GAHC010082312019

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

Case No. : Crl.A./169/2019

MD. BABUL HUSSAIN @ FAKARUDDIN ALI AHMED
S/O- LATE AKTOR ALI, R/O- CHETUAIKHAITY, P.S. LAHARIGHAT, DIST.- MORIGAON, ASSAM.

VERSUS

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

2:MUSTT. AFIA BEGUM
W/O- LATE MANASH ALI
R/O- MAHMARI PATHAR
P.S. LAHARIGHAT
DIST.- MORIGAON, ASSAM
PIN- 782015

B E F O R E

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocates for the Petitioner	:	Mr. S.K. Nargis
Advocates for the Respondents	:	Mr. B.B. Gogoi
Date of Hearing	:	01.02.2024
Date of Judgment	:	20.04.2024

JUDGMENT & ORDER (CAV)

This appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (CrPC for

short) takes exception to the Judgment and order dated 15.03.2019 passed by the learned Special Judge, Morigaon, in connection with Special Sessions (POCSO) Case No. 11/2015 under Sections 376(2) (i) of the Indian Penal Code, 1860 (IPC for short) read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act for short). The appellant was convicted under Section 376 (2) (i) of the IPC, read with Section 4 of the POCSO Act and sentenced to undergo rigorous imprisonment for 10 (Ten) years and to pay a fine of Rs.2,000/- (Rupees Two Thousand) with default stipulation.

Brief Facts:

2. The genesis of the case was that an FIR dated 04.09.2013 was lodged with the police at Laharighat Police Station (PS for short) by the informant-say 'Y' alleging *inter alia* that Babul Hussain (hereinafter, also referred to as the appellant), a pan shop owner committed sexual assault on the 10 year old daughter of the informant, who will hereinafter be referred to as the victim or 'X'.

3. A Laharighat PS Case No. 209/2013 was registered under Section 376 IPC read with Section 6 of the POCSO Act and the Investigating Officer (IO in short) embarked upon the investigation. He recorded the statements of the witnesses and forwarded the victim for recording her statement under Section 164 CrPC and also for medical examination. On finding a prima facie case against the appellant, charge sheet was laid against him under Section 376 IPC.

4. At the commencement of trial, a formal charge was framed under Section 376 IPC by

the Assistant Sessions Judge. Witnesses were examined but the Assistant Sessions Judge learnt that the victim was below 18 years of age and this case had to be tried under the POCSO Act and vide order dated 01.04.2015, the case was forwarded to the learned Special Judge (POCSO), for trial. The learned Special Judge then altered the charge and framed charge under Section 376 (2) (i) IPC, read with Section 4 of the POCSO Act and the appellant abjured his guilt and claimed innocence. The prime witnesses were re-examined after alteration of charges and they were again cross-examined thereafter. Although the prosecution and the defence did not re-examine several witnesses who were already examined by the learned Assistant Sessions Judge, PW-1 and PW-2 were re-examined after alteration of charges.

5. To substantiate its stance, the prosecution adduced the evidence of 13 (Thirteen) witnesses and the defence cross examined the witnesses to refute the charges. The defence did not cross examine PW.7, PW.8 and PW.10 (MO). On the incriminating evidence projected by the prosecution, the statement of the appellant was recorded under Section 313 CrPC and the accused/appellant, in a mechanical manner denied the incriminating allegations projected by the prosecution witnesses. His answers under Section 313 CrPC were evasive in nature. To all the incriminating circumstances, the appellant answered as follows:

"*I am innocent.*"

"*It is false.*"

"*I am not involved with the incident.*"

"*I have no knowledge about the findings of the doctor.*"

6. The appellant also did not tender any evidence in defence.

Findings of the learned trial Court:

7. After addition of charges under the POCSO Act, the prime witnesses were allowed to be cross examined again whilst the other witnesses were not re-cross-examined. It was held by the learned trial Court that this did not cause a dent in the evidence. The learned trial Court has held that the evidence of the prosecutrix has stood firm even after the rigorous cross examination by the defence, and her evidence in the Court is consistent to her statement under Section 164 CrPC. The IO, PW.13's evidence reveals that a chequered, white undergarment was seized from the victim which was forwarded for forensic examination and the forensic report marked as Exhibit-6 has proved the presence of human semen and blood in the undergarment. It was thereby, held that the testimony of the IO, PW.13, which remains un-contradicted, has proved presence of human semen and blood in the undergarment. The learned trial Court has further held that after the charge under the POCSO Act was added, the prosecutrix and the informant were recalled by the prosecution and they were subsequently duly cross examined by the defence. The evidence of the prosecutrix has been corroborated by the evidence of her mother, PW.1and has been substantiated by the evidence of the IO, PW.13 and the forensic evidence. The evidence of other independent witnesses have also substantiated the evidence of the victim and the informant i.e. the evidence of 'X' and 'Y'. It was further observed by the learned trial Court that PW.3's evidence is contrary to the evidence of other witnesses. Harun Al Rasid stated as PW.3 that in the gathering, the victim stated that the appellant did not commit 'bad act' on her. Some independent witnesses

also did not support the evidence of the partisan witnesses.

8. Moinul Haque/PW.8, Abbas Ali/PW.9 and Abdul Malek/PW.11's evidence is contradictory to the evidence of other PWs, who have implicated the appellant. Further, the learned trial Court has dismissed the contradictory evidence of PW.3, PW.8, PW.9 and PW.11 by holding that the testimony of the prosecutrix inspires confidence. The evidence of the victim has also been substantiated and supported by the evidence of PW.4, PW.5 and PW.6. It was held that the evidence of these witnesses are almost in the nature of *res gestae* with regard to the alleged incident of penetrative sexual assault upon the prosecutrix. It was held that the evidence of PW.13, IO, has proved the forensic evidence, which has rendered the medical evidence nugatory. It was held that the doctor's opinion that no evidence of sexual assault was found can be dismissed. Based on the evidence of the prosecutrix, the informant, the IO and the other witnesses i.e. PW.4, PW.5 and PW.6, the learned trial Court held the appellant guilty of offence under Section 376 (2)(i) of the IPC read with Section 4 of the POCSO Act.

Submissions on behalf of the appellant:

9. It is submitted by the learned counsel for the appellant that the medical officer has categorically stated that no evidence of sexual assault could be detected on medical examination of the victim. The age of the victim given by the medical officer is between 11 to 13 years which belies the evidence of PW.1 that her daughter was 10 (Ten) years old at the time of the incident. It is further submitted by the learned counsel for the appellant that it has been erroneously held by the learned trial Court that the forensic report has proved this case against the appellant. There is not a whisper in the evidence that there was a match of

the blood sample and the semen, nor any sort of DNA match was proved by forensic evidence. It has been held in a non-challant manner by the learned trial Court that the FSL report has proved human semen and blood and so, this case has been proved that the appellant has committed rape on the victim without even matching the sample with that of the appellant.

10. It has been assiduously and fervently argued by the learned counsel for the appellant that initially charge was framed under Section 376 IPC vide order dated 13.08.2014 by the learned Assistant Sessions Judge, Morigaon but thereafter, charge was altered and a formal charge was framed under Section 376 (2)(i) of IPC read with Section 4 of the POCSO Act by the learned Special Judge (Sessions), Morigaon vide order dated 25.06.2015. Further, the learned counsel for the appellant has laid stress in her argument that the radiological age of the girl was given as 15 to 16 years by the medical officer, PW.10 but surprisingly, the learned trial Court has held that the age of the victim girl was between 11 to 13 years without any birth certificate or school certificate to substantiate that the age of the victim was between 11 to 13 years.

11. The learned counsel for the appellant has also emphasised through her argument that the investigation was conducted in a slipshod manner. The investigation commenced on the basis of a GD entry. The FIR was not even lodged when the IO embarked upon the investigation. The evidence of the IO reveals that the statement of the victim was not recorded by a woman police in violation of the provisions of the POCSO Act and the CrPC. Exhibit 5 is the seizure list which reveals the names of the seizure witnesses who were not

examined. The signatures of the accused person/appellant and informant were not taken on the seizure list Exhibit 5. From the evidence of PW.12 and PW.13, contradiction has surfaced that the victim was found in Ruhul Amin's house and not in the appellant's house.

12. The evidence of PW.11 reveals that Ruhul Amin influenced the victim to give evidence against the appellant and implicate the appellant through her evidence. Due to prevailing business rivalry between the appellant and Ruhul Amin, a false case was foisted against the appellant.

13. The learned counsel for the appellant laid stress in her argument that according to Modis' Medical Jurisprudence, only after attaining majority, 14 (Fourteen) upper teeth and 14 (Fourteen) lower teeth will be found on examination.

14. The learned counsel for the appellant has submitted that the erroneous Judgment and order of conviction is not sustainable.

Arguments on behalf of the State and Respondent No. 2:

15. *Per contra* the learned Additional Public Prosecutor Mr. B.B. Gogoi laid stress in his argument that the deposition of the victim, PW.2 is consistent to her statement under Section 164 CrPC. It is fairly submitted by the learned Additional Public Prosecutor that the doctor has given her age as 15 to 16 years. So stating, the learned Additional Public Prosecutor has submitted that the learned trial Court has rightly convicted the appellant under Section 4 of the POCSO Act. The informant's evidence has corroborated the victim's evidence.

16. It is submitted that lack of injury or lack of recent evidence of rape does not exonerate an accused of the offence of rape. In certain cases of penetrative sexual assault, there may not be traces or signs of injury or evidence of sexual assault during medical examination of a victim. It cannot be ignored that the forensic report has revealed a positive test of semen and human blood in the undergarment of the victim seized in connection with this case. The learned Additional Public Prosecutor has prayed to dismiss the appeal as the conviction is sustainable.

17. The learned Additional Public Prosecutor laid stress in his argument that the medical officer PW.10 was not cross examined relating to the difference in the clinical age and the radiological age of the victim, so the benefit cannot be taken at this later stage of appeal. The remaining part of the arguments submitted by both the sides will be discussed at the appropriate stage.

18. Heard Ms. S.K. Nargis, learned counsel on behalf of the appellant as well as Mr. B.B. Gogoi, learned Additional Public Prosecutor (APP, for short) for the respondent No. 1/ State of Assam and Mr. P. Saikia, learned Legal Aid Counsel for the respondent No. 2.

19. Now, the question that falls for consideration is whether the learned trial Court has erroneously convicted the appellant under Sections 376 (2) (i) of the IPC, read with Section 4 of the POCSO Act.

20. To decide this case in its proper perspective, the evidence is re-appreciated.

Discussion and Conclusion:

21. PW.1-Y is the informant and she deposed that the appellant is not known to her. About a year ago, (from the date of deposition, i.e., 17.09.2014), one day at about 03:00 pm, her daughter-X went to the appellant's shop to purchase betel nut. She was at home and she was informed that her daughter met with a mishap. At that time, she went to Tinsukia Bazar and noticed an assemblage of people. Public had also assembled at the place of occurrence ('PO', for short). She saw the public helping her daughter into a vehicle which would take her to Lahorighat Police Station. She also went to the Police Station. She lodged the FIR and affixed her thumb impression on the FIR. She did not notice the appellant at that time. The Police then forwarded her daughter to the Morigaon Civil Hospital for medical examination and also to the Magistrate, who recorded her daughter's statement. She was given custody of her daughter.

22. PW.1-Y further testified that the appellant committed rape on her daughter, who was only 10 years old at the time of the incident.

23. This witness was cross-examined at length, but no contradiction as per Section 145 of the Indian Evidence Act, 1872 ('The Evidence Act', for short), qua Section 162 of the CrPC could be elicited through the cross-examination of this witness vis-à-vis, the cross-examination of the IO. She has admitted in her cross-examination that although she had given her daughter's age as 10 years, she did not submit any certificate to prove her daughter's age.

24. It is apt to mention at this juncture that after charge under Section 6 of the POCSO Act was added by the learned trial Court, this witness, PW.1-Y was again re-cross-examined and she testified in her cross-examination that she learnt about the incident from her daughter.

25. The victim-X deposed as PW.2 that about a year ago (from 17.09.2014), one day at about 03:00 pm, she went to the Tinsukia Bazar to buy betel nut from the appellant's shop. The appellant then told her that his wife was not present at home and he took her into his house and then asked her to do the dishes. Accordingly, she washed the dishes, but the appellant then gagged her and committed rape on her. Then, she came to the appellant's shop. At that time, the Police arrived and took her with them. The Police interrogated her and took her to the Morigaon Civil Hospital for medical examination. She gave her statement before the Magistrate. She has proved her statement as Exhibit-1 and her signatures as Exhibits- 1 (1) and 1 (2).

26. In her cross-examination, the victim testified that she got acquainted to the appellant, 4/5 months before the incident. She used to purchase recharge vouchers from the appellant's shop. Her mother also used to purchase articles from his shop. To the questions posed to her during cross-examination, the victim also replied that she did know whether her mother used to purchase articles from the appellant on credit. She also admitted that they are very poor. She has also admitted in her cross-examination that she gave her statement before the Magistrate according to the narrative of Ruhul Amin, Fakaruddin and Safiqul Islam, whose shops are located near the appellant's shop. She has stated that she used to address the above named persons, Ruhul, Fakaruddin and Safiqul, as uncle (Mama). She has also admitted in her cross-examination that she did not know her actual age.

27. I find substance in the argument of the learned counsel for the appellant that the evidence of PW.1, does not inspire confidence. PW.1 has vehemently denied in her cross-examination that she had purchased goods worth Rs. 25,000/- from the appellant's shop and

did not return the money. In her evidence-in-chief, PW.1 has stated that the appellant was not known to her, while, on the contrary, her daughter, PW.2 has categorically stated in her cross-examination that she as well as her mother used to purchase articles from the appellant's shop. This evidence of PW.2 belies the evidence of PW.1.

28. The other disturbing evidence in this case is that PW.2 has admitted in her cross-examination that the appellant's neighbours, namely, Ruhul Amin, Fakaruddin and Safiqul Islam, who reside near the appellant's shop and whom she refers to as 'Mama', have induced her to give her statement before the Magistrate according to their narrative.

29. Now, let us scrutinize the statement of the victim under Section 164 CrPC.

30. Oath was not administered to the victim by the Magistrate as the victim gave her age as 10 years. Several questions were asked to the victim to assess whether she could give rational answers and on being satisfied that the victim could give rational answers, her statement under Section 164 CrPC was recorded by the Magistrate without administering oath. The victim-X has stated under Section 164 CrPC that she used to work as helper in the appellant's house. As they are very poor, her mother also works as a domestic help. On the day of the incident, after washing the utensils, the appellant gagged her by her mouth and thereafter, forcefully committed rape on her. When she started crying, the appellant fled from the PO and the people in the market assembled at the PO. She informed them that the appellant committed rape on her and then the Police was called by the public. She has proved her statement under Section 164 CrPC, as Exhibit-1.

31. The victim's statement under Section 164 CrPC manifests incriminating evidence that

the appellant had committed penetrative sexual assault on the victim and then the public gathered at the PO when the victim started to cry and the public called the Police.

32. The learned counsel for the appellant kept harping on about the statement of the victim in her cross-examination that the victim was tutored by Ruhul Amin, Fakaruddin and Safiqul Islam to give evidence against the appellant. Will this cause a dent in the evidence? Why were Ruhul, Fakaruddin and Safiqul interested to the extent that they tutored the victim to give evidence against the appellant? *Mens rea* to rope in the appellant in a false case has been projected by the learned counsel for the appellant only against Ruhul Amin. Md Fakaruddin, Md Safiqul and Md Ruhul Amin deposed as PWs-4, 5 and 6, respectively.

33. Md Fakaruddin deposed as PW.4 that about 3/4 months ago, while he was at home, he heard from the local residents that some incident between a boy and a girl had occurred at Tinsukia Bazar. He then went to the PO and noticed a gathering. When the victim was confronted by the public, she informed them that the appellant had committed 'bad act' with her and thereafter, she was handed over to the Police. He did not meet the appellant. The cross-examination of this witness is not noteworthy.

34. In sync with the evidence of PW.4, Md Safiqul Islam deposed as PW.5 that he has a hotel at Tinsukia Bazar and the appellant has a betel nut shop near his hotel. On 04.09.2013, while he was playing carrom behind the shop, he noticed a gathering and came out. A girl was being confronted by the public and they asked the girl if someone had committed 'bad act' with her. At that time, the girl informed that the appellant had committed 'bad act' with her. He too did not notice the appellant at the PO. Later, the appellant was handed over to the Police.

35. In his cross-examination, he stated that about 100/150 people assembled at the PO.

36. Close on the heels of evidence of PWs-4 and 5, Md Ruhul Amin deposed as PW.6 that both the victim and the appellant are known to him. The incident occurred about 17 months ago, at about 02:00 pm. He was returning from his shop and he noticed a gathering and on being asked, the victim informed the public that the appellant had committed sexual assault upon her. He saw the appellant in his shop and the Police took away the appellant. He has admitted in his cross-examination that his shop is near the appellant's shop. He has also admitted that there are about 20/25 shops near the PO. His statement has been corroborated by the statement of the IO, Sri Rebat Chandra Baruah, who deposed as PW.13 that PW.6 mentioned in his previous statement that the victim stated in his presence before the pubic that the appellant had committed 'bad act' on her. Thus, no contradiction as per Section 145 of the Evidence Act, could be elicited, although the defence tried to bring in contradictions through cross-examination.

37. On the question posed to him during cross-examination by the defence, PW.6 has denied that he has given false evidence against the appellant as he has a professional rivalry with the appellant whose sales are higher than his sales. The *mens rea* projected by the defence relating to business rivalry between PW.6 and the appellant can be taken note of, but at the same time, this cannot be accepted as a reason to foist a case against the appellant.

38. The learned APP has laid stress in his argument that *mens rea* projected by the learned counsel for the appellant holds no water. There are other witnesses in this case whose evidence incriminates the appellant. The other neighbours, PW.4 and PW.5 were not confronted with any question of business rivalry between them and the appellant.

39. The next important witness is the Medical Officer [Dr (Mrs) Jaya Prava Boro), who deposed as PW.10 that on 04.09.2013, at about 09:30 am, she examined the victim-X and found the following:-

"*1. Identification mark - One back mole on right clavicle.*

2. Height - 4 ft. 3 inch.

3. Weight - 27 kgs.

4. Teeth - U-14/L-14 nos.

5. Breast - Developing Stage.

6. Auxillary hair - present, growing stage.

7. Pubic hair - present, growing stage.

8. Vaginal hymen - Open, no injury seen.

9. External Injuries - No injury seen.

10. Vaginal injuries - No injury seen.

11. Genital Canal - No injury seen.

12. Perinium - No injury seen.

13. Vaginal smear Regd. No. 1834/13 dated 4.9.13.

Report - No spermatozoa seen.

14. X-Ray No. MCH. 3024,3025, 3026 dated 5.9.13 reported by-

Dr. R. P. Bora, Radiologist, age of the girl is in between 15 to 16 years.

Opinion:

1. *No definite sign of recent sexual intercourse found.*

2. *No teeth mark or nail mark seen in any part of the body of the girl.*

3. *Clinically the age of the girl is in between 11 to 13 years."*

40. She has proved her medico legal report as Exhibit-2 and her signature on the report, as Exhibit-2 (1).

41. The learned counsel for the appellant emphasized through her argument that no injuries could be detected on examination of the victim. The radiologist gave the age of the victim as 15/16 years and this belies the evidence of the victim, PW.2 as well as the evidence of her mother, PW.1, who stated that the victim was 10 years old at the time of the incident. The learned counsel for the appellant has prayed to extend the benefit of 2 (two) years on the higher side of 16 years by holding that the victim was 18 years at the time of the incident. It is also submitted that even the clinical age of the victim, according to the opinion, is between 11 to 13 years and not 10 years and this is the reason why, although, the charge was framed under Section 6 of the POCSO Act, the appellant was held guilty of offence under Section 4 of the POCSO Act. It is submitted that the contradictions in the evidence between PW.1 and PW.2 cannot be ignored.

42. It is also apt to mention at this juncture that the victim PW.2 has admitted in her cross examination that she did not know her actual age. Reliance can also be placed on *Modi's 24th*

Edition of Medical Jurisprudence and Toxicology at page-233 relating to age determination. The victim in this case had 28 (Twenty Eight) teeth, 14 (Fourteen) upper, and 14 (Fourteen) lower. According to Modi's jurisprudence, third molars or wisdom teeth erupts between 17th to 25th year of individuals. It is mentioned that a person would get his 28th teeth at about 14 (Fourteen) years of age which also could be suggestive of the fact that the victim was more than 14 (Fourteen) years of age at the time of the incident. The radiological age of the victim is already given as 15 to 16 years.

43. The findings of the Medical Officer that the victim had 28 teeth at the time of examination indicates that the victim had all her teeth, except the wisdom teeth, which establishes the fact that the radiological age of the victim was indeed between 15 to 16 years. The learned trial Court had erroneously relied on the clinical age given by the Medical Officer as 11 to 13 years. Even if the radiological age of the child is held to be between 15 to 16 years, the question of consent does not arise in this case nor has the defence raised any dispute relating to the consent of the victim. The act has been totally denied by the defence by alleging business rivalry between the appellant and the neighbouring shop owners.

44. When the question of consent is not raised, the benefit of adding two years on the higher side of 16 (Sixteen) years also does not arise. Moreover, the medical report reveals the physical growth of the victim. It is assumed that the age of the victim was indeed between 15 to 16 years, approximately.

45. Now, reverting back to the evidence, Md Harun Al Rashid deposed as PW.3 that the incident occurred about a year ago, at about 01:00 pm. He was in his pharmacy at Tinsukia Bazar. At that time, he suddenly heard a commotion near his shop and he went there and he

asked the boys present at the PO about the commotion and the boys informed him that the appellant had committed 'bad act' with the girl (victim). PW.3 further deposed that he met the girl and the appellant at Tinsukia Bazar and when he confronted the victim, she stated that no incident had occurred. He heard that the victim used to work in the appellant's house. Thereafter, the Police recorded his statement.

46. In his cross-examination, he also stated that he had seen the informant buying goods from the appellant's shop. Now, this belies the evidence of PW.1, who deposed that the appellant was not known to her till the date of the incident.

47. Another witness, PW.9 also deposed in the appellant's favour. Md Abbas Ali deposed as PW.9 that about a year ago, at around 12:30 pm, while having tea in Aminul's shop at Tinsukia Bazar, he heard the local public discussing that a false case has been lodged against the appellant with the allegation that he had molested a girl.

48. In his cross-examination, this witness has also stated that Ruhul Amin's shop is near to the appellant's shop and both Ruhul Amin and the appellant used to fight over their sale of goods in their shops. Ruhul Amin had conspired and foisted a case against the appellant.

49. Another witness, Md Abdul Malek, PW.11, deposed that about a year ago at noon, he heard a commotion in the hotel of Ruhul Amin near the appellant's shop. Then he went there, and the people who gathered there, informed him that the appellant committed rape on the victim. When he confronted the victim, the victim told him that the appellant did not commit rape on her. The Police came and took the victim to the Police Station.

50. In his cross-examination, PW.11 stated that Ruhul Amin tutored the victim to

make a statement before the Police that the appellant committed rape on her. The victim and her mother used to work in Ruhul Amin's (PW.6's) shop. The statements of the inimical witnesses were not contradicted, nor were they declared as hostile witnesses. Their evidence thus casts a shadow of doubt over the allegations against the appellant.

51. If the statements of the Medical Officer and PWs-8, 9 and 11 are carefully scrutinized, it appears that the victim was examined immediately after the appellant allegedly committed rape on her. No injuries were detected by the Medical Officer. Moreover, except the victim and her mother, not a single witness has stated that the victim was 10 years old at the time of the incident. The rivalry of PW.6, Ruhul Amin and the appellant has been brought to the fore by the evidence of the witnesses, PW.3, 9 and 11. Moreover, the statement of the victim under Section 164 CrPC also supports the evidence of PW.9 and PW.11 that the victim used to work as a domestic help in the appellant's house. Doubt creeps into one's mind if the victim was only 10 years old. Could it have been possible that such a young girl could have worked as a domestic help in the appellant's house? The age given by the victim and her mother also comes under cloud. The other major contradictions between the depositions of PW.1 and PW.2 is that PW.1 denied to recognize the appellant, when she gave her evidence-in-chief in the Court, whereas the victim and PW.9 have categorically stated that the victim used to work in the appellant's house. Thus, the evidence of PW.1 and PW.2 does not inspire confidence.

52. Although PW.7 has supported the evidence of PW.1 and PW.2, yet due to the

contradictions between the depositions of PW.1 and PW.2, the evidence of PW.7 cannot be accepted as corroborating or supporting evidence. Md Abdul Jabbar deposed as PW.7 that about 1½ years ago, at about 12 noon or 01:00 pm, he heard a commotion at Tinsukia Bazar and he went to the PO and noticed a gathering. The people assembled at the PO, informed him that one pan-shop owner had committed 'bad act' with a girl. After some time, the Police came and took her away. This evidence of PW.7 also cannot be accepted, as this evidence is hearsay evidence.

53. In view of my foregoing discussions, it is thereby held that the evidence of the victim and the informant does not at all inspire confidence. Although there were no contradictions as per Section 145 of the Evidence Act vis-à-vis Section 162 CrPC, yet many dissimilarities surfaced in the evidence of the witnesses. The comparison of the evidence-in-chief of the witnesses reveals that the evidences are dissimilar. The mother, PW.1 has stated that the appellant is not known to her, whereas, on the contrary, her daughter, PW.2 has stated that they are acquainted with the appellant. Surprisingly, PW-1 stated that she came to know the appellant only after the incident, whereas it has surfaced from the evidence of the victim that her mother, PW.1 used to purchase articles from the appellant's shop. It has also surfaced from the evidence of PW.3, PW.9 and PW.11 that the victim used to work as a domestic help in the appellant's house. Thus, it is not at all possible that the appellant was not known to the informant-Y, PW.1. The argument of the learned counsel for the respondent and the learned Additional Public Prosecutor that no contradictions could be elicited through

the cross-examination of the witnesses, thus, holds no water.

54. The dissimilarities surfacing in the evidence of the prosecution witnesses does not at all inspire confidence. Even after considering the submissions of the learned Additional Public Prosecutor that the business rivalry between PW-6 and the appellant, does not form the *mens rea* to foist a case against the appellant, yet it cannot be ignored that the evidence of the victim clearly reveals that PWs- 4, 5 and 6 have influenced her to give evidence against the appellant. PW.11 deposed that PW-6 coerced the victim into making false accusations against the appellant. It is thereby held that due to the discrepancies in the evidence, the appellant deserves a benefit of doubt. I would also like to reiterate that no injuries were detected on the victim on her examination by the MO.

55. Again, reverting back to the evidence, the IO (PW.13) is a formal witness. Sri Rebat Chandra Baruah deposed as PW.13, that on 04.09.2013, he was serving as Attached Officer of Lahorighat Police Station. On that day, the OC received an FIR lodged by 'Y' and registered the same as Lahorighat PS Case No. 209/2013 and endorsed him with the investigation. He went to the PO on 04.09.2013 and recorded the statements of the witnesses and prepared the sketch map marked as Exhibit-4, wherein Exhibit-4 (1) is his signature. He examined the victim, seized her undergarment, and forwarded the same for forensic examination. He collected the forensic report and proved the same as Exhibit-6. The report reveals human blood

and semen in the undergarment of the victim. He made several attempts to arrest the appellant but could not apprehend him as he was evading arrest. On completion of investigation, he submitted charge sheet under Section 376 IPC, read with Section 6 of the POCSO Act.

56. In his cross-examination, he deposed that there are about 100/150 shops near the PO. They found the victim at Md Ruhul Amin's (PW-6's) shop.

57. ASI, Abdul Khalek, deposed as PW.12 that on 04.09.2013, he was on duty at Lahorighat Police Station and on that day, about 02:30 pm, the OC received an FIR that one girl was sexually assaulted. Then he registered a GD Entry and he, along with the staff, including a woman constable, went towards the PO. He noticed a crowd and the victim in a tea-stall. The appellant who allegedly committed sexual assault, fled from the PO. He brought the victim to the Lahorighat Police Station and recorded her statement. Thereafter, he handed over the Case Diary to the SI, Rebat Chandra Baruah (PW.13), who subsequently conducted the investigation of this case.

58. The IO, PW.13, found the victim in PW.6's tea-stall and it cannot be ignored that the victim's statement under Section 161 CrPC was not recorded by a woman constable, who had accompanied PW.12. PW.12's evidence reveals that he recorded the victim's statement. The victim's deposition that she was tutored by Ruhul (PW.6) and the fact that she was recovered from PW.6's shop by the IO causes a dent in the evidence.

59. The submission of the learned counsel for the appellant that the victim was recovered in the afternoon from a place near the PO, but the Medical Officer's (PW.10's) evidence

reveals that she examined the victim at 09:30 am on the same day, can however be brushed aside.

To this argument in favour of the appellant, the learned Additional Public Prosecutor has submitted that there must have been a typographical error. It ought to have been '09:30 pm', instead of '09:30 am'.

60. Regarding the forensic report, it is held that the forensic report is not conclusive. The blood and the semen or the DNA found while examining the undergarment of the victim was not matched with the blood sample of the appellant. Thus, it cannot be held that there was a DNA match to conclusively prove that the blood sample and the semen was that of the appellant. Moreover, the forensic report also appears to be contradictory to the medico-legal report of the victim. No injuries were detected by the Medical Officer and it was opined that there were no signs of recent sexual intercourse found, while examining the victim. Thus, the blood sample of the victim without any injury being detected on the victim cannot be held to be the victim's blood sample moreso, when this was not matched to conclusively prove the forensic report. It is true that in certain cases of rape, injuries of sexual assault may not be detected, but in this case, after comparing the medico-legal report and the forensic report, it cannot be held that there is evidence of recent sexual assault on the victim. As the medico-legal report is not similar to the forensic report, it is held that the forensic report could not conclusively prove that the appellant committed rape on the victim. No injuries were detected by the MO, and thus it cannot be asserted that blood sample extracted from the victim's garments is her blood.

61. Credence cannot be given to the testimonies of PW.1 and PW.2, relating to the age of

the victim. The medico-legal report reveals that the victim's radiological age was between 15 to 16 years at the time of the incident and her clinical age was 11 to 13 years. The facts of this case is also taken into consideration. The victim, PW.2 stated that she was working as a housemaid in the house of the appellant. Medico-legal report relating to teeth described as 14-Upper and 14-Lower, also reveals that the victim's age could not have been 10 years at the time of the incident. When the prosecution has failed to prove the foundational facts, presumption under Sections 29 and 30 of the POCSO Act, does not operate against the appellant. The appellant was convicted under Section 376 (2) (i) IPC, read with Section 4 of the POCSO Act.

62. Section 42 of the POCSO Act reads:

> "***42. Alternate punishment. -- Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, [376A, 376AB, 376B, 376C, 376D, 376DA, 376DB], 3[376E, section 509 of the Indian Penal Code or section 67B of the Information Technology Act, 2000 (21 of 2000)], then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.]"***

63. In the instant case, the trial Court has convicted the appellant under Section 376 (2) (i) of the IPC with the greater degree of punishment. The learned trial Court had the alternative to punish the appellant either under Section 376 (2) (i) of the IPC or under Section 4 of the POCSO Act.

64. It is apparent that this case is bristled with discrepancies and the benefit of doubt must be transposed to the appellant.

65. The learned counsel for the appellant has relied on the decision of this Court in ***Manirul Islam Vs. State of Assam & Anr.***, reported in **2021 (3) GLT 128** wherein it has been held that:

> "*51. From the above, it becomes apparent that mere insertion of* ***sections 29*** *and* ***30(2)*** *in the POCSO does not altogether relieve the prosecution of the burden of proof contemplated under* ***sections 101*** *and* ***102*** *of the Evidence Act but merely lessen the burden on the prosecution by shifting the onus upon the accused . However, such reverse onus would shift upon the accused only when the prosecution succeeds in prima facie establishing the charge by adhering to the standard of proof of preponderance of probability. It is only then, the accused would have to displace the presumption of guilt. What therefore, follows is that conviction in a proceeding initiated under the POCSO Act cannot be based solely on presumption of guilt of the accused under* ***sections 29*** *&* ***30*** *of the Act. For the above reasons, we find our- selves in agreement with the guiding principles* ***laid down in*** *paragraph 71 of* ***Bhupen Kalita*** *(supra) formulating the parameters to be satisfied for drawing presumption of guilt by the Court under* ***sections 29*** *and* ***30(2)*** *of POCSO.*
>
> *52. Coming to the facts of this case, we are of the opinion that the prosecution has failed to establish the foundational facts. The testimony of the prosecutrix is also found to be full of contradictions and hence, unreliable. From the impugned judgement and order, we find that the conviction of the accused on the basis of presumption drawn under* ***sections 29*** *&* ***30(2)*** *of the POCSO. Therefore, we are of the view that in the absence of cogent evidence brought on record to prima facie establish the foundational facts, conviction of the accused cannot be based solely on presumption of guilt, premised on the precincts of the doctrine of reverse burden."*

66. I have also relied on the decision of this Court in ***Manirul Islam's case (supra).*** It has also been held in my foregoing discussions that the evidence of the victim and the informant does not inspire confidence. Due to the discrepancies in the evidence, the appellant deserves a benefit of doubt. It is held that the prosecutrix fails to qualify as a sterling

witness. It is held that the evidence of the victim and her mother is found to be infirm and deserves to be rejected. I am unable to agree with the conclusion arrived at by the learned trial Court. Accordingly, the Judgment and Order dated 15.03.2019, passed by the learned Special Judge, Morigaon, convicting the appellant under Section 376 (2) (i) of the IPC, read with Section 4 of the POCSO Act, is hereby set aside.

67. However, keeping in view the provisions of Section 437-A CrPC, the appellant, Md Babul Hussain @ Md Fakaruddin Ali Ahmed, is directed to furnish personal bond in the sum of Rs. 30,000 (Rupees Thirty Thousand) only and assure the bond in the like amount before the learned trial court which shall be effective for a period of six months.

68. Send back the Trial Court Record.

JUDGE

Comparing Assistant