GAHC010244372022

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

Case No. : Crl.A./319/2022

KHANDAKAR MEZBAHUL ALOM
S/O LATE KHANDAKAR MATIAR RAHMAN,
VILL.- METUAKUCHI,
P.S. AND DIST.- BARPETA, ASSAM, PIN- 781308.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY THE P.P., ASSAM.

2:AMIR HUSSAIN
S/O LATE GAJI MIYA

VILL.- CHASRA GAON

P.O.- SATRA KANARA

P.S.- BAGHBAR
PIN- 781308

Advocate for the appellant : Mr. M.U. Mahmud, Adv.

Advocate for the respondent No.1 : Ms. A. Begum APP, Assam.

Advocate for the respondent No.2 : Ms. D. Borpujari, Legal Aid Counsel

:::BEFORE:::

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MR. JUSTICE RAJESH MAZUMDAR

Date on which judgment is reserved : **17/06/2026**
Date of pronouncement of judgment : **23/06/2026**
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)

Heard Mr. M.U. Mahmud, learned counsel for the appellant. Also heard Ms. A. Begum, learned Addl. Public Prosecutor for the State and Ms. D. Borpujari, learned Legal Aid Counsel for the respondent No. 2.

2. This appeal has been filed against the impugned Judgment dated 14.11.2022 passed by the Addl. Sessions Judge-cum-Special Judge (POCSO), Barpeta, in Special POCSO Case No. 25/2018 arising out of Barpeta P.S Case No. 588/2018, by which the appellant has been convicted under Section 6 of the POCSO Act and sentenced to undergo Rigorous Imprisonment for 12 years and to pay a fine of Rs. 20,000/-, in default to undergo Simple Imprisonment for another 1 year, for having committed aggravated penetrative sexual assault on the victim girl of 9 years.

3. The facts of the case in brief is that an FIR dated 23.03.2018 was submitted by PW-1, who is the father of the victim, to the effect that the appellant had called his 9-year-old daughter around 12 noon on 07.03.2018 to

his house on some pretext. Thereafter, taking advantage of the absence of any other person in the house, the appellant who resides near the house of PW-1, raped her, thereby injuring her genital area, which caused profuse bleeding. On returning home in the evening and witnessing her serious condition, the victim was taken and treated in the Government Hospital FAAMCH, Barpeta. However, as the appellant had threatened his daughter repeatedly, to cover up the incident, they got to know the truth only 2 days later. PW-1 further stated in his FIR that he being a daily wage worker and the appellant being an influential person, the appellant took advantage of his penury, by threatening them not to divulge the real incident to others, as a result of which, lodging of the FIR dated 23.03.2018 was delayed. The FIR also stated that the medical report was also enclosed with the FIR, which could only have referred to the FAAMCH, Barpeta.

4. Pursuant to the FIR, Barpeta P.S Case No. 588/2018 was registered under Section 6 of the POCSO Act on 23.03.2018 at 11.10 a.m. The police then took the victim to the FAAMCH, Barpeta on 23.03.2018 at around 1.45 p.m, where she was medically examined. After investigation of the case was completed, charge sheet was filed against the appellant under Section 6 of the POCSO Act. The learned Trial Court thereafter framed charge under Section 6 of the POCSO Act, to which the appellant pleaded not guilty and claimed to be tried.

5. The learned Trial Court thereafter examined 7 prosecution witnesses and 1 defence witness. After examining the appellant under Section 313 Cr.PC, the learned Trial Court came to a finding that the appellant had committed the offence under Section 5 (m) of the POCSO Act, which was punishable under Section 6 of the POCSO Act. The appellant was accordingly convicted and sentenced in terms of Section 6 of the POCSO Act.

6. The appellant has put to challenge his conviction by the learned Trial Court, on the ground that there are major discrepancies and contradictions in the evidence of the prosecution witnesses. While the victim was supposedly under treatment in a government hospital i.e., FAAMCH, Barpeta for 7 days prior to the lodging of the FIR, according to the father of the victim and 3 days according to the mother of the victim, wherein, 5 stitches had been allegedly made on the private parts of the victim, no Doctor or Nurse of FAAMCH has been made a prosecution witness. No medical prescription or medical report with regard to the victim's damaged genitals or treatment in FAAMCH, Barpeta has been made a part of the charge sheet. Further, the incident having allegedly occurred on 07.03.2018, there is an enormous delay in filing the FIR on 23.03.2018, even though the FIR reveals that the informant (PW-1) was aware of the alleged rape of the victim, 2 days after the incident, i.e., on 09.03.2018.

7. The appellant's counsel also submits that there is nothing in the evidence of the parents of the victim, to the effect that the appellant had threatened the parents of the victim, even though the FIR states that the appellant had threatened the parents not to divulge the real incident to others, as a result of which, the lodging of the FIR got delayed. The further case of the appellant is that it was only because the appellant had asked PW-1 to vacate the house belonging to the appellant, that a false case had been foisted upon the appellant by PW-1 and his family. He also submits that the evidence of the Defence Witness – 1 (DW-1), which supports the case of the appellant, has not been shaken or controverted by the prosecution during cross-examination. He also submits that the victim had in her evidence stated that she had injured herself in her urinary passage area, after falling from a tree. When the victim, who is the prime witness to the incident, had been declared a hostile witness by

the Prosecution and had subsequently changed her evidence to being raped on her cross-examination by the Prosecution, the changed evidence of the hostile witness could not have been made the basis for convicting the appellant.

8. On the other hand, the learned Addl. Public Prosecutor and the Legal Aid Counsel for the respondent No. 2 submit that there is no infirmity with the conviction of the appellant by the learned Trial Court. They submit that the private parts of the victim was injured, which required stitches and the evidence of the Doctor, who examined the victim on 23.03.2018, was to the effect that the healed wound on the left side of the vaginal wall of the victim could not have been caused by falling on a hard surface. Also, the hymen was torn. Further, the suggestion made by the appellant that a false case had been foisted upon the appellant due to a land dispute between the parties, was denied by the prosecution witnesses.

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

10. As can be seen, the issue pertains to whether the 9- year-old girl had been raped by the appellant and whether the delay in filing the FIR was fatal to the Prosecution. Further, though the victim was apparently given 5 stitches in her private parts in the government hospital FAAMCH, Barpeta, no proof of the same has been produced by the Prosecution, by way of the Doctors and Nurses who would have attended to the victim in FAAMCH, Barpeta. There is also no medical report, medical prescription or proof that she had been admitted into and treated in the hospital or discharged from the said hospital.

11. The evidence of PW-1, who is the informant and father of the victim, is to the effect that he earns his livelihood by doing labour. While returning home at

around 6 p.m. after a day's work, he found his 9-year-old daughter lying on the bed, bleeding profusely from her private parts. She was immediately rushed to FAAMCH, Barpeta for treatment, where she was admitted and treated for about a week. During her stay in the hospital, five stitches were made on her private parts and she was given medicine. When PW-1 questioned her daughter about her injuries, his daughter initially told him that she had sustained the injury by falling from a guava tree. However, she subsequently disclosed that she suffered bleeding in her private parts because the appellant had sexual intercourse with her. PW-1 further stated that his victim daughter told him that the appellant called her to his house on several occasions. As such, he filed an FIR.

12. In his cross-examination, PW-1 stated that the FIR was written by an Advocate and he had put his signature therein. He also stated that after his daughter was treated in the hospital on being admitted on 07.03.2018, she was released after one week. He filed the case against the appellant 10/12 days after the release of his daughter from the hospital. PW-1 further stated that, during investigation, he had shown the medical documents of the treatment given to his daughter to the police, who then took some of the papers, while a few remained with him. He also stated that he was living on the land and house constructed by the appellant, which was under occupation of the appellant. He also stated that the appellant had asked him to vacate, but he did not vacate the building. He also stated that his daughter could climb trees. He also denied the suggestion that he had filed a false case due to the appellant asking him to vacate his land, which he did not do. He also denied the suggestion that his daughter suffered injuries on her private parts by falling from a tree.

13. The re-examination of PW-1 is to the effect that the victim was 9 years of

age at the time of the incident and her date of birth was 05.03.2009. The I.O. had seized the original birth certificate of the victim and thereafter given the same to him on zimmanama. However, he could not produce the birth certificate, as he had misplaced the same.

14. The evidence of PW-2, who is the mother of the victim, is to the effect that the informant was her husband and she identified the appellant who was her co-villager. PW2- stated that she and her husband were daily labourers and on coming back home in the evening from work, she found her 9-year-old daughter lying on the ground of their house, bleeding profusely from her private parts. Her clothes were stained with blood and PW-2 then changed her daughter's dress. In the meantime, her husband had also come home. They then took their daughter to FAAMCH, Barpeta, where their daughter was admitted for treatment. The Doctors stitched her injuries to prevent bleeding and her daughter remained admitted in the hospital for 3 days. PW-2 stated that her daughter told her that she went to pay a visit to the house of the appellant, whom she addressed as 'Nana' and there she sustained injuries on her private parts. PW-2 then stated that she did not want to speak with regard to what her daughter had told her. She also stated that her husband had lodged an FIR with regard to what had occurred to her daughter, as the same was true.

15. In her cross-examination, PW-2 stated that they were residing on the land belonging to the appellant. However, the appellant had asked them to vacate the land. She also denied the suggestion that her daughter sustained injuries due to a fall. She also denied the suggestion that a false case had been filed against the appellant because of a land dispute.

16. The evidence of PW-3, who is the victim, is to the effect that she knew the

appellant and that her father had lodged the FIR. She stated that her date of birth was 05.03.2009 and the incident had taken place about 3 years back, around 11 o'clock during the day. While she was playing with her younger sister and some of her friends, she climbed up a tree. Thereafter, she fell from the tree and sustained injury in her urinary passage area. Her parents arranged for her treatment. PW-3 stated that that's all she had to say. During the recording of the victim's testimony, the learned Special P.P. made a prayer to the learned Trial Court to allow him to cross-examine the victim, as she had allegedly resiled from her previous statement given before the Investigating Officer. The same being allowed by the learned Trial Court, the Prosecution cross-examined the victim. The cross-examination of the victim by the Prosecution and by the defence, as is reflected in the Trial Court records, is reproduced herein below, as follows:-

> " x x x (by prosecution)
>
> *Police questioned me.*
>
> *The Learned Special Public Prosecutor has drawn the attention of the witness to the statement made by her before the I/O where she stated, "At around 12 o'clock during the day, our neighbour, whom we address as Nana and whose real name is Misbahul Alam, called me to buy bidi (a type of cheap cigarette made of unprocessed tobacco wrapped in leaves - Tr.) from a shop. I brought bidi from a nearby shop and thereafter, he told me to massage his hands. After telling me to massage him, Nana closed the doors and windows of the house. He removed the clothes and the underwear that I was wearing, laid me down on a bed, applied ointment on my vagina, and committed bad acts with me and he committed the bad acts with me for about 10 minutes.".*
>
> *You stated before the police in the aforesaid manner. What do you have to say regarding this?*
>
> *Yes, I said this to police. Nana had given me Rs. 10 to buy bidis and a matchbox. He told me to massage his hand. He closed the door and committed bad acts with me. As a result of his bad acts, there was bleeding from my urinary passage. After returning*

from work, my mother took me to the hospital. At first, I was scared after arriving at the court, and that is why, I did not speak the truth. I did not get injured because of falling down from the tree; actually I got hurt because Nana committed bad acts with me. Ext. 2 is the statement given by me to the Court. Ext. 2(I) and 2(II) are my signatures.

x x x x (by defence)

When my mother had asked me about the incident, I told her that I had sustained injury as a result of falling down from a tree; however, afterwards, I told her the truth. My father had a land dispute with the accused person. Police questioned me in the police station. After recording my statement, the police read over the same to me. It is not a fact that I have adduced false evidence as there is a land dispute. Police seized my blood-stained clothes. I have not seen those clothes in the court. It is not a fact that the accused did not commit any kind of bad act with me and that there was no bleeding from my urinary passage."

17. The evidence of PW-4, who is the neighbour of the informant, is to the effect that he knew the appellant and the victim girl. PW-4 stated that the incident took place in the year 2018. One day, when he returned home from his office, the informant came to his home and told him that the appellant used to call his minor daughter (victim) to his house on various pretexts. PW-4 then stated that he had nothing else to say.

At this stage, the Prosecution prayed to the learned Trial Court, to allow them to cross-examine PW-4, on the ground that he had resiled from his previous statement made before the I.O. The learned Trial Court allowed the same and PW-4 was cross-examined by the Prosecution and by the defence, which are as follows:-

"*XXXX by Prosecution*

Police had recorded my statement.

It is not a fact that before the I.0. I have stated that "Two days ago I came to

know from Amir Hussain that on 20.03.2018 at about 12:00 pm taking advantage of the absence of family members Misbahul Alam called the informant's minor daughter Sukurjan Nessa age about 10 years and thereafter forcibly raped her as a result of which the victim girl sustained serious injury on her private parts and there was bleeding from her private parts."

It is also not a fact that I have stated before the I.0. that "the accused is of a bad character and he had committed similar offences on the past also."

Accused is also from my own village. I know him personally.

It is not a fact that I have suppressed the actual fact and has deposed falsely today to save the accused.

Cross examination by defence

Informant Amir Hussain resides at Matuakuchi village and my village is Sonkuchi. Both the village are adjacent. The house of the informant is situated at a distance of ½ km. from my house."

18. The deposition of PW-5 is to the effect that he had no knowledge about the case.

19. The evidence of PW-6 is to the effect that on 23.03.2018, while working as a lady Medical Officer in the Department of Forensic Medicine of Fakhruddin Ali Ahmed Medical College and Hospital, Barpeta, she examined the victim. The evidence of PW-6 is to the effect that there were no stains detected in the wearing garments of the victim and no bodily injury was detected. The findings of PW-6 on the genital examination of the victim and her opinion are reproduced hereinbelow as follows:-

"*Genital Examination:-*

Pubic hairs:- Absent

Vulva(Labia majora & minora):- Normal

Hymen:- Teared

Vagina:- admit 1 finger already healed wound on left of vaginal wall.

Cervix and Uterus:- Uterus not palpable per abdominally.

Fourchette and Perineum:- Normal

Vaginal swab collected:-

Result of vaginal swab smear examination:- No Spermatozoa is seen on microscopic examination of vaginal swab slide.

Opinion:-

(1) There is no recent sign of sexual intercourse, but there is old sign of sexual intercourse as already healed wound on left side of vaginal wall is seen.

(2) There is no injury on her body except already healed wound on left side of vaginal wall.

3) There is no X-ray report from Radiology department, her actual age could not be ascertained.

In this connection, I have submitted my medical report. Ext.3 the medical report submitted by me and Ext.3 (i) is my signature.

08.04.2022

Cross examination

The healed wound on left side of vaginal wall may be caused 12/15 days prior to her examination on 23.03.2018. Such wound cannot be caused by falling over hard substances. Though the victim was admitted at Gynecology ward, I did not examine from 07.03.2018 to 10.03.2018 at FAAMCH, Barpeta and I did not examined her at that time."

20. The evidence of PW-7, who is the Inspector at Barpeta Police Station, is to the effect that the informant lodged an FIR on 23.03.2018, which was

registered as Barpeta P.S Case No. 588/2018 under Section 6 of the POCSO Act. On taking up the investigation, PW-7 examined the informant, his wife and the victim and recorded their statements. The victim was also taken to FAAMCH, Barpeta for examination. The victim was also produced before a Magistrate for recording her statement under Section 164 Cr.P.C. After seizing the Birth Certificate of the victim which showed her date of birth as 05.03.2009, the original Birth Certificate was handed over to the informant on *zimmanama*. The appellant was arrested on 03.05.2018, on the basis of the materials that were uncovered during investigation. PW-7 also collected the medical report of the victim and submitted a charge-sheet against the appellant under Section 6 of the POCSO Act.

In his cross-examination, PW-7 stated that prior to sending the victim girl for medical examination, the informant had on his own taken the victim before a Doctor. He also stated that he did not seize any wearing apparel of the victim.

21. The evidence of DW-1 is to the effect that she knew the informant, as the informant's wife (PW-2) worked as a maid in their house. She also knew the appellant who resides in their village. The alleged incident took place in the year 2018. DW-1 stated that PW-2 came to her house one day and asked for the money she owed her, amounting to Rs.1,200/-, which she needed for the treatment of her child, who had fallen from a tree and sustained injury on her vagina. After giving the money to PW-2, PW-2 took her daughter for treatment. After three days, PW-2 along with her daughter came to her house. Later, DW-1 came to know that the informant (PW-1) had filed a case against the appellant, on the ground of having committed a bad act with the victim. DW-1 further stated that the informant stayed in the land of the appellant and as the

appellant had asked the informant to vacate the land, the instant false case had been filed against the appellant. DW-1 further stated that the informant has however vacated the land of the appellant.

In her cross-examination, DW-1 stated that she had not seen the injury sustained by the informant's daughter and that she had not deposed falsely to save the appellant.

22. In the case of ***The State of Uttar Pradesh Vs. Raghuvir Singh, Criminal Appeal No. 1588/2013***, the Supreme Court has held that the evidence of a Prosecution witness and a defence witness are to be examined without predilection or bias. No witness is to be given better treatment than the other. The credibility and trustworthiness given to a defence witness should be at par as that given to a Prosecution witness.

23. The examination of the appellant under section 313 Cr.PC is basically to the effect that the appellant has given a blanket denial with regard to the evidence that had been adduced against him, regarding having committed aggravated penetrative sexual assault on the victim. With respect to the question put to the appellant, as to whether he had anything to say about the case, the appellant stated that a false case had been lodged against him, as he had asked the informant and his family to vacate the plot of land in which he had initially provided them shelter.

24. As can be seen from the evidence of the witnesses recorded by the learned Trial Court, there is a delay of 16 days in filing the FIR. The incident allegedly occurred on 07.03. 2018. Due to the alleged serious injury suffered by the victim, the parents of the victim rushed her to FAAMCH, Barpeta on

07.03.2018. In the FIR, the informant (PW-1) stated that he got to know the truth two days later, i.e, on 09.03.2018. Interestingly, the informant and his wife did not take any action against the appellant on 09.03.2018. No reasons have been given by the parents of the victim as to why they did not take any action against the appellant 09.03.2018 or prior to 23.03.2018, i.e, the date the FIR was filed.

25. The informant (PW-1) stated that the victim was in the hospital for 7 days, which meant that the victim was discharged from FAAMCH, Barpeta on 14.03.2018. On the other hand, the mother (PW-2) of the victim stated that the victim was in FAAMCH, Barpeta for 3 days, which meant that the victim was discharged on 10.03.2018. Whatever may be the date of discharge of the victim, no reason has been forthcoming from PW-1 and PW-2 as to why the FIR was filed only on 23.03.2018, except to say that the appellant had threatened them not to divulge the incident to others.

26. Interestingly, neither has the informant (PW-1) nor his wife (PW-2) given any testimony before the learned Trial Court that they had been threatened by the appellant to not divulge from what had actually happened to the victim, that is, that the victim had been raped. The above statement made by the informant in his FIR appears to be a made up reason for the delay in filing the FIR.

27. The evidence of PW-1 and PW-2 is to the effect that their victim daughter was bleeding profusely from her private parts when they came home. In the evidence of PW-1, the victim was lying on the bed; while in the evidence of PW-2, the victim was seen lying on the ground. The victim was rushed to hospital and apparently stayed in the FAAMCH, Barpeta for a few days, where her private parts were allegedly stitched and she was given treatment. Interestingly,

even though the police were informed about it, as has been stated by the Investigating Officer in his evidence, no Doctor or Nurse who had treated the victim in FAAMCH, Barpeta, has been made a Prosecution witness There is no statement recorded by the police under section 161 Cr.PC, in respect of any Doctor or Nurse of FAAMCH, Barpeta, who had treated the victim. There is no admit card or discharge certificate issued by FAAMCH, Barpeta, relating to the victim, proving that the victim had been treated and had been admitted into FAAMCH, Barpeta. There is nothing in the charge-sheet, in relation to any medical prescription or Doctor's examination report in relation to any injury pertaining to the private parts of the victim, which had allegedly been taken care of in FAAMCH, Barpeta.

28. The huge gap between the date of the alleged incident of penetrative sexual assault and the filing of the FIR, 16 days later, has not been explained satisfactorily by the Prosecution witnesses. It is highly unlikely for parents, not to report a case of rape of their daughter to the police at the earliest possible instance. If it was a case of rape of the victim and if the genital area of the victim had been damaged, the same would have been, in all probability, noticed by the Doctors and Nurses of FAAMCH, Barpeta who treated her on 07.03.2018 onwards. The same would have been immediately informed to the parents of the victim also by the Doctors and Nurses in FAAMCH, Barpeta. The silence on the part of the Prosecution witnesses, regarding no information being provided to the parents of the victim by the Doctors and Nurses in FAAMCH, Barpeta, that the victim had been raped, gives rise to an inference that the victim had not been raped.

29. As stated earlier, though the informant in the FIR has stated that the

reason for the delay in filing the FIR was that the informant had threatened them not to disclose the truth, PW-1 and PW-2 have not stated anything to that effect in their testimony before the learned Trial Court. On the other hand, the stand taken by the appellant and the evidence of DW-1, is to the effect that the appellant had asked the informant and his family to vacate the land and building of the appellant. It is an admitted fact that the informant and his family members were living in the house of the appellant and there is no dispute with regard to the fact that the informant was not living on his own land or house.

30. In the case of ***State of Himachal Pradesh Vs. Shree Kant Shekari,*** reported in ***(2004) 8 SCC 153,*** the Supreme Court has held that delay in lodging an FIR in a rape case cannot be used as a ritualistic formula for discarding the Prosecution case or doubting it's authenticity, when the testimony of the victim appears to be totally reliable, trustworthy and credible. However, in the present case, we do not find the testimony of the victim to be totally reliable, trustworthy and credible, especially, when she has been treated as a hostile witness during trial.

31. At the time of recording the evidence of the victim, the victim had initially started off by stating that the injury that had been caused to her private parts was due to having fallen from a tree. Though the victim has subsequently changed her testimony during cross-examination by the prosecution after being declared a hostile witness, the evidence of the Defence Witness (DW-1) cannot be ignored, wherein she has stated that she had given Rs. 1200/- to PW-2 to enable PW-2 to take the victim for medical treatment due to the injury sustained on her private part as she fell from a tree. On considering the entire issue, it would not be safe to rely upon the evidence of the victim and her parents for

convicting the appellant. Further, the manner in which the victim has suddenly changed track from having fallen from a tree and then saying that she has been raped, due to which she had hurt her private parts, does not appear to be truthful. In fact, it appears that the allegation of rape made by the victim in her evidence has been fabricated and that the child had been tutored to implicate the appellant. Further, the mother of the victim i.e. PW-2 has also not come straight to the point, by stating in clear terms that the victim had told her that she had been raped by the appellant. In fact, PW-2 has been hedging and only implying that what was stated in the FIR was true.

32. As held by the Supreme Court in the case of ***Bihari Nath Goswami Vs. Shiv Kumar Singh*** reported in ***(2004) 9 SCC 186***, the paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent.

33. In the case of ***Hiren Das Vs. State of Assam*** reported in ***2014 (3) GLT 134,*** this Court has held that it is settled position of law that because the witness is declared hostile, his entire evidence cannot be excluded or rendered unworthy of consideration. Merely because the Court gave permission to the prosecution to cross-examine its own witnesses, it does not efface his evidence. The evidence remains admissible in trial and hence, there is no legal bar to base the conviction or acquittal upon the testimony of such witness. Merely on the ground that the witness has been declared as hostile, his whole testimony cannot be excluded from consideration. In appropriate cases, the Court can rely upon the part of the testimony of such witnesses, if that part of the deposition

is found to be credit worthy ***[Gura Singh Vs. State of Rajasthan*** reported in ***(2001) 2 SCC 205].*** In the present case, we do not find the evidence of the victim to be reliable to come to a finding that the appellant was guilty of raping her for the reasons stated in the foregoing paragraphs.

34. In the case of ***Goverdhan Vs. State of Chattishgarh*** reported in ***(2025) 3 SCC 378***, the Supreme Court has held that merely because the witness has turned hostile does not necessarily mean that their evidence has to be thrown out entirely and what is supportive of the prosecution can certainly be used. Para 93 and 94 of the above judgement is reproduced as follows :-

"***93.*** *However, it is also to be noted that merely because the witnesses turn hostile does not necessarily mean that their evidence has to be thrown out entirely and what is supportive of the prosecution certainly be used. In Gangadhar Behera v. State of Orissa reported in (2002) 8 SCC 381, it was observed as following :*

"*15. To the same effect is the decision in State of Punjab v. Jagir Singh reported in (1974) 3 SCC 277 and Lehna v. State of Haryana reported in (2002) 3 SCC 76. Stress was laid by the appellant-accused on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence prayer is to apply the principle of falsus in uno, falsus in omnibus (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of a particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno, falsus in omnibus has no application in India and the witnesses cannot be branded as liars. The maxim falsus in uno, falsus in omnibus has not received general acceptance nor has this maxim come to occupy the status of the rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called "a mandatory rule of evidence". (See Nisar Ali v. State of U.P. reported in AIR 1957 SC 366. Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to*

differentiate the accused who had been acquitted from those who were convicted. (See Gurcharan Singh v. State of Punjab reported in AIR 1956 SC 460. The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See Sohrab v. State of M.P. reported in (1972) 3 SCC 751 and Ugar Ahir v. State of Bihar reported in AIR 1965 SC 277. An attempt has to be made to, as noted above, in terms of felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See Zwinglee Ariel v. State of M.P. reported in (1952) 2 SCC 560 and Balaka Singh v. State of Punjab reported in (1975) 4 SCC 511. As observed by this Court in State of Rajasthan v. Kalki reported in (1981) 2 SCC 752 normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi v. State of Bihar reported in (2002) 6 SCC 81. Accusations have been clearly established against the appellant-accused in the case at hand. The courts below have categorically indicated the distinguishing features in evidence so far as the acquitted and the convicted accused are concerned."

94. *To the same effect it was held in Raja v. State of Karnataka reported in (2016) 10 SCC 506 as follows : (SCC p. 516, para 32)*

"*32. That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in [Himanshu v. State (NCT of Delhi), reported in (2011) 2 SCC 36 by drawing sustenance of the proposition amongst others from Khujji v. State of M.P. reported in (1991) 3 SCC 627 and Koli Lakhmanbhai Chanabhai v. State of Gujarat reported in (1999) 8 SCC 624. It was enounced that the evidence of a hostile witness remains admissible and is open for a court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable*

evidence available on record."

35. The appellant has tried to make out a case that a false case has been foisted upon the appellant on account of the appellant asking the informant and his family to vacate his land and building.

36. In the case of ***Imrat Singh Vs. State of M.P.*** reported in ***(2020) 14 SCC 257,*** the Supreme Court has held that enmity, as is often said is a double-edged sword, it can be the motive but it can also be a reason to falsely implicate the other side. Hereto, we find it a possibility that the informant and his family have made out a false case due to the appellant having told the informant and his family to leave his property.

37. It is surprising to note that the Doctor (PW-6), who had examined the victim on 23.03.2018, has stated that there was an already healed wound on the left side of the vaginal wall of the victim, without making any observation that the victim's private parts had been subjected to stitches. It is usual for a Doctor to record the history of a patient and in case of rape, it was essential for the Doctor to have made some observation with regard to what treatment and procedure had been followed in a case of a torn vagina, allegedly requiring stitches. It should also be borne in mind that while an intact hymen does not *ipso facto* prove that rape had not been committed, a torn hymen can also be due to various factors besides rape. It can happen due to Falling, jumping, running etc.

38. Another aspect of the case is that the victim (PW-3) has stated in her evidence that she sustained injury in her urinary passage area after falling down

from a tree. It was only after she was declared a hostile witness and the Prosecution had cross-examined the victim, did she say that the appellant had committed a bad act on her. She also stated that her father had a land dispute with the appellant. She also stated that the police seized her bloodstained clothes. However, the victim has nowhere stated in her evidence that her private parts had been stitched in the hospital. The Flip-flop testimony of the victim leads us to believe that the victim cannot be said to be a sterling witness, whose testimony alone can be the basis for convicting the appellant.

39. The issue that arises due to the victim being declared a hostile witness, is as to whether the evidence of such a witness who has turned hostile can be the basis for conviction. Interestingly, the informant (PW-1) in his evidence had stated that the appellant used to call the victim to his house on several occasions, thereby implying that she had been raped on various occasions. If that be the case, it is not understood as to why there should be serious damage caused to the private parts of the victim only on 07.03.2018.

40. The judgements of the Supreme Court mentioned above, clearly show that even the evidence of a hostile witness can be used by the prosecution, if the same is supportive of the prosecution case. Thus, it is clear that the evidence of the victim could be used for corroborating the evidence supporting the prosecution case. In the present case, the only real evidence required to prove the guilt of the appellant, was the evidence of the victim, i.e. PW-3. However, the PW-3 has been declared a hostile witness and she was accordingly cross-examined by the Prosecution. Thus, while the evidence of the victim was to be corroborated, the victim’s statement can now only be used for corroborative purpose. As such, the evidence given by the victim on being cross examined by

the Prosecution, cannot be safe to be used for the purpose of conviction of the appellant, without there being any corroboration of the same. As the evidence of the victim does not corroborate the evidence of any reliable witness and as the medical report, in our view, does not conclusively prove that rape had been committed upon the victim, we hold that the conviction of the appellant by the learned Trial Court under section 6 of the PCOSO Act was unsustainable. Thus, we find that the appellant would have to be given the benefit of doubt from the charge framed against him, on account of the discrepancy in the evidence of the victim before the learned Trial Court, wherein she had initially stated that she had fallen from a tree and injured her urinary passage. Another aspect of the matter is the evidence of DW-1, who had stated that the mother of the victim had taken Rs. 1200/- from her, for the medical treatment of PW-3, who had fallen from a tree. We do not find any reason to doubt the evidence of DW-1 and keeping in view the many gaps and lapses in the prosecution case, we are of the view that the case may not be a case of penetrative sexual assault.

41. In view of the reasons stated above, we do not find it safe to uphold the decision of the learned Trial Court, inasmuch as, there is a grave discrepancy in the evidence of the victim and the absence of evidence with regard to what has happened in FAAMCH, Barpeta, from 07/03/2018 till the alleged discharge of the victim from the said hospital. To ensure that an innocent person is not convicted and keeping in view the lacunas mentioned above, we find that the prosecution has not been able to prove the guilt of the appellant beyond all reasonable doubt. Accordingly, the impugned judgement dated 14/11/2022 passed by the learned Additional Sessions Judge-cum-Special Judge (POCSO), Barpeta, in Special POCSO Case No. 25/2018, is hereby set aside. The appellant is accordingly acquitted of the charge framed against him. The respondents are

directed to immediately release the appellant from judicial custody, if not wanted in any other case.

42. Send back the TCR.

43. In appreciation of the assistance provided by Ms. D. Borpujari, learned Legal Aid Counsel, her fee should be paid by the Gauhati High Court Legal Service Committee, as per norms.

JUDGE **JUDGE**

Comparing Assistant

Sukhamay Dey

Digitally signed by Sukhamay Dey
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