPC.

30. As stated in the following paragraphs, the appellant has not given any explanation for his presence at the place of occurrence and as to why he fled from the place of occurrence. The appellant has replied to all the questions put to him under Section 313 Cr.P.C with a terse "false".

31. In the case of ***Raj Kumar vs. State of M.P,*** reported in ***(2014) 5 SCC 353,***, the Supreme Court has held that the accused has a duty to furnish an explanation in his statement under Section 313 Cr.P.C, regarding any incriminating material that has been produced against him. In the event the

accused chooses to remain in complete denial during his examination under Section 313 Cr.P.C, the Court would be entitled to draw an inference including such adverse inference against the accused as may be permissible in accordance with law. In the present case, the appellant has not given any explanation with regard to him being present at the place of occurrence and on the evidence of rape being made against him. Thus, besides there being eyewitnesses to the rape, the evidence of PW-7 and the victim's statement under Section 164 Cr.P.C, which corroborates her testimony, it can also be inferred that rape had been committed by the appellant on the victim. However, in view of the reasons stated in the foregoing paragraphs, we are unable to agree with the finding of the learned Trial Court that the victim's age has been proved to be 14 years at the time of the incident, in the absence of any School/Birth Certificate of the victim being produced during trial.

32. With regard to the submission of the learned counsel for the appellant that PW-4, 5 & 6 are interested witnesses, inasmuch as, they are related to the victim, we do not find any reason to doubt the testimony of PW-4, 5 & 6, only because they are related to the victim, as the Supreme Court in ***State of U.P. vs. Saman Das,*** reported in ***AIR 1972 SC 67,*** has held that the relationship of a Prosecution Witness to the deceased itself is not sufficient for disbelieving his testimony, unless motive is alleged and proved against him, to spare the real assailant and also when there is no cogent evidence on record, to show that any such witness had any enmity against the accused. In the present case, there is no evidence or a whisper of a suggestion made by the appellant during cross-examination of the Prosecution Witnesses, that PW-4, 5 & 6 had any enmity with the appellant or had a reason to falsely implicate the appellant. There is

also no whisper of any enmity between the victim's family and the appellant in the prosecution case.

33. In view of the reasons stated above, we hold that though conviction under Section 4 of the POCSO Act, 2012 is not made out, only because the age of the victim being below 18 years of age has not been proved during trial, the factum of rape of the victim by the appellant has been proved. As such, the appellant is convicted under Section 376(1) IPC and is accordingly sentenced to undergo rigorous imprisonment for 12 years (twelve years) with a fine of Rs.20,000/-, in default to undergo rigorous imprisonment for 6 months. Consequently, the impugned judgment dated 27.09.2022 passed by the learned Special Judge (POCSO), Baksa in Special (POCSO) Case No.04/2020 is modified to the extent indicated above.

34. The appeal is accordingly dismissed with the above modification.

35. Send back the TCR.

36. In appreciation of the assistance provided by the learned Legal Aid Counsel for the respondent no.2, her fees should be paid by the Gauhati High Court Legal Services Committee.

JUDGE **JUDGE**

Comparing Assistant

Anupam Chutia
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