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2026:GAU-AS:16966-DB

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

Case No. : CRL.A(J)/131/2024

RAJIB MEDOK
S/O. LATE DEBANANDA MEDOK, R/O. AYENGIA CHARIALI, P/S. SILAPATHAR, DIST. DHEMAJI, ASSAM.

VERSUS

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

2:SWAPAN DAS
S/O. NIRANJAN DAS
R/O. AYENGIA CHARIALI
P/S. SILAPATHAR
DIST. DHEMAJI
ASSAM

Advocate for the appellant : Mr. S. Biswas, Legal Aid Counsel.

Advocate for the respondents : Mr. R.R. Kaushik, Addl. P.P, Assam,
None for the respondent no.2.

:::BEFORE:::
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MR. JUSTICE SANJEEV KUMAR SHARMA

Date on which judgment is reserved : **12/11/2026**

Date of pronouncement of judgment : **18/11/2026**
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. S. Biswas, learned counsel for the appellant. Also heard Mr. R. R. Kaushik, learned APP for the State.

2. This is an appeal against the impugned judgment dated 05.10.2024, passed by the Special Judge (POCSO), Dhemaji, in Special POCSO Case No. 39/2021, arising out of Silapathar P.S. Case No. 374/2021, by which the appellant has been convicted under Section 448 IPC read with Section 6 of the POCSO Act and has been accordingly sentenced to undergo rigorous imprisonment for 1 year with a fine of Rs. 1,000/-, in default, to undergo rigorous imprisonment for 1 month under Section 448 IPC and to suffer rigorous imprisonment for 25 years with a fine of Rs. 20,000/-, in default, to suffer rigorous imprisonment for 2 years under Section 6 of the POCSO Act.

3. The conviction of the appellant has been done on account of the appellant committing house trespass in the house of the victim, besides having committed aggravated penetrative sexual assault on the victim child, who was less than 12 years, inasmuch as, the victim was born on 05.05.2009 as per the date of birth recorded in the seizure list, by which the victim's birth certificate was seized and the appellant was seen raping the victim on 01.08.2021 by the father of the victim.

4. The brief facts of the case is that an FIR dated 01.08.2021 was submitted by the informant (PW-1), who was the father of the victim, stating that on 01.08.2021, at around 1 pm, the appellant had raped his daughter (PW-1), who was approximately 12 years old, by forcibly laying her on a bed in his house and gagging her mouth and while trying to rescue her. When he came home, he saw his daughter being raped by the appellant and while trying to rescue her, the appellant pushed him away and fled.

5. Pursuant to the FIR dated 01.08.2021, Silpathar P.S. Case No. 374/2021 under Sections 447/376 IPC, read with Section 4 of the POCSO Act, was registered.

6. The investigation of the case was endorsed to Sub-Inspector Kuladhar Konwar. After the case I/O investigated the case, he submitted the charge sheet against the appellant under Sections 447/376(3) IPC read with Section 6 of the POCSO Act.

7. The learned Trial Court thereafter framed charges against the appellant under Section 448 IPC read with Section 6 of the POCSO Act, to which the appellant pleaded not guilty and claimed to be tried.

8. The learned Trial Court examined 9 Prosecution Witnesses and after examining the appellant under Section 313 Cr.PC, the learned Trial Court came to a finding that the appellant had committed offences punishable under Section 448 IPC read with Section 6 of the POCSO Act. The learned Trial Court thereafter convicted the appellant under Section 448 IPC and Section 6 of the POCSO Act and sentenced him accordingly.

9. The appellant's counsel submits that the evidence of the Doctor who examined the victim, does not corroborate the evidence of the Prosecution Witnesses, to the effect that aggravated penetrative sexual assault had been committed by the appellant, inasmuch as, there was no injury on the private parts or the body of the victim. There was also no evidence of

recent sexual intercourse on the victim, as stated by the Doctor in his evidence, which was a prerequisite for coming to a finding that rape had been committed upon the victim. The counsel for the appellant further submits that there was discrepancy in the statement of the victim made under Section 164 Cr.P.C. vis-à-vis the testimony given by the victim's father during trial. He also submits that the mother of the victim had not been examined by the learned Trial Court, to ascertain whether the appellant had gone into the house of the victim and raped the victim. There was also no hue and cry made by the victim at the time of the alleged rape, which would have drawn the neighbours of the victim at the place of occurrence. He also submits that while the Doctor's evidence and his medical report showed that the victim was 4 weeks pregnant at the time of examination of the victim, the same did not prove that it was the appellant who had impregnated the victim. As there was no corroborative evidence to prove the testimony of the victim that she had been subjected to penetrative sexual assault, the conviction and sentence imposed upon the appellant by the learned Trial Court was not sustainable. As such, the appellant should be acquitted of the charges framed against him, by setting aside the impugned judgment.

10. The learned APP, on the other hand, submits that besides the testimony of the victim, which is enough to convict the accused in a case of sexual assault, if it is found to be truthful and inspires the confidence of the Court, the evidence of the father corroborates the same, as he had stumbled on to the appellant having sexual intercourse with his 12 year old daughter. The evidence of the Doctor also corroborated the fact that the victim had been subjected to sexual intercourse, not only because of the fact that she was pregnant, but also because of the rupture of the hymen of the victim.

11. The learned APP further submits that there was no enmity between the father of the victim and the appellant in the evidence adduced by the witnesses, except for a general statement made by PW-2 (father), to the effect that he did not have a good relationship with the appellant. He also submits that the issue in the present case is not with regard to the pregnancy of the victim, though the said fact/evidence had been put to the appellant during his examination under Section 313 Cr.P.C. The issue is whether the appellant had committed

penetrative sexual assault on the victim on 01.08.2021. The age of the victim being below 12 years, as testified by the Doctor, which was not questioned by the appellant, there was no infirmity in the conviction and sentence of the appellant under Section 448 IPC for house trespass and under Section 6 of the POCSO Act, for committing aggravated penetrative sexual assault on the victim. He accordingly prays that the impugned judgment should not be interfered with.

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

13. The evidence of PW-1 (informant) is to the effect that the informant (PW-2) was her father and that at present the victim was reading in Class-VII. She also stated that she knew the appellant and his house was situated near their house, which was separated by three other houses. The victim also stated that the appellant was a wage-earner and that the incident had occurred on 01.08.2021 at about 1 pm in the victim's house, when she was alone. Her mother was also not in the house at the time of incident, as her mother had gone to answer nature's call in her relatives' latrine located in another house. The victim's father was also not in the house, as he had gone to watch a football match in the village field. Her younger brother, who was 9 years old, was also not in the house. When she was weaving cloth in a handloom (tat hal) inside her house, the appellant entered her house and took her to her father's bed, whereupon she was laid on the bed. The appellant then removed her panty and inserted his penis into her vagina. While the appellant was having sexual intercourse with the victim, the victim's father entered the house and saw the incident and the appellant fled, after pushing her father. After her mother came back, the victim narrated the incident to her mother, stating that the appellant had raped her. On the same night, the victim was taken to Dhemaji Civil Hospital, where the doctor examined her. The victim was then taken to the court after about 3 days and her statement was recorded by the Magistrate. Her statement recorded under Section 164 Cr.PC was exhibited as P1/PW1 and she identified her signature.

In her cross-examination, the victim denied the suggestion that the appellant

had not raped her. She also denied the suggestion that she had been tutored by her mother.

14. The evidence of PW-2 (informant), who is the father of the victim, is to the effect that he knew the appellant. One day in the month of *Aghun* at about 12 noon, when he came home after watching a cricket match, he saw the appellant raping his daughter. When he tried to assault the appellant, the appellant fled from his house. PW-2 then lodged an FIR against the appellant in Silpathar Police Station. He also stated that at the time of the occurrence of the incident, the age of the victim was 11 years.

In his cross-examination, PW-2 stated that the appellant was his neighbour and he used to create commotion after consuming alcohol. He stated that he did not have good relations with the appellant. He also stated that he did not have any enmity with the appellant. He also denied the suggestion that he had lodged a false case against the appellant.

15. The evidence of PW-3 is to the effect that she knew the informant and the appellant. About 3 years back, she had heard that the appellant had raped the victim.

16. The evidence of PW-4 is to the effect that she knew the appellant and the informant. About 3 years back, she heard a hue and cry and when she went to the house of PW-2, where PW-2 told her that the appellant had raped his daughter.

In her cross-examination, PW-4 stated that she had not told the police, that about three years back, she had gone to the house of the informant on hearing a hue and cry, wherein the informant told her that the appellant had raped his daughter. She also denied the suggestion that the appellant did not tell her that the appellant

had raped his daughter.

17. The evidence of PW-5, who is the elder sister of the informant, is to the effect that she knew the appellant. About three years back, the informant had told her that the appellant had raped his daughter.

18. The evidence of PW Nos. 6 and 7 is to the effect that they knew the appellant and the informant. However, they did not know anything about the incident.

19. The evidence of PW-8 (doctor) is to the effect that on 01.08.2021, she examined the victim, while working as Medical and Health Officer (Ayur) at Dhemaji Civil Hospital. She was informed that a known boy from her village entered the victim's house, during the absence of her parents and sexually assaulted her. The general physical examination of the victim showed as follows:-

"*i. development of hair –*
a) Axillary – not fully developed
b) Pubic- not fully developed.
ii. Breast:-
Development- not fully developed
Findings-not fully developed"

There was also no violent mark on the body or the private parts of the victim. The examination of the genitalia of the victim was as follows:-

"*Examination of the genitalia:*
1. Development of genitalia- not fully developed.
2. Pubic hair- not fully developed.
3. Clitoris- not fully developed.
4. Labia majora and minora- not fully developed.

5. Fourchette- not fully developed.
6. Hymen- Ruptured.
7. Vagina- not fully developed.
8. Injuries- No.
9. Discharge and stains - No.
10. Internal examination - Her hymen was not intact."

As per the radiological examination of the victim, which was done by Part X-ray, the age of the victim was found to be below 12 years. Further, the Ultra-sonography-USG revealed that there was a single intrauterine early pregnancy (Gestational sac corresponding 4 weeks 4 days). Name of Sonologist Dr. B. Kuli (Aisha Diagnostic, Silapathar).

In the opinion of the doctor (PW-8), her finding on the examination of the victim was as follows:-

"*Her pregnancy test was positive.*
Hymen was not intact.
USG revealed- Single intrauterine early pregnancy. (Gestational sac corresponding 4 weeks 4 days).
X-ray reveals- Her age was below 12 years."

20. The evidence of PW-9, who is an Inspector of Police, is to the effect that on 01.08.2021, PW-2 had lodged an FIR in the Silapathar Police Station (P.S) and the then O/C of the Silapathar P.S had registered a case and endorsed the same to S.I Kuladhar Konwar, to investigate the case. After investigating the case and having the victim medically examined and her statement recorded under Section 164 Cr.P.C, the case I.O submitted a charge-sheet under Sections 447/376(3) IPC read with Section 6 of the POCSO Act against the appellant.

In his cross-examination, PW-9 stated that it was not stated in the case diary as to wherefrom the birth certificate of the victim had been seized by the case I.O. There was also no mention in the case diary as to whether the case I.O had confirmed the date of birth of the

victim, by going to the office of the Registrar of Births and Deaths.

21. The examination of the appellant under Section 313 Cr.P.C shows that the appellant has given a blanket denial with regard to the evidence adduced against him, by stating that they were all false and that a false case had been registered against him.

22. The statement made by the victim under Section 164 Cr.P.C is to the effect that while she was weaving a *mekhela chadar (shawl)* on a handloom, the appellant came and caught hold of her hand and gagged her mouth. He then pulled her inside the room and committed inappropriate acts with her. Just at that time, her father came in to take his mobile charger and on witnessing the incident, he raised a hue and cry. The appellant requested her father not to inform anyone about the incident. However, when her father refused his request, the appellant caught her father by the neck and then fled from the place of occurrence.

23. As can be seen from the evidence of the appellant, she had been subjected to rape by the appellant and the same had been witnessed by her father when he suddenly came home. When the victim's father tried to assault the appellant, the appellant fled. This evidence of the victim has been corroborated by her statement made under Section 164 of the Cr.P.C.

24. The evidence of the eye-witness (PW-1), who saw the victim being raped by the appellant, i.e. the father, shows that he came home after watching a cricket match and when he tried to assault the appellant, the appellant ran away. There is a slight discrepancy, inasmuch as, the victim's father had said that he had watched a cricket match, while the victim had stated in her evidence that her father had gone to watch a football match. This discrepancy in the statements made, as to whether the victim's father had gone to see a football match or a cricket match, is a minor discrepancy and does not go to the root cause of the issue involved in the present case, which is whether the appellant had raped the minor victim girl.

25. The evidence of the doctor is to the effect that not only was the hymen of the victim not

intact, but the examination of the victim revealed that she was 4 weeks 4 days pregnant and that her X-ray report revealed her age to be below 12 years of age. The doctor had also stated in her evidence that the private parts of the victim including her pubic hair, were not fully developed, besides her hymen being ruptured. This evidence of the doctor, in our view, also corroborates the testimony of the victim that she had been subjected to penetrative sexual assault by the appellant. Though the appellant has tried to make out a case that there is no finding with regard to the appellant being the cause of the pregnancy of the victim, we are of the view that the issue to be gone into at present, is only with regard to whether the appellant had committed penetrative sexual assault on the victim on 01.08.2021 at about 1 p.m in the house of the victim. In terms of the evidence of the victim and the account of the eye-witness, i.e., the father of the victim having seen the incident coupled with the evidence of the doctor, we have no doubt that the Prosecution has proved beyond all reasonable doubt that the appellant had committed penetrative sexual assault on the victim.

26. With regard to the stand of the appellant's counsel that the non-examination of the mother of the victim vitiated the Prosecution case, the evidence of the victim is to the effect that her mother was not at home at the relevant point of time, as she had gone to answer to nature's call in the latrine located in the house of their relative, inasmuch as, the latrine in their house was not in order. The fact that the mother of the victim was not in the house at the time the incident occurred, is clear from the later part of the testimony of the victim, where she stated that her mother came home after answering the call of nature, whereupon the victim narrated the incident to her mother. In view of the fact that the mother of the victim was not in the house at the relevant point of time, we do not see what relevance the evidence of the mother would be in the present case.

27. With regard to the stand taken by the appellant's counsel that the victim did not cry out at the time of the rape, we have to remind ourselves of the fact that the victim is a young child and just because a victim of sexual assault does not cry out at the time of the sexual assault, does not mean that no rape had occurred. A victim of a sexual assault need not cry out for fear at the time of the sexual assault and it cannot be said that the victim had not been raped, only because

she did not cry out.

28. We also find that the present case cannot be said to be a false case, only because of a general statement made by the father of the victim that he did not have good relationship with the appellant.

29. The blanket denial by the appellant with regard to the questions put to him during his examination under Section 313 Cr.P.C in relation to the evidence of rape committed by him, leads to an inference that the appellant was guilty of the crime. It is not the case of the appellant that he was not in the house of the victim. The appellant has also not given any suggestion in the cross-examination of the Prosecution Witnesses, to the effect that he was never in the house of the victim at the relevant point of time. In the case of ***Raj Kumar Vs. State of Madhya Pradesh*** reported in ***(2014) 5 SCC 353,*** the Supreme Court has held that in the event of complete denial, silence and/or non-explanation of incriminating materials during examination under Section 313 Cr.P.C, the Court would be entitled to draw an inference including adverse inference against the accused, as may be permissible in accordance with law.

30. On considering the above facts, we have no doubt that the Prosecution has been able to prove that the appellant had committed penetrative sexual assault on the victim. Further, it is not necessary that there has to be an injury on the private parts of the victim, to prove that rape had been committed. No suggestion has been put by the appellant to the Prosecution Witnesses, including the victim, that she was raped by another person other than the appellant.

31. The above being said, we find that the appellant has not questioned the age of the victim. However, the same does not mean that the Prosecution is not required to prove the age of the victim, inasmuch as, the appellant has been convicted under Section 6 of the POCSO Act only, on account of the penetrative sexual assault committed by him upon the victim on 01.08.2021. The seizure list by which the Birth Certificate of the victim had been seized, records the fact that the Date of Birth of the victim was 05.05.2009. Interestingly, while the seizure list has

been exhibited as Ext P/5 (PW-9), the victim's Birth Certificate has not been exhibited. If we are to accept the Date of Birth of the victim to be 05.05.2009 in terms of the Date of Birth mentioned in the seizure list, which has apparently been made on the basis of the Birth Certificate of the victim, then the victim would have been more than 12 years at the time of the incident, for which Section 5(m) of the POCSO Act would not be attracted. Further, there is no finding by the learned Trial Court that the victim was subjected to penetrative sexual assault more than once, to attract Section 5(l) of the POCSO Act. The charge framed by the learned Trial Court under Section 6 of the POCSO Act has only spoken about house trespass and the commission of aggravated penetrative sexual assault upon the victim on 01.08.2021 at about 1 p.m, which can only be relatable to Section 5(m) of the POCSO Act. As Section 5(m) of the POCSO Act is relatable to penetrative sexual assault committed on a child below 12 years, the conviction and sentence imposed upon the appellant under Section 6 of the POCSO Act is not sustainable, given the fact that Section 5(m) of the POCSO Act is not attracted to the facts of this case, the victim being above 12 years of age as on 01/08/2021.

32. Section 4(2) of the POCSO Act provides as follows:

> "*(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine."*

33. As per the evidence of the doctor, the radiological examination of the victim showed that the age of the victim was below 12 years. As such, the benefit of (+) (-) one or two years would have to be added to the age of the victim of a sexual offence, to determine the age of the child in terms of the decision of the Supreme Court in the case of ***Mahadeo v. State of Maharashtra,*** reported in ***(2013) 14 SCC 637***, where it has been held that the procedure for determination of age of a juvenile in conflict with law under Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 would also apply for determination of the age of a rape victim. Keeping the ratio of the above decision in view, which is somewhat similar to Section

94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, we hold that the Ossification test can be conducted upon the victim of a sexual assault, for determining victim's age. Further, even if the benefit of ± 1 year is to be given to determine the age of the victim in the present case, the same would show that the victim was below 14 years at the relevant time of the incident, in view of the ossification test having held the victim to be below 12 years.

34. The Supreme Court in the case of ***Pawan Kumar Vs. State of Uttar Pradesh [(2023) 15 SCC 683], Vinod Katara Vs. State of U.P. [(2023) 15 SCC 210]*** and ***Rajni Vs. State of U.P. [AIR 2025 SC 2787],*** gave the age benefit of only 1 year on the lower side to a child/juvenile in conflict with law, as there cannot be an exact assessment of age in the medical test conducted upon the said child. In the case of ***Karan Vs. State of M.P.,*** reported in (***2023) 5 SCC 504***, the Supreme Court held that Ossification Test will only give a broad assessment of the age. It cannot give an exact age. It also held that there is a element of margin of plus or minus 1-2 years.

35. The Supreme Court in the case of ***Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir [(1982) 2 SCC 538],*** held that one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. The Supreme Court in the case of ***Ram Suresh Singh Vs. Prabhat Singh alias Chhotu Singh & Anr. [(2009) 6 SCC 681],*** held that if a medical report is to be considered for ascertaining the age of a juvenile in conflict with law, error of two years in determining the age of the juvenile is possible.

36. Thus, though the radiological report which comes within the meaning of an ossification test, has found the victim to be below 12 years of age, even the addition of another two years to the age of the victim would take her age to be below 14 years. In any event, the victim would be below 16 year of age.

37. In view of the above, while Section 5(m) of the POCSO Act would not be attracted to the

case in hand, the appellant's action attracts Section 4(2) of the POCSO Act, as the child is and would be below 16 years of age.

38. In view of the reasons stated above, the conviction and sentence of the appellant under Section 6 of the POCSO Act is hereby set aside as Section 5(m) of the POCSO Act is not attracted. However, the victim being below 16 years of age at the time of being subjected to penetrative sexual assault by the appellant, the appellant is guilty of having committed the offence of penetrative sexual assault under Section 4(2) POCSO Act. Accordingly while the conviction and sentence of the appellant under Section 6 of the POCSO Act is hereby set aside, the appellant is convicted under Section 4(2) of the POCSO Act. The charge is altered from Section 6 of the POCSO Act to Section 4(2) of the POCSO Act. The appellant is accordingly sentenced to undergo rigorous imprisonment for 20 years with a fine of Rs.20,000/-, in default to suffer rigorous imprisonment for another 2 years under Section 4(2) of the POCSO Act. The conviction and sentence under Section 448 IPC is not interfered with. The sentences under Section 448 IPC and Section 4(2) of the POCSO Act shall run concurrently. The impugned judgment dated 05.10.2024, passed by the Special Judge (POCSO), Dhemaji, in Special POCSO Case No. 39/2021, arising out of Silapathar P.S. Case No. 374/2021 is accordingly modified to the extent indicated above.

39. The appeal is accordingly disposed of.

40. Send back the TCR.

41. In appreciation of the assistance provided by the legal Aid Counsel for the appellant, his fees should be paid by the Gauhati High Court Legal Services Committee as per norms.

JUDGE **JUDGE**

Comparing Assistant

Sukham ay Dey

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