



2024:GAU-AS:9150-DB

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

CRIMINAL APPEAL [J] NO. 17/2022

Rajesh Patnayak

.....Appellant

-VERSUS-

The State of Assam

.....Respondent

Advocates :

Appellant : Mr. A. Ahmed, Amicus Curiae
Respondent : Ms. M. Barman, Legal Aid Counsel
Date of Hearing, Judgment & Order : 11.09.2024

BEFORE

HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MRS. JUSTICE MITALI THAKURIA

JUDGMENT & ORDER [ORAL]

[M. Choudhury, J]

The instant criminal appeal from Jail under Section 383, Code of Criminal Procedure, 1973 [CrPC] is preferred against a Judgment and Order dated 24.03.2021 passed by the Court of learned Special Judge at Tinsukia in POCSO Case no. 60[T] of 2018,

which arose out of Tinsukia Police Station Case no. 1480/2018 and corresponding G.R. Case no. 2467/2018. By the Judgment and Order dated 24.03.2021, the Court of learned Special Judge, Tinsukia finding the accused-appellant guilty of the offence under Section 6 of the Protection of Children from Sexual Offences [POSCO] Act, 2012, has sentenced him to undergo rigorous imprisonment for twenty years and to pay a fine of Rs. 5,000/-, in default of payment of fine, to undergo simple imprisonment for another six months. It has been ordered that the period already undergone by the accused in Jail during investigation, enquiry or trial is to be set-off in terms of Section 428, CrPC.

2. The investigation of the crime case, Tinsukia Police Station Case no. 1480/2018 was set into motion on receipt of a First Information Report [FIR] from the informant-P.W.2 by the Officer In-Charge, Tinsukia Police Station on 08.11.2018. In the FIR, the informant-P.W.2 had inter alia alleged that at about 08-00 p.m. on 07.11.2018, he sent his younger brother [name withheld & hereinafter mentioned as 'the victim', for easy reference] for purchasing milk powder from a shop of one Dara Singh situated near Tinkunia Pukhuri [Pond], Tinsukia. When the victim did not return for about an hour, all the family members of the informant started searching for the victim. It was at that time, three-four boys came with the informant's brother, that is, the victim at about 09-30 p.m. and the family members of the victim were informed that the victim was subjected to sexual assault by someone. On being asked, the victim informed that while he was returning with the milk powder packet, a middle-aged person, who was taking dendrite near Reliance Trend, Tinsukia asked him to assist him in lifting one battery over his shoulder. The victim further told that when he **went** to do so then the person forcefully took him near the Namghar situated in the vicinity of Tinkunia Pukhuri [Pond]. Thereafter, the person removed the wearing appurtenances of the victim by pressing his neck and sexually assaulted him. The victim further told that after sometime, he somehow managed to escape and called nearby bye-passers and some bye-passers brought him to his house. The informant mentioned that grievous injuries on the rectum of the victim were noticed and blood was found oozing out from the rectum. The informant further mentioned that the inner garment of the victim remained lying at the place of occurrence.

3. On receipt of the FIR [Ext.-2], the Officer In-Charge registered the same as Tinsukia Police Station Case no. 1480 of 2018 for the offence under Section 377, Indian Penal Code [IPC] read with Section 10, POCSO Act on 08.11.2018. In the FIR exhibited as Ext.-2, it is mentioned that the FIR was received at about 12-05 p.m. on 08.11.2018. After registration of Tinsukia Police Station Case no. 1480 of 2018, the Officer In-Charge, Tinsukia Police Station, Pratap Gogoi [P.W.8] took up the investigation of the case himself.
4. As the informant-P.W.2 was accompanied by the victim to the Police Station at the time of lodging the FIR, statements of both the informant-P.W.1 and the victim who was examined as P.W.3 in the trial, were recorded under Section 161, CrPC at the Police Station itself. Thereafter, the victim was sent to Tinsukia Civil Hospital for medical examination and it was on 08.11.2018 itself, the victim was also medically examined by the Medical & Health Officer, Tinsukia Civil Hospital at around 02-00 p.m. The victim was thereafter, sent to the Court of learned Chief Judicial Magistrate, Tinsukia for recording of his statement under Section 164, CrPC. Accordingly, the statement of the victim was recorded under Section 164, CrPC [Ext.-4] on 08.11.2018 by the learned Judicial Magistrate, First Class, Tinsukia. In the course of investigation, the I.O. [P.W.8] recorded statements of few other witnesses under Section 161, CrPC, apart from preparing a Sketch Map of the P.O. [Ext.-5].
5. It is the case of the prosecution that at around 10-00 a.m. on 09.11.2018, the accused was identified by the victim and on being identified, the accused was apprehended near Tinkunia Pond, Tinsukia by the local public. Thereafter, the accused was arrested by the Police. From the materials on record, it has emerged that the accused was forwarded to the learned Special Judge, Tinsukia on 09.11.2018 itself and after being so produced, the accused was remanded to Judicial Custody. On 09.11.2018 itself, the statement of the accused was recorded by the I.O. before he was arrested. After collecting the Medical Examination Report of the victim [Ext.-1] and after completing the investigation into the case, the I.O. [P.W.8] laid a charge-sheet under Section 173[2], CrPC vide Charge-Sheet no. 17/2019 on 31.01.2019 [Ext.-6] finding a prima facie case well established against the accused for committing the offences defined in Section 377, IPC and Section 10, POCSO Act.

6. On submission of the Charge-Sheet and on receipt of the case records of G.R. Case no. 2467 of 2018, the Special Court registered the same as POCSO Case no. 60[T] of 2018. The case was thereafter opened by the learned Special Public Prosecutor. After hearing the learned Special Public Prosecutor and the learned defence counsel; and after perusal of the materials on record; the learned Special Court framed a charge under Section 6, POCSO Act against the accused with the allegation that on or about the day, 07.11.2018, the accused had committed aggravated penetrative sexual assault on the victim at a place near Tinkunia Pukhuri, Tinsukia. When the charge was read over and explained to the accused, the accused pleaded not guilty and claimed to be tried.
7. During the course of the trial, the prosecution side examined eight nos. of witnesses and exhibited 6 nos. of documents in order to bring home the charge against the accused. The prosecution witnesses examined were : [i] P.W.1 : Dr. Lovelin, Medical & Health Officer, Tinsukia Civil Hospital; [ii] P.W.2 : the informant-elder brother of the victim; [iii] P.W.3 : the victim; [iv] P.W.4 : Bablu Ram; [v] P.W.5 : Dilip Ram; [vi] P.W.6 : Rakesh Ram; [vii] P.W.7 : Probin Dutta; and [viii] P.W.8 : Pratap Dutta, the I.O. & Officer In-Charge, Tinsukia Police Station. The documents exhibited were : [i] Ext.-1 : Medical Examination Report dated 08.11.2018; [ii] Ext.-2 : FIR dated 08.11.2018; [iii] Ext.-3 : Seizure List, M.R. no. 378/2018 dated 08.11.2018; [iv] Ext.-4 : the statement of the victim recorded under Section 164, CrPC on 08.11.2018; [v] Ext.-5 : Sketch Map of the P.O.; and [vi] Ext.-6 : Charge-Sheet no. 17/2019 dated 31.01.2019. In addition, the prosecution side also exhibited two materials exhibits : [i] Mat. Ext.-1 : One underwear of the victim seized vide Seizure List, M.R. no. 378/2018; and [ii] Mat. Ext.-2 : Birth Certificate of the victim.
8. After closure of the evidence from the prosecution side, the accused was examined under Section 313, CrPC to provide him the opportunity to explain the circumstances appearing against him in the evidence led by the prosecution. The plea of the accused was outright denial and the accused stated that the case was lodged on false ground. When the accused was asked as to whether he would adduce any evidence in his support, he declined to adduce any defence evidence. Thereafter, the learned Special Court after hearing the learned counsel for the parties; and upon appreciation

of the evidence/materials on record; proceeded to deliver the Judgment and Order of conviction and sentence, impugned herein.

9. We have heard Mr. A. Ahmed, learned Amicus Curiae for the accused-appellant; Mr. K. Baishya, learned Additional Public Prosecutor for the respondent State of Assam; and Ms. M. Barman, learned Legal Aid Counsel for the respondent-informant.
10. Mr. Ahmed, learned Amicus Curiae appearing for the accused-appellant has submitted that the accused was not known to the victim from any earlier point of time and as such, the investigating authority ought to have resorted to Test Identification Parade [TIP] for proper identification of the real culprit. He has submitted that the incident had allegedly occurred when the victim went to a shop to buy milk powder and the alleged incident had occurred when he was on his way back home from the said shop after purchasing milk powder. But the prosecution did not examine the shop owner from where the victim had returned. From the evidence/materials on record, it is revealed that the victim was taken back home by three persons from near the place of occurrence. It was incumbent upon the prosecution to examine those persons to establish the veracity of the prosecution case. Mr. Ahmed has further contended that the age of the victim was sought to be established by a Birth Certificate issued by the Registrar of Births and Deaths, Tinsukia but to prove the same, the competent authority issuing the Birth Certificate was not examined. The victim had deposed that he escaped from the clutches of the accused after attacking him with a broken glass on his face but the prosecution failed to explain about the injury on the person of the accused. As the victim was allegedly below 18 years, his testimony could not have been received without corroboration on material particulars. With such projections, the learned Amicus Curiae has contended that the prosecution has not been able to prove the charge beyond all reasonable doubts and as such, the accused is entitled to be acquitted, at least, on benefit of doubt.
11. Mr. Baishya, learned Additional Public Prosecutor and Ms. Barman, learned Legal Aid Counsel for the respondent no. 2-informant have supported the verdict of guilt, as recorded by the learned trial court. It has been contended by them that the testimony of the victim received sufficient corroboration from other cogent evidence/materials on record to establish that the accused and none else was the

perpetrator of the serious crime. Even without the other evidence/materials on record, the testimony of the victim is consistent throughout to inspire confidence and the medical evidence has fully corroborated the testimony of the victim. It is well settled that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. The recovery of the wearing apparel [underwear] from the place of occurrence after few days is a relevant fact in the backdrop of the given facts and circumstances of the case. They have contended that the prosecution had exhibited the Birth Certificate of the victim in original and the same was issued under the provisions of the Registration of Births and Deaths Act, 1969. It is their submission that such a Certificate can be received in evidence to prove the fact of age of a victim. The testimony of the victim is totally in conformity with the medical evidence. Non-examination of the shop owner or the persons who had brought the victim to his house after the occurrence had not created any dent in the prosecution case. It is the quality of evidence not the quantity of evidence, which is material to bring home a charge. Learned State Counsel and learned Legal Aid Counsel have, thus, contended that the Judgment and Order of conviction and sentence of the learned trial court being well reasoned, does not call for any interference.

12. We have duly considered the submissions of the learned counsel for the parties and have also gone through evidence/materials on record including the testimonies of the prosecution witnesses and the documentary evidence, available in the case records of POCSO Case no. 60[T] of 2018, in original. We have also gone through the decisions in : **Pradeep vs. the State of Haryana, [2024] 1 SCR 306; Criminal Appeal no. 416 of 2016 [Bhagawan Sahai and another vs. State of Rajasthan]**, decided on 03.06.2016; and **P. Sasikumar vs. the State represented by the Inspector of Police**, 2024 INSC 474.
13. In a case of sexual assault, it is the testimony of the victim which is of utmost import and relevance. The victim here testified as P.W.3. It is therefore, apt to refer to the testimony of the victim at first.
14. In his examination-in-chief, P.W.3 deposed to the effect that he knew the accused since after the occurrence. As regards his age, P.W.3 stated that he was born on 02.11.2004 and exhibited his Birth Certificate issued by Registrar of Births and

Deaths, Tinsukia in support of such fact as Mat. Ext.-2. As regards the incident, P.W.3 stated that the occurrence took place on the day of Dipawali. P.W.3 stated that at about 08-00 p.m., he had gone to the shop of one Dara Singh to purchase milk. When he was on his way back after purchasing milk, he met the accused on the road. He was told by the accused that that the accused had a battery of a car to be loaded in a vehicle and on such premise, the accused asked for help from him. P.W.3 stated to have declined the request of the accused. But suddenly, the accused caught hold of him from behind by putting a knife on his neck. Thereafter, the accused forcibly took him to the Namghar at Tinkunia. After taking him to the Namghar, the accused had forcibly removed his pant and inserted his penis into his [the victim] anus. The accused also dashed his head against the wall of the house and as a result, he lost consciousness. When he regained consciousness the accused was found having carnal intercourse with him. Finding a broken glass on the floor, the victim then hit the face of the accused with it and ran out of the place without his pant. On the road, he told about the incident to three boys who were there and they took him to the place of occurrence again. As his pant was still lying at the place of occurrence, he put on his pant and thereafter, he was brought to his home by the three boys. On reaching home, he informed about the incident to his mother and his elder brother. Thereafter, his brother filed the case against the accused in the Police Station. P.W.3 further stated that he was sent to Tinsukia Civil Hospital by the Police for medical examination and also to the court for recording of his statement under Section 164, CrPC. P.W.3 further stated that on the day of occurrence, he was wearing a blue coloured jeans pant and one underwear, which had to be left at the place of occurrence. Two days after the occurrence when he and his brother were going to a shop to bring medicine for their mother, he saw the accused on the road and showed the accused to his brother and some other people. On being so identified, the accused was apprehended. P.W.3 further stated that he would be able to identify his underwear which he left at the place of occurrence. P.W.3 further stated that till the date of giving testimony [28.08.2019] he had been suffering from pain. P.W.3 also exhibited his statement recorded under Section 164, CrPC as Ext.-4 and the underwear as Mat. Ext.-1.

15. In cross-examination, P.W.3 stated that he met the accused in front of Reliance Trends at Tinkunia at about 08-30 p.m. At that time, there were no shops of crackers

in front of Reliance Trends. P.W.3 stated that after holding him in front of Reliance Trends, the accused took him to the backside of the Namghar after crossing the road. At that time, people were traveling by that road in cars and on foot also. P.W.3 stated that while taking him to the backside of the Namghar after crossing the road, nobody had seen them. P.W.3 stated that when the accused dashed his head against the wall, he sustained injury on the backside of his head and he was bleeding from that wound. When the accused first told him to remove his pant, he shouted for help but nobody came forward. He denied a suggestion that he did not state before the Police and the Magistrate that with a piece of broken glass he had caused injury to the accused; and that the accused dashed his head against the wall and he lost his senses for some time; and that after regaining senses, he found that the accused was having carnal intercourse with him. P.W.3 stated that the type of underwear like Mat. Ext.-1 would be readily available in the market.

16. From the evidence of P.W.3, it is revealed that in his testimony, the victim stated that he was forcibly taken from in front of Reliance Trends near Tinkunia by the accused and thereafter, he was taken to the backside of a Namgahr which was in front of Reliance Trends by forcing him to cross the road. In the Sketch Map of the P.O., the place of occurrence, marked as 'X' was shown behind the Namghar. In the Ext.-5, it is shown that the boundary which is by the side of the A.T. Road, are bounded by concrete walls. The pond named Tinkunia Pond is near the Namghar. In the Charge-Sheet [Ext.-3], the residence of the accused is shown as Tinkunia, Police Station – Tinkunia. Similarly, the address of the informant [P.W.2] with whom the victim used to reside, is also at Tinkunia, Mazumdar Colony, Tinsukia Municipal Board.
17. The FIR [Ext.-2] lodged by the informant-P.W.2 was received at the Police Station at around 12-05 p.m. on 08.11.2018. It has been recorded in the FIR that the place of occurrence was about 1 km from the Police Station.
18. The manner in which, the investigation was carried out can be found out from the testimony of the I.O. of the case, Pratap Gogoi, a Sub-Inspector of Police and the then Officer In-Charge, who testified as P.W.8. In his testimony, P.W.8 stated that when on 08.11.2018, he was attached to Tinsukia Police Station, the informant-P.W.2 lodged the FIR in the Police Station stating inter alia that his younger brother, a

minor, was subjected to aggravated sexual assault by someone near Tinkunia Pukhuri [Pond]. On receipt of the FIR, he [P.W.8], as the In-Charge of the Police Station, registered the FIR as Tinsukia Police Station Case no. 1480 of 2018 under Section 377, Indian Penal Code [IPC] read with Section 10, POCSO Act and took up the investigation himself.

19. We now turn to the testimony of P.W.1, Dr. Lovelin, who medically examined the victim on 08.11.2018. P.W.1 stated that on 08.11.2018, she was working as the Medical & Health Officer-I at Tinsukia Civil Hospital. At around 02-00 p.m. on that day, that is, on 08.11.2018, she examined the victim in connection with Tinsukia Police Station Case no. 1480 of 2018, on being brought and identified by one UBC 671 Purna Chetry of Tinsukia Police Station. Consents from the victim, his elder brother, P.W.2 and his mother were taken for such medical examination. The victim gave her a history of sexual assault on 07.11.2018 by an unknown person. P.W.1 stated that after medically examined, she found the following observations on the victim :-

**Physical examination - Normal. Teeth - 28, permanent.
Injuries - 3 nos. of scratches were present on the right side of the neck, measuring 1 cm each.**

On examination of anus, there was tear, edema and tenderness and swelling of size 1 x 1 cm. Superficial laceration of size 1 x ½ c.m. No active bleeding seen.

Anal swab taken for detection of spermatozoa and as per report, the supplied smear does not show any spermatozoa.

20. P.W.1 further stated that on the basis of the above findings, clinical examination and laboratory findings, an opinion was reached that there were signs suggestive of recent use of force, consistent with recent sexual assault. The Medical Examination Report was exhibited by P.W.1 as Ext.-1 and her signature therein as Ext.-1[1]. In cross-examination, P.W.1 stated that though she stated that the injuries were recent but the age of the injuries were not mentioned. P.W.1 deposed that the age of the injury was normally ascertained from the colour of the injury. But in the case in hand, the colour of the injury was not mentioned. P.W.1 denied the suggestion that the

opinion that the injuries were recent was not correct. It was elicited by the defence from P.W.1 that the injuries sustained by the victim cannot normally be sustained by scratching with hard object as because the injury sustained was a little deep in the anus. P.W.1 categorically denied a suggestion that the victim was not examined by her on 08.11.2018.

21. When the testimony of the victim is read together with the testimony of P.W.1 and the Medical Examination Report [Ext.-1], we do not find any apparent inconsistency between them. In other words, the testimony of P.W.3 has received corroboration from the medical evidence. The doctor, P.W.1 found tears, edema, tenderness and swelling in the anus of P.W.3 and such finding is found consistent with the testimony of P.W.3 that the accused had inserted his penis into the anus of the victim. It was elicited by the defence itself by cross-examining P.W.1 that the injury sustained in the anus of the victim was little deep and such injury cannot normally be sustained by scratching with hard object. The injuries in the nature of scratches found on the neck of the victim appeared to be consistent with the version of the victim that he was caught hold off by the accused from behind and a knife was put on his neck by the accused in order to take him forcibly behind the Namghar at Tinkunia.
22. The informant-P.W.2, in his evidence-in-chief, deposed to the effect that he came to know the accused after the occurrence. On the incident, P.W.2 stated that the incident took place during the previous Kali Puja. P.W.2 stated that at around 08-00 p.m., his younger brother [the victim] was sent by him to bring milk from the shop of Dara Singh at Tinkunia and he also went out of the house around the same time. He returned home at about 09-30 p.m. and it was after his return, he enquired about his brother [the victim], his family members told him that the victim did not return home till then. Then, he went out in search of the victim to the shop of the Dara Singh where he was told that the victim had purchased milk from his shop and sometime earlier, the victim had left the place for home. It was at about 10-00 p.m., the victim was brought home by three boys and those three boys told the family members them that the victim was subjected to sodomy. The victim was found bleeding from his anus at that time. P.W.2 stated that he immediately took the victim to City Hospital but doctors there advised him to file a report first before the Police. Then, he went to the Police Station at around 11-30 p.m. and it was on the advice of the Police, the

FIR was lodged in the following morning. On lodging of the FIR, the Police personnel took the victim immediately to Tinsukia Civil Hospital for medical treatments after recording his [P.W.2] statement. P.W.2 also stated that the victim was also sent to the Court for recording his statement under Section 164, CrPC. P.W.2 further stated that the occurrence took place near Tinkunia Namghar. When Police went to the P.O., an underwear of the victim was seized from there by a Seizure List, Ext.-3. When the underwear seized by the Seizure List [Ext.-3] was shown to him, he identified the underwear, Mat. Ext.-1 was a one which belonged to the victim. P.W.2 further stated that it was after three/four days of occurrence, the victim saw the accused near the Kali Mandir and accordingly, Police was informed. The accused was arrested by the Police thereafter. As regards the condition of the victim, P.W.2 stated that the victim was being medically examined from time to time at Tinsukia Civil Hospital and the victim had been suffering from pain in anus. P.W.2 further stated that doctors had advised him to take the victim for advanced medical treatment.

23. During cross-examination, P.W.2 stated that his house was at Municipal Colony, behind Municipal Market, near Sarvajanin Kali Mandir, Tinkunia and the shop of Dara Singh situated near Reliance Trends. He further stated that the Namghar was opposite to Reliance Trends. He further stated that the persons who brought the victim home were neither known to him nor known to the victim. He denied a suggestion that he did not state before the Police that after three-four days of occurrence, the victim had seen the accused near Kali Mandir. P.W.2 stated that the type of underwear [Mat. Ext-1], which was seized by the Police would be readily available in the market and the seized underwear, Mat. Ext.-1 could also belonged to some other person. He had, however, denied a suggestion that the seized underwear, Mat. Ext.-1 did not belong to the victim. He denied a suggestion that the accused never committed the alleged act on the victim and he had deposed falsely by stating that the victim was bleeding from his anus.
24. P.W.4 deposed that he knew the victim and the accused and the house of the victim was near his house. P.W.4 stated that he came to know the accused after the accused was apprehended. P.W.4 stated that on one day he met the victim and his elder brother, P.W.2 on the road and at that time, the victim showed him [P.W.4] a person [the accused] and told him [P.W.4] that the accused had carnal sexual

intercourse with him and the person was to be apprehended. P.W.4 stated that he then apprehended the accused and also called the police. Before the court, P.W.4 identified the accused as the one whom he had apprehended. In cross-examination, P.W.4 denied a suggestion that the victim never showed him [P.W.4] the accused and never told him [P.W.4] that the accused was the person who had forcible carnal sexual intercourse with the victim.

25. P.W.5 stated that he used to know the victim as his house was adjacent to the house of the victim. He came to know the accused since after the occurrence, which took place during the previous Kali Puja. P.W.5 was told by the elder brother of the victim, that is, P.W.2 that the accused who had sexually assaulted the victim, was apprehended after two days of the sexual assault. Then, he [P.W.5] had gone to the place where the accused was kept detained by some persons and the victim identified the accused as the one who had sexually assaulted him. During cross-examination, he denied the suggestions given to him by the defence.
26. The testimony of P.W.6 is of not of much relevance as he only stated that he knew the informant and the victim and did not know the accused.
27. P.W.7 stated that he had a Pan shop near the Namghar at Tinkunia. P.W.7 stated that he came to know from the Police that on a night, an incident of rape upon a boy had occurred. He was told by the Police personnel to open the gate of the Namghar and accordingly, he opened the gate of Namghar as one of the keys of the Namghar used to be with him. Police personnel then entered into the precinct of the Namghar and recovered one underwear. Police seized the underwear vide the Seizure List, Ext.-3 wherein he subscribed his signature as Ext.-3[2]. P.W.7 further stated that the elder brother of the victim was with the Police personnel and it was he who identified the underwear to be of his younger brother. P.W.7 further identified the underwear, shown to him as Mat. Ext.-1 before the Court, as the one which was seized by Police in his presence. During cross-examination, P.W.7 stated that the underwear like Mat. Ext.-1 would be readily available in the market.
28. To bring a case of a victim within the scope and ambit of the POCSO Act, the prosecution has a duty to establish that the age of the victim conforms to the

definition provided in Section 2[d] of the POCSO Act. As per Section 2[d] of the POCSO Act, 'child' means any person below the age of eighteen years. In the case in hand, the prosecution side had placed on record an original Birth Certificate of the victim in the form of Mat. Ext.-2. The Birth Certificate [Mat. Ext.-2] is a Certificate of Birth issued under Section 12 read with Section 17 of the Registration of Births and Deaths Act, 1969. As per the Birth Certificate [Mat. Ext.-2], the date of birth of the victim is 02.11.2004. In the Birth Certificate [Mat. Ext.-2], it is further recorded that the date of its registration is 09.11.2024. In the Birth Certificate [Mat. Ext.-2], it has been certified that information incorporated therein had been taken from the original record of Birth, which is the Registrar for Tinsukia Birth Registration Unit of District – Tinsukia, Assam. If the date of birth mentioned in the Birth Certificate [Mat. Ext.-2] is accepted, then on the date of the alleged incident which occurred on 07.11.2018, the age of the victim was indubitably below eighteen years. Moreover, the defence did not raise any serious challenge as regards the age of the victim.

29. The Central Act – the Registration of Births and Deaths Act, 1969 ['the Act, 1969', for short] has provided for the regulation of registration of births and deaths and for matters connected therewith. The Act, 1969 has provided for maintenance of register for recording births and deaths within the local area. As mentioned hereinabove, the Birth Certificate involved here, that is, Mat. Ext.-2 is a Certificate which has been issued by the Registrar of Births and Deaths, Tinsukia as per the provisions of Section 12 and Section 17 of the Act, 1969. Section 12 of the Registration of Births and Deaths Act, 1969 has provided for the form and manner as prescribed and manner in which such a Certificate is to be issued. As the Register for recording births and deaths, maintained by the Public Officer, forms the records of the acts of the Public Officer, as per Section 74 of the Evidence Act, it is a Public Document. Section 76 of the Evidence Act has provided for certified copies of Public Documents. As per Section 77 of the Evidence Act, such certified copies may be produced in prove of the contents of the Public Documents or parts of the Public Documents of which they purport to be copies. Section 17 of the Act, 1969 has provided for search of Birth Register and supply of extract thereof by certifying the same by the Registrar or any other authorized officer. Section 17 of the Act, 1969 has also further provided that such extract shall be admissible in evidence for the purpose of proving the birth to which the entry relates. Section 35 of the Evidence Act has prescribed that if entry is

made in any public register by a public servant in the discharge of his official duty, then such entry becomes a relevant fact and is admissible in evidence. The rule of evidence embodied in Section 79 of the Evidence Act has provided for drawing presumption as to genuineness of certified copies. Section 79 has inter alia provided that the Court shall presume to be genuine every document purporting to be a Certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by an authorized officer. The Birth Certificate involved herein, that is, Mat. Ext.-2 being a document fulfilling the conditions of the above provisions, is admissible in evidence by its mere production in view of the provisions of Section 77 of the Evidence Act and Section 17 of the Act, 1969 for the purpose of proving the birth to which the entry relates. Therefore, no formal proof is required for such a Birth Certificate.

30. When an accused was not known to the victim or the witnesses from a point of time anterior to the occurrence of the crime, a widely used method of accused identification, by the victim or the witnesses, in criminal trials is the Test Identification Parade [TIP]. The evidence of a TIP is admissible under Section 9 of the Evidence Act, but it is not a substantive piece of evidence. It is to be used to corroborate the evidence given by witnesses before a court of law at the time of the trial. A Test Identification Parade [TIP] is to be undertaken during the course of investigation.
31. In **P. Sasikumar** [supra], referred to by the learned Amicus Curiae, it has been observed that the relevance of a TIP depends on the facts and circumstances of given the case and in a given case, TIP may not be necessary. Non-conduct of a TIP may not prejudice the case of the prosecution or affect the identification of the accused. It has been held therein that holding or not holding of TIP would depend upon the facts and circumstances of the case. In a case where the victim or the witnesses had a clear opportunity to see the accused before the identification parade is held then the TIP as a corroborative piece of evidence would have no sanctity. Reverting back to the facts of the case in hand, it has been established that the incident of alleged sexual assault had occurred on 07.11.2018. As per the testimony of the victim, when after two days of the occurrence, he was on his way along with his elder brother, to buy medicine for treatment of his mother. The accused was then

seen by him at a place near Tinkunia, a place where the accused used to reside. After the accused was being identified by the victim, he was apprehended by public. The Police thereafter, arrested the accused and after arrest, the accused was produced before the Court of learned Special Judge, Tinsukia on 09.11.2018. The FIR [Ext.-1] was lodged and registered on 08.11.2018. From the materials on record, it has emerged that the accused after being apprehended by the public, was assaulted by some of the aggressive by-passers and in the process, the accused sustained some injuries on his person. Having regard to the proximity in time between the institution of the FIR on 08.11.2018 and production of the accused before the learned Special Court, Tinsukia on 09.11.2018, we do not find any force in the contention of the learned Amicus Curiae that there are ought to have been a Test Identification Parade [TIP] of the accused.

32. There is another aspect of import and pertinence. Immediately after the incident on 07.11.2018, it was the victim himself who had identified the accused on a day immediately after such occurrence. The incident of sexual assault was committed only on the victim by the accused and it was the victim only who could have identified the accused. The testimony of the victim was to the effect that when he was forcibly dragged behind the Namghar at Tinsukia, there was no other person present who had seen them. During the course of the trial, the defence did not take any such plea that they were seen by any third person. The testimony of the victim that there were only two persons, that is, the victim and the accused at the time of occurrence was not dispelled and dislodged in any manner whatsoever by the defence. In such given fact situation obtaining in the case, the contention regarding TIP is found to have no force.
33. The law is well settled that a victim of sexual assault is a competent witness under Section 118 of the Evidence Act and his or her evidence should be received in similar manner as that of an injured witness in a case of physical violence. A victim of sexual assault is not an accomplice after the crime. There is no caveat in law that his or her testimony cannot be acted upon without corroboration in material particulars. In fact, such a victim stands at pedestal even higher than an injured witness. A case of an injured witness, ordinarily there is injury on the physical form. But in a case of sexual assault, it is both physical as well as psychological and emotional. It is also settled

that a child witness if found competent to depose on the facts and to be reliable one, his or her evidence could be the basis of conviction. Even in the absence of oath, the evidence of a child witness can be considered under Section 118 of the Evidence Act, subject to the rider that such child witness is able to understand the questions and able to give rational answers thereof. The witnesses give testimony before the trial court and the trial court is in the best position to form an opinion as to whether the person including a child, is competent to depose as a witness of facts and whether the person or the child would be able to understand the questions and able to give rational answers thereof. The trial court has all the opportunity to examine the demeanor of the witness and to form an opinion as regards competency or otherwise of the witness.

34. The victim, at the time of his testimony, was above twelve years of age and as per Section 4 of the Oaths Act, 1969, oath can be administered to the victim and the victim was accordingly administered oath by the learned trial court before recording his testimony. It has been observed in **Pradeep** [supra], as a well-settled proposition, that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence as sometimes a child witness of tender age is easily susceptible to tutoring. It has been observed that the Court has an obligation to make careful scrutiny of the evidence of a child witness and has to apply its mind to the question whether there is possibility of the child witness being tutored. It has also been observed that it is advisable to record the preliminary questions and answers so that an appellate court can go into the correctness of the opinion of the learned trial. On examination of the materials record, it is noticed that the witness, P.W.3, that is, the victim was not asked any preliminary question by the learned trial court and received answers from him. It is not discernible as to whether any question was asked to the victim to obtain his answers by the learned trial court. But the defence had thoroughly cross-examined the victim and during thorough cross-examination, not even a suggestion was given to the victim that he would not be competent to testify on the incident. The evidence of a child witness and its credibility depends on the facts and circumstances of the case.
35. It has been observed by the Hon'ble Supreme Court in **Ratansinh Dalsukhbhai Nayak vs. State of Gujarat**, [2004] 1 SCC 64, that the decision on the question

whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. In the present case, the learned Special Court which had all the opportunity to examine the victim, had found the victim to be competent to depose as a witness of facts. Nothing has been brought on records nor anything was indicated from the records by the defence to take a different view by this Court. In the absence of any iota of material, we do not find any reason to disagree with the view of the learned Special Court in accepting the victim as a competent one to depose as a witness of facts.

36. From the definition of penetrative sexual assault, provided in Section 3[a] of the POCSO Act, penetration of penis, to any extent, into the vagina, mouth, urethra or anus of a child is sufficient to hold the person guilty of the offence. In other words, to complete the offence even the slightest penetration is sufficient complete the offence. When the testimony of the victim, P.W.3 and the medical evidence in the forms of testimony of P.W.1 and the Medical Examination Report [Ext.-1] are read together, the medical evidence is found to be in conformity with the oral testimony of the victim. It is evident that when the victim was examined on 08.11.2018, there was tear, edema, tenderness and swelling in his anus and there was also superficial laceration. Such nature of injuries are found to be consistent with the testimony with the testimony of the victim that the accused had committed carnal intercourse with him forcefully. The injury sustained by the victim in his anus was deep. It is evident from the Medical Examination Report of the victim that there were signs suggestive of recent use of force consistent with recent sexual assault. After taking a note of the definition of penetrative sexual assault, more particularly, taking into account of the fact that while committing the penetrative sexual assault, the accused made use of a knife, it can be safely concluded that the offence committed by the accused on the victim comes within the scope and ambit of aggravated penetrative sexual assault, which was forceful.

37. There is no principle of law that it is inconceivable that a child of age of about 14 years would not be able to recapitulate the facts in memory. A child is always receptive of abnormal events which take place in his or his life and would never forget those events for the rest of his or her life. The event of aggravated penetrative sexual assault has the effect of creating permanent mental trauma in the mind of a child like the victim, P.W.3 and it is inconceivable that the victim would not be recapitulate the events which occurred during the course of the aggravated penetrative sexual assault from him by the accused. In such view of the matter, the testimony of the victim [P.W.3] is inspired confidence.
38. The defence has sought to raise a point as regards discrepancy by pointing out that the victim in his previous statement recorded under Section 164, CrPC [Ext.-4] had stated after taking up a piece of glass lying on the ground he threatened the accused and saved his life. But in his testimony before the Court, the victim had stated that with the glass, he hit the accused on his face to free himself from the grip of the accused. With such projection, the defence sought to raise a point that the prosecution did not explain the injury appeared to have been suffered by the accused. On a scrutiny of the entire evidence on record, it is not found that the defence had in the course of the trial or during examination of the accused under Section 313, CrPC had raised any plea that he had also sustained an injury on his person. In absence of any iota of material on the point of sustaining any injury on the person of the accused, such a contention raised at the stage of appeal after consideration, deserves rejection and it is accordingly observed.
39. The FIR [Ext.-2] had made a mention that a wearing apparel in the form of an underwear of the victim remained lying on the place of occurrence. The FIR was lodged and registered at 12-05 p.m. on 08.11.2018. The recovery of an underwear from the place of occurrence at Tinkunia behind the Namghar near Tinkunia Puhkuri was made at 04-50 p.m. on 08.11.2018 by the Seizure List [Ext.-3], in presence of witnesses, P.W.7. Such recovery is a relevant fact in as much as the victim himself had identified the underwear [Mat. Ext.-2] to be the one which was worn by him on the date of the incident and which had to be left behind by him at the P.O. because of the acts perpetrated on him.

40. As per Section 134 of the Evidence Act, no particular number of witnesses in any case shall require for the proof of any fact. It is not the quantity of evidence but the quality of evidence, which is material in a criminal trial. The learned Special Court is found to have dealt with the issue elaborately in the light of the principles laid down in the decisions in **Lallu Manjhi vs. State of Jharkhand**, AIR 2003 SC 854; **S.P. Rathore vs. CBI**, AIR 2016 SC 4486; **Prithipal Singh vs. State of Punjab**, (2012) 1 SCC 10; and **Binay Kumar vs. State of Bihar**, AIR 1997 SC 322; to hold that even a single witness can prove a fact of a case, if he or she is wholly reliable, trustworthy and inspire confidence and the testimony of one single witness, if wholly reliable, is sufficient to establish the identity of the accused. In view of the view already expressed as regards the credible, reliable and consistent testimony of the victim [P.W.3], there is no reason for us to disagree with the above view reached by the learned Special Court on the basis of the evidence/materials on record and the above decisions, mentioned above.
41. The decision in **Bhagawan Sahai** [supra] is in connection with failure to explain the injuries on the person of the accused. It has been held therein that once court comes to a finding that the prosecution has suppressed the genesis and origin of the occurrence and also fails to explain the injuries on the person of the accused, then the only possible and probable course left open is to grant benefit of doubt to the accused. But in the case in hand, the defence has not been able to bring any material on record, not to speak of any conclusive material on record, to even infer that the accused had sustained any injury on his person. As such, the decision in **Bhagawan Sahai** [supra] is of no assistance to the cause of the appellant.
42. At this stage, it is apposite to refer to Section 29 of the POCSO Act, 2012 which provides for presumption as to certain offence. As per Section 29, where a person is prosecuted for committing or abetting or attempting or to commit any offence under Section 3, Section 5, Section 7 and Section 9 of the POCSO Act, 2012, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. Section 3 has provided for the definition of 'penetrative sexual assault'. A person is said to commit 'penetrative sexual assault' if – [a] he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any

other person; or [b] he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or [c] he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the body of the child or makes the child to do so with him or any other person; or [d] he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person. The provisions contained in Section 5 have provided for incidents when 'penetrative sexual assault' becomes 'aggravated penetrative sexual assault'. As per Section 5[h], whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance, commits aggravated penetrative sexual assault and if such a charge is proved, he is liable to be punished under Section 6. As per Section 2[d] of the POCSO Act, 2012, 'child' means any person below the age of eighteen years.

43. Ordinarily, unless it is irrebuttable presumption, no presumption is absolute and every presumption is rebuttable. The presumption under Section 29 of the POCSO Act, 2012 is a rebuttable presumption. Such a presumption gets operational when the necessary foundational facts are established by the prosecution by leading evidence. The burden of proof ordinarily lies with the prosecution and does not lie on the accused. The burden of proof ordinarily lies with the prosecution and does not lie on the accused. In such situation, it is for the prosecution to establish the foundational facts first in order to bring the statutory presumption under Section 29 into the operation so as to shift the onus to the accused to prove the contrary. In the case in hand, the prosecution by leading the evidence had established the foundational facts that on the date of the incident, the prosecutrix had to suffer penetrative sexual assault at the hand of the accused. As a result, the presumption under Section 29 of the POCSO Act, 2012 got activated against the accused. Consequently, the onus shifted to the accused to prove the contrary. The defence did not adduce evidence during the trial.
44. On appreciation of the evidence/materials on record, in its entirety, we have already reached a view that the evidence/materials on record led by the prosecution in this case, more particularly, the testimony of the victim and the medical evidence are of reliable, credible and conclusive nature, which have found corroboration from the

other prosecution witnesses. In such view of the matter, mere non-examination of the shop owner named Dara Singh and the 3 [three] persons who had brought the victim to his house from the P.O. on the date of the incident are not of any significance to create any dent in the prosecution case. The core of the prosecution case is found to have remained intact all throughout.

45. In view of the provision contained in Section 5[h] of the POCSO Act, the penetrative sexual assault of the nature involved in the case in hand, has become aggravated penetrative sexual assault, which is punishable under Section 6 of the POCSO Act. As per the extant sub-section [1] of Section 6 of the POCSO Act, whoever commits aggravated penetrative sexual assault is to be punished with rigorous 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, or with death.
46. The learned counsel for the parties are also heard on the point of sentence imposed.
47. The learned Special Court after finding the accused guilty for committing the offence defined in Section 5[h] of the POCSO Act, heard the accused on the point of sentence as per the provision of Section 235[2], CrPC. The learned Special Court also heard the learned Special Public Prosecutor and the learned defence counsel. The statement of the accused was recorded by the learned Special Court. After such hearing, the learned Special Court recorded that the accused was a young person and no proof of any previous conviction has been found against the accused. At the same time, the learned Special Court has observed that the accused has committed a very heinous offence on an innocent child, who had no enmity against him and such act required to be curtailed by punishing the accused in the proper manner. The learned Special Court has observed that after considering the entire aspects of the case as well as the age, character, antecedent and the offence committed being the first one by the accused, has sentenced the accused in the afore-mentioned manner to meet ends of justice.
48. A submission is advanced to the effect that since the alleged incident had occurred on 07.11.2018, the sentence imposed is harsh qua the then existing provision of

Section 6 of the POCSO Act. It is noticed that an amendment to Section 6 has been carried out by Act 25 of 2019 w.e.f. 16.08.2019. Prior to the amendment carried out w.e.f. 16.08.2019, a person guilty of an offence under Section 5 was punishable under Section 6 with rigorous imprisonment for a term which shall not be less than ten years but which may be extend to imprisonment for life and shall also liable to be fine. As per the prescription contained in sub-section [2] of Section 235, CrPC, the learned Special Court after hearing the accused on the question of sentence, is required to pass a sentence on him according to law.

49. Clause [1] of Article 20 of the Constitution of India has provided that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
50. Taking into purview the factors taken by the learned Special Court at the time of hearing the accused and the learned counsel for the parties on the point of sentence; and having regard to the provisions contained in Section 6 of the POCSO Act at the time of commission of the offence, on 07.11.2018; and Article 20 of the Constitution of India; we are of the considered view that a period of rigorous imprisonment for twelve years will sub-serve the ends of justice. Accordingly, while affirming the Judgment of conviction by the learned Special Court on the accused-appellant, the sentence imposed to the accused-appellant stands modified to a period of rigorous imprisonment for twelve years. There is no inference as regards the amount of fine imposed by the learned Special Court on the accused-appellant. Accordingly, the present criminal appeal stands partly allowed to the extent indicated above.
51. As it is found that a heinous crime of the nature defined in Section 6 of the POCSO Act has been committed upon the victim, we are of the considered view that if no compensation has been disbursed to the victim till date, the District Legal Services Authority shall expedite the process of awarding compensation to the victim in terms of the provision contained in Section 357A, CrPC read with the extant Assam Victim Compensation Scheme.

52. Before parting with the records, we wish to place our appreciation on record as regards the services rendered by Mr. A. Ahmed, learned Amicus Curiae appearing for the accused-appellant and direct the Registry to make available to him just remuneration as per the notified fee structure applicable to the Amicus Curiae.
53. The records of the Special Court are to be sent back forthwith.

JUDGE

JUDGE

Comparing Assistant