GAHC010246272023

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

Case No. : CRL.A(J)/139/2023

DEBAN GOGOI
S/O LATE BISTURAM GOGOI,
VILL.- NAGAJANKA, BASAGAON,
P.O.- NAGAJANKA, P.S.- MARIANI,
DIST.- JORHAT, ASSAM, PIN- 785634.

VERSUS

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

2:GEETA GOGOI
W/O SHRI UMESH GOGOI

VILL.- NAGAJANKA
BASAGAON

P.O.- NAGAJANKA
P.S.- MARIANI

DIST.- JORHAT
ASSAM
PIN- 785634

Advocate for the appellant : Mr. M.K. Sharma, Legal Aid Counsel.

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Advocate for the respondents : Mr. R.R. Kaushik, Addl. P.P., Assam,
Mr. H. Gupta, Amicus Curiae for (R-2)

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

Date of hearing and judgement : 05/11/2026

JUDGMENT & ORDER (ORAL)

(M. Zothankhuma, J)

1. Heard Mr. M.K. Sharma, learned Legal Aid Counsel for the appellant. Also heard Mr. R.R. Kaushik, learned APP for the State and Mr. H. Gupta, learned Amicus Curiae for the respondent no. 2.

2. This appeal has been filed against the impugned judgment dated 22/08/2023, passed by the learned Special Judge, Jorhat, in Special Case no. 33/2020, arising out of Mariani PS Case no. 72/2020, by which the appellant has been convicted under Section 6 of the POCSO Act read with Section 376(AB) IPC. However, in view of Section 42 of the POCSO Act, 2012, the appellant has been sentenced under Section 6(1) of the POCSO Act, to undergo rigorous imprisonment for life and to pay a fine of ₹5,000/- in default, to undergo rigorous imprisonment for a period of 2 years, on account of having caused aggravated penetrative sexual assault on a 7 year old girl.

3. The brief facts of the case is that an FIR dated 26/02/2020 was submitted by the informant (PW-2) to the Officer-in-Charge, Mariani Police Station, stating that around 2 pm on 25/02/2020, the married appellant, who resided near their house, had given two bananas to her daughter, who was 7 years old. Thereafter, on taking her inside his house, he had committed a bad act on her after removing her clothes. On returning from her workplace, PW-2 found the victim in a pensive mood and when asked about the same, the victim narrated the entire

incident to her. As the appellant had ruined her daughter's life, she wanted legal action to be taken against the appellant. Pursuant to the FIR dated 26/02/2020, Mariani PS Case Number 72/2020 under Section 376(2)(i) IPC read with Section 4 of the POCSO Act was registered.

4. The Investigating Officer (PW-8) thereafter started the investigation and had the victim medically examined by a Doctor, besides having her statement recorded under Section 164 Cr. PC. After completing the investigation, the Investigating Officer submitted a charge sheet against the appellant, on finding a *prima facie* case established against the appellant under Section 376(2)(i) IPC read with Section 4 of the POCSO Act.

5. The above being said, the learned Trial Court framed two charges against the appellant under Section 376(AB) IPC and Section 6 of the POCSO Act, to which the appellant pleaded not guilty and claimed to be tried.

6. The learned Trial Court thereafter examined 8 Prosecution Witnesses and after examining the appellant under Section 313 Cr.PC, it came to a finding that the appellant had committed an offence punishable under Section 376(AB) IPC read with Section 6 of the POCSO Act. However, the appellant was sentenced to undergo rigorous imprisonment for life with a fine of ₹5,000/-, in default, to undergo rigorous imprisonment for a period of 2 years, in terms of Section 42 of the POCSO Act.

7. The appellant's counsel has now put to challenge the impugned conviction and sentence passed by the learned Trial Court, on the ground that the appellant had not committed aggravated penetrative sexual assault on the victim, inasmuch as, the statements made by the victim under Section 161 Cr.PC and 164 Cr.PC only spoke of the appellant's private parts having touched the private parts of the victim. There was no penetration. This fact has been corroborated by the evidence of the IO (PW-8) in terms of Section 145 of the Evidence Act. Thus, when the testimony of the victim, which is to the effect that the appellant had inserted his private parts into the private parts of the victim, had not been corroborated and had been contradicted by the victim's statements made under Section 161 Cr.PC and 164 Cr.PC, the learned Trial Court committed an error in convicting the appellant under Section 6 of the POCSO Act. He further submits that the evidence of the Doctor, who conducted the medical

examination of the victim, did not support the testimony of the victim that she had been raped. He accordingly submits that the appellant could have at best, been convicted only for sexual assault and not for having committed aggravated penetrative sexual assault.

8. Mr. R.R. Kaushik, the learned APP for the State and Mr. H. Gupta, learned Amicus Curiae for the respondent no. 2, have fairly submitted that the statement made by the victim under section 161 Cr.P.C and 164 Cr.PC contradicts her testimony made before the learned Trial Court. It is also admitted by them that the medical evidence does not conclusively prove that there was any penetration of the private parts of the victim by the private parts of the appellant. However, they submit that the action of the appellant squarely attracts the provision of sexual assault, as provided in section 7 of the POCSO Act. As the victim is below 12 years of age, as can be seen from the ossification report made by the Doctor showing her age as 7-9 years, Section 9 (m) of the POCSO Act would be attracted to the case.

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

10. In the case of ***R Shaji Vs. State of Kerala*** reported in ***(2013) 14 SCC 266***, the Supreme Court has held that statements made under section 161 Cr.PC can be used for the purpose of contradiction and statements made under section 164 Cr.PC can be used for the purpose of contradiction or corroboration.

11. In the present case, we have perused the Trial Court records and have found that the victim in her statement made under Section 161 Cr.PC, has stated that besides the appellant having put his saliva on the private parts of the victim girl, the private parts of the appellant had touched the private parts of the victim girl. Similar is the statement of the victim made under Section 164 Cr. PC. In terms of the judgment of the Supreme Court in ***R Shaji (Supra),*** it is clear that the statement made by the victim under section 164 Cr.PC does not corroborate the testimony of the victim. In fact, the victim's statements under section 161 and 164 Cr.PC contradicts the testimony of the victim given during trial.

12. We have also noticed that the victim has been cross-examined by the defence with regard to the contents of her statement made under section 161 Cr.PC and 164 Cr.PC. The same

question has also been put to the IO (PW-8), to the effect that the victim had not told the IO that the appellant had inserted his private parts into the private parts of the victim. This fact has not been denied by the IO (PW-8) in his evidence. As such, we find that the defence has been able to contradict the testimony given by the victim that the appellant had committed penetrative sexual assault on the victim, in terms of section 145 of the Evidence Act.

13. We also find that the Doctor who had examined the victim (PW-7) has clearly stated in his testimony that there was no evidence of recent sexual intercourse detected at the time of examination of the victim and there was no evidence of injury on her person. The medical report also states that the hymen of the victim was intact. It is no doubt true that absence of injury or an intact hymen does not *ip-so-facto* mean that no rape has occurred. However, due to the testimony of the victim that she had been subjected to penetrative sexual assault, having been clearly contradicted by the IO in terms of section 145 of the Evidence Act, we are unable to agree with the learned Trial Court that the victim had been subjected to penetrative sexual assault in terms of Section 3 of the POCSO Act, inasmuch as, the same has not been proved beyond all reasonable doubt. We have also noticed that the evidence of all the other Prosecution Witnesses is based on what they had heard. However, the evidence of PW-3 is relevant in this respect wherein she has stated in her testimony that the victim had told her that the appellant had misbehaved with her and tried to commit a bad act on her. The relevant portion of the testimony of PW-3 given during trial, regarding what the victim told PW-3, is reproduced herein below as follows.

> "*The accused was sitting in the verandah of his house. As told to me by the victim, "when the victim was about to leave the house, the accused called her on the pretext of giving a banana but the accused grabbed the victim, took her inside, shoved her inside a bed and misbehaved with her and tried to commit beya kaam with her".*
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> *When the accused tried to commit beya kaam with the victim, my daughter called the victim's name, and the accused let the victim go."*

The above extract of the testimony of PW-3, in our view, only points towards an attempt to commit penetrative sexual assault and does not prove that the appellant had committed

penetrative sexual assault on the victim.

14. In view of the reasons stated above, we are of the view that the foundational facts with regard to the appellant committing penetrative sexual assault on the victim had not been established by the Prosecution at any point of time and as such, the requirement of the appellant to rebut any presumption of guilt with regard to penetrative sexual assault does not arise. As such, we hold that the conviction and sentence of the appellant under Section 6 of the POCSO Act by the learned Trial Court is not sustainable and the same is accordingly set aside.

15. The above being said, the testimony of the victim with regard to the appellant having committed sexual assault on the victim is apparent. Further, the same is also corroborated by the statement made by the victim under Section 164 Cr.PC. Thus, while the issue of the appellant having committed penetrative sexual assault on the victim has not been proved, the corroboration of the victim's testimony by her statement under Section 164 Cr.PC proves the fact that the appellant had sexually assaulted the victim in terms of section 7 of the POCSO Act 2012. As the victim was below 12 years of age at the time of incident, Section 9(m) of the POCSO Act is attracted, which is punishable under Section 10 of the POCSO Act. Accordingly, we convict the appellant under Section 10 of the POCSO Act and sentence him to undergo rigorous imprisonment for 6 years and 6 months with a fine of Rs. 5000/-, in default, to undergo rigorous imprisonment for a further 6 months. The impugned judgment dated 22/08/2023 passed by the learned Special Judge, Jorhat, in Special Case No. 33/2020 is hereby modified to the extent indicated above. However, the sentence awarded to the appellant under Section 6 of the POCSO Act, pursuant to the impugned judgment dated 22/08/2023, is set aside and the appellant would have to undergo the sentence provided by way of this judgment under Section 10 of the POCSO Act. The period of judicial custody already undergone by the appellant would be adjusted against the period of sentence to be undergone in terms of this judgment.

16. The impugned judgment is accordingly modified to the extent indicated above.

17. Appeal is accordingly disposed of.

18. Send back the TCR.

19. In appreciation of the assistance provided by Mr. M.K. Sharma, learned Legal Aid Counsel and Mr. H. Gupta, learned Amicus Curiae, their fees should be paid by the Gauhati High Court Legal Services Committee, as per norms.

JUDGE **JUDGE**

Comparing Assistant