GAHC010052382021

**IN THE GAUHATI HIGH COURT**
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)**

**CRL APPEAL NO. 200 OF 2021**

Nakul Kalita,
S/o- Late Saya Ram Kalita,
R/o Village Tokradia (Baharsupa),
P.S.- Hajo, District- Kamrup, Assam- 781102

*.....**Appellant***

***-Versus-***

1. The State of Assam,
   Represented by the Public Prosecutor, Assam.

2. Prabhat Kalita
   S/o- Shri Ramesh Kalita,
   R/o- Village Tokradia (Baharsupa),
   P.S.- Hajo, District – Kamrup, Assam- 781102

**.....Respondents**

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| For Appellant | : | Mr. Y. S. Mannan, Advocate |
| For Respondent(s) | : | Ms. B. Bhuyan, Addl. P.P., Assam<br>Mr. P. K. Munir, Advocate (for respondent No. 2) |
| Date of hearing | : | 09.12.2024 |
| Date of Judgment | : | 20.12.2024 |

**HON'BLE MR. JUSTICE SUMAN SHYAM**
**HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA**

# JUDGMENT

*(MRIDUL KUMAR KALITA, J)*

**1.** Heard Mr. Y. S. Mannan, learned counsel appearing for the appellant. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor appearing for the State of Assam as well as Mr. P. K. Munir, learned counsel appearing for the informant/respondent No. 2.

**2.** This appeal, under Section 374(2) of the Code of Criminal Procedure, 1973, has been preferred by the appellant, *Nakul Kalita*, impugning the judgment and order dated 16.12.2020 passed in the Special Sessions (POCSO) Case No. 51/2018, by the learned Special Judge, Kamrup, Amingaon, whereby the appellant was convicted under Section 6 of the POCSO Act, 2012 and was sentenced to undergo rigorous imprisonment for 12 years and to pay fine of Rs. 10,000/- (Rupees Ten Thousand) only and in default of payment of fine to undergo further simple imprisonment for 6 months.

**3.** The facts relevant for consideration of this appeal, in brief, are as follows.

**(i)** That on 20.11.2017, the father of the victim girl had lodged an FIR before the Officer-in-charge of Hajo Police Station, *inter alia*, alleging that in the month of *Bohag* (corresponding to the English calendar months of April-

May), the appellant came to the house of the first informant telling that he would not be present in his house so he requested and took the daughter of the first informant along with him to his house so that she may stay with his wife. It is also stated in the FIR that about 15 days prior to lodging of the FIR, the daughter of the first informant was taken for a test regarding jaundice. During jaundice test, the doctor informed the first informant that his daughter is carrying seven months of pregnancy. It is further stated in the FIR that when the first informant enquired from his daughter, he came to know that when his daughter was taken to the house of the present appellant in the month of *Bohag* (April-May), he gave some tablet to her to consume and after she became unconscious, he committed sexual intercourse with her as a result of which she became pregnant at a tender age of 16 years only.

**(ii)** On receipt of the aforesaid FIR, the Officer-in-Charge of Hajo Police Station registered the Hajo P.S. Case No. 878/2017 under Section 4 of the POCSO Act, 2012 and entrusted WSI, B. Das to conduct the investigation. After taking up the investigation, the Investigating Officer recorded the statement of the victim girl, informant and other witnesses. She also forwarded the victim to Guwahati Medical College & Hospital. Thereafter, she

visited the place of occurrence and prepared a sketch map of the place of occurrence. On 23.11.2017, the appellant was arrested. After completion of the investigation, the charge-sheet was laid against the appellant under Section 4 of the POCSO Act, 2012.

**(iii)** Initially, on 27/09/2018, the charge under section 4 of the POCSO Act, 2012 was framed against the appellant. However, on 11.06.2019, after considering the materials available on record and after hearing both the sides, the Court of learned Special Judge, Kamrup, Amingaon altered the charge and reframed it under Section 6 of the POCSO Act, 2012 against the appellant. When the said charge was read over and explained to him, the appellant pleaded not guilty and claimed to be tried.

**(iv)** The appellant faced the trial remaining on bail. To bring home the charge against the appellant, the prosecution side examined as many as nine prosecution witnesses. The appellant was examined under Section 313 of the Code of Criminal Procedure 1973, during which he denied the truthfulness of the testimony of prosecution witnesses and pleaded his innocence. He also adduced the evidence of two defence witnesses in his defence. However, ultimately, by the judgment and order which has been impugned in this appeal, the appellant was convicted and

sentenced in the manner as already described in paragraph No. 2 hereinbefore.

**4.** Before considering the rival submissions made by learned counsel for both the sides, let us go through the evidence which is available on record.

**5.** The PW-1, who is the father of the victim girl, as well as the informant in this case, has deposed that the appellant is his neighbour and the victim girl is his second daughter. He has deposed that at the time of the incident, the victim was 16 to 16 ½ years old and was studying in Class X. PW-1 has deposed that the appellant used to call the daughter of the informant to his flower garden to work there and she also used to go there occasionally. He has deposed that when he and his wife took the victim girl (his daughter) to doctor for treatment of jaundice, the doctor told them that their daughter was carrying 5 to 6 months of pregnancy. PW-1 has further deposed that on inquiry, their daughter told them that when she went to the house of the appellant to work, the appellant gave her some tablet and after taking it, she felt sleepy. Thereafter, the appellant had forcible sexual intercourse with her. PW-1 has further deposed that in this regard, a Village Meeting *(mel)* was held where the appellant was also present. However, no decision could be arrived at in the said meeting. Thereafter, the informant (PW-1) lodged the FIR which is exhibited as Exhibit-1.

**6.** During cross-examination, PW-1 has deposed that the FIR was lodged after two months of knowing about the incident as the

matter was placed before Village meeting *(mel).* PW-1 has also deposed that he did not state before the police that the appellant had forcible sexual intercourse with the victim girl. He has also deposed that the victim girl did not tell them about her pregnancy till she was taken to the doctor for treatment of jaundice. He has also deposed that the police took Photostat copy of the age-related documents of the victim girl.

**7.** PW-2, who is referred to as victim girl in this judgment, has deposed that the incident took place, at about 10 to 10.30 pm, about one year prior to her deposing before the Court. At that time, she was aged about 16 years. She has deposed that on the relevant day, the appellant called her to his house to stay for a night to accompany his wife as he had to go to Guwahati to sell flower garlands. Accordingly, the PW-2 went to the house of the appellant and had dinner in his house. She has deposed that after dinner, the appellant gave her a tablet as she was unwell and suffering from headache. She has also deposed that thereafter she went to sleep along with the wife of the appellant. In the same bed, the appellant also slept. She has deposed that at night, the appellant kept a watch over her by lighting torchlight on her. PW-2 has further deposed that during her sleep, she felt someone pressing her body. In the next morning when she woke up, she did not find the appellant at his home. She has further deposed that when she went to urinate, she felt burning sensation in her genitals. On the next day at about 8:00 PM, she came back home and went to school.

PW-2 has further deposed that after 4 to 5 months of the said incident, she suffered from jaundice and her father took her to the doctor for treatment. The doctor informed them that she was carrying 4 to 5 months of pregnancy. PW-2 has further deposed that thereafter her father lodged a case and a *village mel* (Meeting) was also held regarding the said incident. However, the appellant did not attend the meeting. She has also deposed that finally in the last village meeting, the appellant came and admitted that he did bad act with the victim on the date of occurrence after giving her some medicine. She has also deposed that police recorded her statement. She was also sent to the Magistrate for recording of her statement under Section 164 of the Code of Criminal Procedure, 1973. She was also referred for her medical examination. She exhibited her statement recorded under Section 164 of the Code of Criminal Procedure, 1973 as Exhibit-2. PW-2 has further deposed that she gave birth to a female child after lodging of the FIR. She has also deposed that the child is now given in adoption to some unknown person. During cross-examination, she was asked certain suggestive questions which were answered in the negative by her. PW-2 has also deposed that when her father inquired about the incident from her after knowing about her pregnancy, she told him that she does not know as to what happened with her. She also deposed that she used to miss periods for 2-3 months and she did not tell her mother when she did not have periods for 2-3 months when she was suffering from jaundice.

**8.** PW-3, Smti Ruhini Kalita, who is the mother of the victim girl, has deposed that the victim is her second daughter and she was 16 years old and was studying in Class X at the time of incident. She has also deposed that when her daughter was taken to the doctor when she was suffering from jaundice, it was revealed during her ultrasound examination that she was having 5-6 months of pregnancy. She has also deposed that the appellant had called the victim girl to her home about 5-6 months ago to remain with his wife as he had to go to Guwahati to sell flower garlands. PW-3 has also deposed that at that time the appellant gave some tablets to the victim girl as she could not sleep. After getting the tablets, she felt asleep. PW-3 has also deposed that the victim girl has told her that during her sleep, the appellant had sexual relationship with her. She has also deposed that thereafter after coming to know about the incident, she informed her husband about the same who informed the village Headman and Secretary about the incident and thereafter a village meeting was held. However, nothing could be decided in the village meeting. Hence, her husband had lodged the FIR in this case.

**9.** During cross-examination, PW-3 has deposed that the appellant got married about 15 years ago and he has no child of his own. She was asked some suggestive questions by the learned defence counsel which were all answered in the negative by her.

**10.** PW-4, Sri Paresh Kalita, who is the brother of the informant, has deposed that the incident took place about a year ago before

his deposing before the Court and at that time the victim girl was 16 years of age and was reading in class X. He has deposed that the victim girl has told her that about four to five months ago, she was called to the house of the appellant to stay with his wife as he had to go to Guwahati to sell flower garland. PW-4 has further deposed that the victim girl told him that the appellant gave her some sleeping tablet and when she fell asleep, the appellant committed rape on her. He has also deposed that the appellant later on admitted his guilt before the Village Headman, President and other villagers that he has raped the victim girl. PW-4 was asked some suggestive questions by the learned defence counsel during his cross-examination to which he answered in the negative.

**11.** PW-5, Shri Anju Medhi, has deposed that he is the President of Village Tokradia Sanrakshani Sammitee and about one year ago, the informant called him to his house and at that time the informant (PW-1) informed them that his daughter is pregnant and he suspects the appellant to be responsible for her pregnancy.PW-5 has further deposed that thereafter he along with others went to the house of the appellant for inquiring about the incident where the appellant denied of having committed any bad act with the victim. This witness was declared hostile by the prosecution side and during cross-examination by the prosecution side, he answered in the negative to a suggestive question put to him to the effect that he told before the Police that the accused had confessed to committing the offence when they enquired with him about the

same. He has also deposed that the victim gave birth to a child but the said child does not stay with the victim at present.

**12.** PW-6, Shri Manoranjan Kalita, has deposed that the informant told him and some other villagers that his daughter is pregnant and the appellant is responsible for the pregnancy. He has also deposed that he along with village Headman and other people went to the house of the appellant and brought him to the house of the informant and the appellant confessed before them that he had committed the offence.

**13.** During cross-examination, PW-6 has deposed that the appellant has been married since last 10 years and he does not have any child of his own. He has also deposed that he does not know if the appellant was suffering from any disease regarding any incapacity to father a child. He was also asked certain suggestive questions by the learned defence counsel which were all answered in the negative by him.

**14.** PW-7, Sri Ananda Kakati, has deposed that the informant has told him that his daughter was not having menstruation for last 7 months and she is pregnant. He also deposed that the informant told him that the appellant is responsible for the pregnancy of his daughter. He has also deposed that a village meeting was held in this regard. However, no decision was taken in the said village meeting.

**15.** During cross-examination, he has deposed that the appellant got married about 10-12 years ago and he has no children of his own.

**16.** PW-8, Dr. Oli Goswami, who conducted the medical examination of the victim girl, has deposed that on 21.11.2017, she was working as a PG (*post graduate*) on duty in the Department of Forensic Medicine at Guwahati Medical College Hospital and on that day, at around 2:45 PM, she examined the victim girl.

**17.** During her examination, she found the victim girl to be pregnant. The ultra sonography of lower abdomen of the victim girl showed single live intrauterine pregnancy of approximate gestational age of 30 weeks, 6 days invariable presentation. She opined that there is no evidence of recent sexual intercourse on the victim girl. She has also deposed that she had suggested the Investigating Officer regarding the DNA profiling. She exhibited the medical report as Exhibit-3.

**18.** During her cross-examination, the PW-8 has deposed that the age of the victim is not mentioned in the Exhibit-3 medical report, as the Investigating Officer did not make any requisition for ascertaining the age of the victim girl. She also deposed that as the victim girl was having 30 weeks, 6 days of pregnancy, the Investigating Officer was advised to conduct the DNA test after termination of pregnancy.

**19.** PW-9, Bhanita Das, SI of Police, who is the Investigating Officer, has deposed that on 20.11.2017, she was working as an

Attached Officer at Hajo Police Station. On that day, the informant had lodged an FIR before the Officer-in-charge of Hajo Police Station. Upon receipt of the said FIR, Hajo P.S. Case No. 878/2017 was registered and she was entrusted to conduct the investigation. She has also deposed that she recorded the statement of the informant, victim and one Paresh Kalita in the Police Station and, thereafter, sent the victim to Guwahati Medical College and Hospital. She has also deposed that at about 11:15 AM, she visited the place of occurrence along with other police staff and prepared the sketch map and recorded the statement of other witnesses. She has also deposed that on 23.11.2017, the appellant was arrested and was forwarded to the Court. She has also deposed that the victim was sent to Court for recording her statement under Section 164 of the Code of Criminal Procedure, 1973 on 23.11.2017. She has deposed that after collecting the medical report and after completion of the investigation, finding sufficient materials against the appellant under Section 4 of the POCSO Act, 2012, she laid the charge-sheet which is exhibited as Exhibit-5. She also exhibited the sketch map of the place of occurrence as Exhibit-4.

**20.** During her cross-examination, certain contradictions in the testimony of other witnesses were confirmed by her. PW-9 has deposed that the informant (PW-1) has stated before her that he suspected the appellant of having committed sexual intercourse with his daughter as she regularly visited his house. PW-9 has also deposed that the victim (PW-2) did not state before her that she

slept along with the *"Khuri Maa" (aunt)* and the accused in the same bed on the night time and that the accused whom she addressed as *"Khura" (uncle)* kept a watch over her by lighting the torchlight and that during her sleep she felt someone pressing her body. She also deposed that the PW-3 (mother of the victim girl) did not state before her that the victim was 16 years old at the time of the occurrence. PW-9 has also deposed that she could not get any information regarding the birth of the child of the victim girl. She has also deposed that she did not take any steps for conducting the DNA test for determining the paternity of the child after the birth of the child. She has answered in the negative to certain suggestive questions put to her by the learned defence counsel.

**21.** During his examination under Section 313 of the Code of Criminal Procedure, 1973, the appellant has denied the truthfulness of the testimony of prosecution witnesses and pleaded his innocence. He has stated that on the day of occurrence he was not at his home and he had gone to Bhutan and the victim stayed with his wife on that night. He has also stated that the victim was having an affair with another boy and the case has been lodged against him on false ground. The appellant has also adduced the evidence of two defence witnesses in his defence.

**22.** The DW-1, Smt. Indira Kalita, who is the wife of the appellant has deposed that she was married with the appellant for the last 12 years but they do not have any issue. She has also deposed that on the day of alleged incidents, her husband had gone to Bhutan with

co-villagers at about 10:00 PM and the victim slept with her on that day. The DW-1 has further deposed that the victim was having a relationship with another boy and she lodged a false case against her husband. She also deposed that the victim eloped with that boy after the incident.

**23.** During cross-examination, she has answered in the negative to the suggestive questions put to her by the prosecution side.

**24.** DW-2, Sri Hemen Kalita, has deposed that the victim had love affairs with another boy and had eloped with him after the incident. He has also deposed that the appellant does not have any children from 12 years of his marriage.

**25.** During cross-examination, he has deposed that he does not know if the victim comes and stays in the house of the appellant, during his absence, with his wife.

**26.** Mr. Y. S. Mannan, learned counsel for the appellant has submitted that the Trial Court has erred in convicting the appellant under Section 6 of the POCSO Act, 2012, on the basis of contradictory evidence on record. He has submitted that the Trial Court was wrong in holding that the victim girl was minor at the time of commission of the alleged offence, as no birth certificate or any other document relating to the age of the victim girl has been exhibited by the prosecution side.

**27.** It is also submitted by the learned counsel for the appellant that even the medical report of the victim girl is silent regarding any ossification test or anything from which the age of the victim girl

could have been ascertained. Under such circumstances, he submits that there was no material apart from mere oral testimony of the prosecution witnesses to come to the conclusion regarding the age of the victim girl, which in itself cannot be regarded as the reliable evidence in the matter of ascertaining the age of a person.

**28.** Learned counsel for the appellant has also submitted that the prosecution side has failed to give any proper justification for delayed lodging of the FIR, which itself casts doubt on the veracity of the prosecution story.

**29.** Learned counsel for the appellant has also submitted that apart from deposing that when the victim was sleeping in the house of the appellant along with the wife of the appellant as well as the appellant, while asleep she felt that someone is pressing her body, the victim girl has not specifically deposed regarding the fact of the appellant of having committing any sexual intercourse with her. He also submits that the deposition of the victim girl to the effect that in the last village *mel* (meeting) held, the accused admitted that he did bad act with her after giving her medicine for consumption has not been corroborated by any of the witnesses as none of the witnesses has deposed that the appellant had confessed his guilt in the last village *mel* (meeting).

**30.** Learned counsel for the appellant has also submitted that the Investigating Officer took no steps for conducting DNA profiling to ascertain the paternity of the child of the victim girl. He submits that considering the fact that, while deposing before the Trial Court,

the victim girl has not directly implicated the appellant and all other witnesses are only hearsay witnesses, the scientific evidence through DNA profiling could have helped in ascertaining the paternity of the child of the victim girl and he submits that the appellant cannot be convicted merely on the basis of uncorroborated and contradictory testimony of the prosecution witnesses.

**31.** Learned counsel for the appellant has also submitted that though PW-4 has deposed that the appellant has confessed before Village Headman, the President and other villagers that he raped the victim girl on the night of occurrence. However, the President who deposed as PW-5 has not stated so. Rather, he has deposed that when inquired, the appellant declined to confess his guilt. Learned counsel for the appellant has also submitted that the prosecution side did not adduce evidence of the village headman as a prosecution witness to corroborate the testimony of PW-4.

**32.** Learned counsel for the appellant has also submitted that the doctor who examined the victim girl on 21.11.2017 had found on examination a single live intrauterine pregnancy of approximate gestational age of 30 weeks 6 days. He has submitted that in the FIR which has been exhibited as Exhibit-1, it was alleged that the incident occurred in the month of *Bohag*, i.e., from 15th April to 15th May. However, the doctor who examined the victim girl on 21st November 2017 found the live intrauterine pregnancy of approximate 30 weeks 6 days, which indicates that the pregnancy

was conceived somewhere in the month of March that year. Hence, he submits that the allegations against the present appellant in the FIR cannot be true in light of the medical report of the victim girl where the gestation age was found to be 30 weeks 6 days on the day of examination.

**33.** Learned counsel for the appellant has submitted that the evidence on record is not sufficient to prove the guilt of the appellant beyond reasonable doubt. Therefore, he is entitled to benefit of doubt in this case.

**34.** On the other hand, Ms. B. Bhuyan, learned Additional Public Prosecutor representing the State of Assam has submitted that the evidence of prosecution witnesses has proved beyond reasonable doubt that it is the appellant only who had committed the offence alleged in this case as the victim girl has categorically implicated him in her testimony as well as her statement recorded under Section 164 of the Code of Criminal Procedure, 1973.

**35.** She has also submitted that there is extra-judicial confession by the appellant before the village headman and some other persons as well as before PW-6. She also submits that in the cases involving minor victim, minor contradictions and insignificant discrepancies in the statement of victim girl may be ignored by the Court. She also submits that the conviction in such cases may be based on the uncorroborated testimony of the victim girl only if her testimony is found to be reliable and trustworthy.

**36.** We have considered the submissions made by learned counsel for the appellant as well as learned Additional Public Prosecutor. We have also carefully perused the materials available on record.

**37.** On perusal of the impugned judgment, it appears that the learned special judge relied only on the oral testimony of the victim girl and her parents, i.e., PW-1 and PW-3, to arrive at the finding that the victim girl was 16 years of age on the date of commission of alleged offence and that she was a minor at that time. The father of the victim girl i.e., PW-1 in his deposition has stated that the victim girl was about 16 to 16½ years at the time of the occurrence of the alleged offence.

**38.** No documentary evidence, as envisaged in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, was exhibited in respect of the age of the victim girl. Neither any medical opinion is available, in this case, regarding the age of the victim girl.

**39.** Though, the provision of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 is applicable to determine the age of a child in conflict of law, however, as observed by the Apex Court in the case of ***"Jarnail Singh Vs. State of Haryana"*** reported in ***2013 (7) SCC 263***, the provision of Juvenile Justice Act relating to determining the age of a child in conflict with law should be the basis for determining the age even of a child who is a victim of crime.

**40.** As per the Apex Court, there is hardly any difference, in so far as the issue of minority is concerned, between a child in conflict with law and a child who is the victim of the crime. The observation made by the Apex Court in the above judgment is quoted herein below:

> ***"23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or***

***equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion."***

**41.** It is pertinent to mention here in that after enactment of the Juvenile Justice (Care and Protection of Children) Act, 2015, the provision of Section 94 of the said Act corresponds to the provision of Rule 12 Juvenile Justice (Care and Protection of Children) Rules, 2007.

**42.** In view of the above, we are also of the considered opinion that in absence of any documentary evidence or medical opinion regarding the age of the victim girl, only the oral testimony of witnesses as regards the age of the victim is a very weak piece of evidence to come to the finding regarding the correct age of the minor victim, whose age is stated to be 16 to 16 ½ years by the witnesses.

**43.** Be that as it may, let us now examine as to what incriminating evidence is there, on record, against the appellant under Section 6 of the POCSO Act, 2012.

**44.** Section 6 of the POCSO Act, 2012 prescribes the punishment for aggravated penetrative sexual assault. Section 5(j)(ii) of the POCSO Act, 2012 provides that whoever commits penetrative sexual assault on a child which, in case of a female child, makes the child pregnant as a consequence of sexual assault is said to commit aggravated penetrative sexual assault. Thus, in this case it was for the prosecution side to prove that the appellant had committed penetrative sexual assault on the victim girl as a result of which she became pregnant.

**45.** Let us examine, as to whether this burden could be discharged satisfactorily by the prosecution side or not.

**46.** In this case, as usually happens in case of offences relating to sexual crime, only the victim girl is the eyewitness. However, for the reasons mentioned in following paragraphs, we are of the considered opinion that the testimony of the victim girl does not

inspire confidence to arrive at a conclusion of guilt of the appellant in this case.

**47.** While deposing as PW-2, before the Trial Court, the victim girl has implicated the appellant on two counts. Firstly, she has deposed that when she slept with the wife of the appellant and the appellant, in the same bed, after taking the medicine given to her by the appellant, she felt asleep and during sleep she felt that someone is pressing her body. Further, she also deposed that when she woke up in the morning, while urinating she felt burning sensation. It is pertinent to note that this fact was not stated before the Investigating Officer, during the investigation, by the victim girl. The same has been confirmed by the PW-9 (Investigating Officer) in her testimony. Moreover, in her statement recorded under Section 164 of the Code of Criminal Procedure, 1973, the victim girl had stated that the appellant had committed bad act while she was in sleep, however, the same has not been stated by the victim girl while deposing as PW-2 before the Trial Court. It is pertinent to note that it is what the witness deposed before the Court during trial that is regarded as substantive evidence, whereas, the statement made by witness under Section 164 of the Code of Criminal Procedure, 1973 and only be used for corroboration. The testimony of PW-2 before the Trial Court to the effect that she felt someone pressing her body during sleep, in itself, would not lead to a conclusion that the appellant had any penetrative sexual intercourse with her on the date of alleged incident.

**48.** The other part of testimony of the victim girl was regarding extra-judicial confession made by the appellant wherein she deposes that the appellant had finally confessed in the last village meeting that he had committed bad act with her on the date of occurrence after giving her medicine. However, this testimony of the victim girl has not been corroborated by any of the witnesses. The victim girl has not deposed that she was ever present in any of the village meeting, where the appellant had confessed his guilt. None of the witnesses has deposed that the appellant has confessed his guilt in the last village meeting. Rather, the evidence of PW-1 (father of the victim) suggests that the appellant was present only in one village meeting, where he fainted when he was inquired about the incident. The evidence of PW-3 (mother of the victim) is also similar to that of PW-1 in this regard. No other witness has stated anything regarding confession of guilt by the appellant in village meeting. Thus, the testimony of victim girl regarding the extra-judicial confession of the appellant before the last village meeting, regarding the commission of the alleged offence by him, remains uncorroborated.

**49.** Evidence of other witnesses where they have described the alleged offence in details is merely hearsay evidence, which does not have any probative force.

**50.** Let us now, examine the evidence of other witnesses which relates to the extra-judicial confession allegedly made by the appellant. PW-4, who is the uncle of the victim girl, has deposed

that the appellant confessed before the Village Headman, President and other villagers regarding the fact that he raped the victim girl. However, neither the Village Headman was examined as a witness by the prosecution side, nor the President who has deposed as PW-5 stated anything regarding the confession by the appellant. Rather, the PW-5 (President), in his testimony, has deposed that the appellant had denied of having committed any bad act with the victim girl. Thus, the testimony of the PW-5 in respect of the extra-judicial confession made by the appellant also remains uncorroborated.

**51.** As regards the testimony of PW-6, who had deposed that the appellant was brought to the house of the informant, where he confessed before them that he committed the offence, it appears that the informant i.e., the father of the victim, while deposing as PW-1, has nowhere stated regarding any confession made by the appellant. Hence, we are of the considered opinion that the testimony of PW-6 regarding extra-judicial confession by the appellant remains uncorroborated and therefore, it would be very unsafe to rely on the same for convicting the appellant only on the basis of such uncorroborated extra-judicial confession.

**52.** It is no longer *res integra* that it is not safe to rely on the uncorroborated evidence regarding extra-judicial confession. The testimony of the victim girl (PW-2), regarding the extra-judicial confession made by the appellant, remains uncorroborated. We are of the considered opinion that the version of victim girl was not

consistent throughout. She gave different versions at different times. What she had stated in her statement recorded under Section 164 of the Code of Criminal Procedure, 1973 was not stated before the Trial Court while deposing as PW-2. We are, therefore, of the considered opinion that the Trial Court had erred in holding that the testimony of the PW-2 was corroborated by the evidence of other witnesses. The Trial Court had erred in relying on the uncorroborated testimony of PW-2 in coming to the finding of the guilt of the appellant.

**53.** It is also pertinent to note that though, there is evidence on record that the victim girl had delivered a baby girl after lodging of the FIR. However, no attempt was made by the Investigating Officer for conducting the DNA profiling to find out the paternity of the baby delivered by the victim girl. There is no forensic evidence on record to implicate the appellant with the offence for which he has been convicted.

**54.** In a case involving sexual offence, the testimony of the victim may be enough to come to the finding of the guilt of the accused, if such a testimony is trustworthy as well as reliable.

**55.** However, in the instant case, while deposing as PW-2 (the evidence, which would be regarded as the substantive evidence), the victim girl has not specifically implicated the appellant of having committed any penetrative sexual assault and her testimony regarding the extra-judicial confession by the appellant also remains uncorroborated and when there is contradiction in her statement

made before the Court as the PW-2 and her statement recorded during investigation, we are of the considered opinion that the Trial Court had erred in coming to the finding of the guilt of the present appellant on the basis of the said evidence.

**56.** For the reasons discussed above, we are convinced that the appellant should be given the benefit of the doubt, and we grant it accordingly.

**57.** The impugned judgment is, therefore, set aside and the appellant is accordingly, acquitted of the charge under Section 6 of the POCSO Act, 2012, on getting the benefit of doubt.

**58.** He shall be set at liberty forthwith, if not required in connection with any other case.

**59.** The appeal is accordingly allowed.

**60.** Send back the records of the Trial Court to the Trial Court along with a copy of this judgment.

**JUDGE** **JUDGE**

*Comparing Assistant*