

GAHC010019012023



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

Case No. : CrI.A./27/2023

NURU SIKDAR @ NUR SIKANDAR
S/O LATE KHALEK SIKDAR,
R/O PASHCHIM DEULGURI,
P.S.- BASUGAON,
DIST.- CHIRANG, ASSAM.

VERSUS

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

2:MD. BILAL HUSSAIN
S/O LATE HASEN ALI

R/O PASHCHIM DEULGURI

P.S.- BASUGAON

DIST.- CHIRANG
ASSAM

Advocate for the Petitioner : MR H R A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MRS. JUSTICE MARLI VANKUNG

JUDGMENT

Date : 13-05-2024

(K.R. Surana, J)

Heard Mr. A. Ahmed, learned counsel for the appellant, Ms. S.H. Bora, learned Addl. P.P. for the State and Mr. M. Hussain, learned counsel for the respondent no.2 (i.e. informant).

2) This appeal filed under section 374(2) of the Cr.P.C. is for assailing the judgment dated 05.12.2022, and sentence dated 03.01.2023, passed by the learned Special Judge, Chirang, Kajalgaon in Spl. POSCO Case No. 4/2020. By the said impugned judgment, the appellant was convicted for committing offence punishable under section 376(3) of the I.P.C. and section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act" for brevity) and by the sentence impugned herein, the appellant was sentenced to undergo rigorous imprisonment for a period of 20 (twenty) years and also to pay a fine of Rs.40,000/-, to be paid to the victim if recovered, and in default to undergo further rigorous imprisonment for 3 (three) months.

3) In this judgment and order, the name of the then minor victim and the informant are masked to protect their identity and the victim is hereinafter referred to as 'X' and the informant, who is the father of the then minor victim is hereinafter referred to as 'Y'.

4) The prosecution case was set rolling by Y, who had lodged an FIR on 05.01.2020, before the Officer-in-Charge, Basugaon P.S., alleging that on the same day at around 5.00 p.m. when his minor daughter X, who had gone to the nearby field to bring the cattle back, the appellant, who was waiting near his home took the advantage of the absence of any other person there, grabbed his daughter and gagged her and by removing her clothes, took her

photographs in his mobile phone and after threatening to tell other persons and send her photographs to other people to defame her, raped her and later, his daughter came home crying and narrated the incident to them. On receipt of the said FIR, Basugaon P.S. Case No. 2/2020 was registered under section 376 IPC read with section 4 of the POCSO Act and the case was assigned to Hare Krishna Kalita, S.I. of Police (PW-4) for investigation.

5) The I.O. had investigated the case, prepared the sketch-map, examined witnesses, seized the photocopy of the birth certificate of X, the victim, and got the victim's statement recorded under section 164 CrPC, collected medical report. On completion of investigation, the I.O. had submitted the charge sheet no. 2/2020 dated 31.01.2020.

6) On 14.03.2022, the learned Special Judge read-over and explained charges to the appellant under section 376(3) IPC read with section 4 of POCSO Act. The appellant denied the charges and claimed to be tried.

7) In course of trial, the prosecution had examined 4 (four) PWs.

- a. Y, the informant was examined as PW-1. He had exhibited FIR as Ext.P-1; First Information Form (Ext.P-2); medico-legal report of the victim (Ext.P-3); seizure list of photocopy of birth certificate (Ext.P-4); birth certificate of the victim that was seized by Ext.P-4 (Mat. Ext.1).
- b. X, the victim was examined as PW-2. She had exhibited her statement under section 164 CrPC (Ext.P-5); student registration card (Ext.P-6).
- c. Dr. Mrs. Dipali Bordoloi Manta was examined as PW-3. She had exhibited radiological report of the victim (Ext.P-5); report of pregnancy test and swab test (Ext.P-6);.
- d. Hare Krishna Kalita, I.O. was examined as PW-4. He had exhibited

the signature of Harin Chandra Deka, O/c. of Basugaon P.S. [Ext.P-1(2)] and [Ext.P-2(2)]; prayer for recording statement of victim under section 164 CrPC (Ext.P-6); sketch map (Ext.P-7); charge-sheet (Ext.P-8). He had also exhibited his signature as Ext.P-4(3), Ext.P-6(1), Ext.P-7(1), and Ext.P-8(1).

- e. The learned Trial Court had examined Resminara Khatun as CW-1, and A (name withheld), the younger sister of victim as CW-2.

8) It may be mentioned that Trial Court Record (TCR for short) contains three documents marked as Ext.6. One is photocopy of Student Registration Card, 2019 issued by the Board of Secondary Education, Assam, which is certified to be true copy by the Chief Administrative Officer of Court of District & Sessions Judge, Chirang, which was exhibited on 23.05.2022 by PW-2. The second Ext.6 is the Urine Examination Report of JSB Civil Hospital, Kajalgaon dated 06.01.2020, exhibited on 31.05.2022 by PW-3. The third Ext.P-6 is the carbon copy of the prayer petition submitted by the I.O. (PW-4) on 06.01.2020 before the learned Chief Judicial Magistrate, Chirang for recording statement of the victim under section 164 CrPC. Although the TCR contains the original prayer petition, yet a copy thereof, was marked as exhibit. There is no order of the Court to allow secondary evidence of the document marked as Ext.P-6 to be exhibited.

Evidence of PWs:-

9) PW-1 is the father of X, the victim. He had stated in his examination-in-chief that the incident leading to this case had taken place around 2 years back at around 5.00 to 5.30 p.m. half a km. away from his residence in a field, which was then used as grazing field. At that time he was in his village market and when he came back to his residence from the market, his

daughter was already there and was crying and on being asked, she told that she had gone to the place of occurrence to bring back the cow belonging to them when the appellant had gagged her mouth with a cloth, dragged her to a bush and committed penetrative sexual assault on her. He then brought his daughter to the Basugaon P.S. The police had recorded his and his daughter's statement. Then someone drafted the FIR and he had put his signature thereon. He had stated that he had brought his daughter to Kajalgaon Civil Hospital but in the absence of the doctor, her medical examination could not be done and she was then taken back to the police station and then taken back home. Her medical examination was done after a gap of 1 (one) day in Kajalgaon Civil Hospital and he had exhibited his signature as Ext.P-3(1). The police had seized the birth certificate of his daughter from him and his signature was taken on a paper after that and he had exhibited his signature as P-4(1). He had stated that Resminara Khatun, the wife of his neighbour Rabiul Hussain had accompanied him to police station when the birth certificate was seized. He had identified and exhibited the birth certificate of his daughter as Mat. Ext.1, that was seized vide Ext.P-4. He had stated that the name of victim's younger sister is 'A' (name withheld) and she was born in 2009. He had identified the appellant in the dock. In his cross-examination, PW-1 had stated that he did not remember the date when the case was instituted. The Ext.P-1 FIR was scribed by someone in the police station and he does not know what was written in the said exhibit. He had stated that he had taken his daughter to the police station at around 7.00 p.m. and at that time his statement was recorded and at about 10.00 to 10.30 p.m., the victim was brought to Kajalgaon Civil Hospital and they returned back to Basugaon P.S. at about 11.30 p.m. to 12.00 midnight and thereafter, he went back to his home. After 2-3 days in the afternoon around

2.30 p.m. to 3.00 p.m., the police came to their residence. He had also stated that earlier he had instituted a case against the appellant and his brother, which led to their acquittal after compromise and at that time his daughter was 14 years old. He had stated that his eldest daughter lives in Village- Tilapara outside Chirang District and presently his victim daughter had gone to her elder sister's house. He had denied that he has married his victim daughter to one Kuran Ali. He had denied that he had filed the case against the appellant out of existing grudge because of his old dispute and also because in previous case instituted by him the appellant had been acquitted. He had denied that alleged incident had not occurred against his daughter. He does not know what was written in the seizure list and he had signed as he was asked to do so.

10) PW-2 is the victim. She had stated in her examination-in- chief that she had accompanied her father when he went to the police station to lodge the case against the appellant, whose residence is 10 minutes' walk from her house. She had stated that the incident had taken place in the month of January, 2020 at around 5.30 p.m. to 6.00 p.m. in a field near the residence of the appellant. At that time, she was studying in class-IX in the school (name of school and place withheld). She had gone there with his younger sister to bring back their cows left there for grazing. It had become dark at the time of incident and it had started to drizzle. The appellant then gagged her mouth with a cloth, dragged her to nearby bush, removed all her clothes and raped her. Her younger sister was in the field where cows were grazing. The appellant had detained her for about one hour and after much struggle, she could free herself and came to her residence. At that time her father was in the residence. She described the incident to him and her father took her to police station and instituted the case. She had identified the appellant in the dock. The police then

recorded her statement and the police brought her to Kajalgaon Civil Hospital accompanied with her father and she was medically examined and she had narrated the incident to the doctor. The police had seized her birth certificate as shown by her father. She did not remember if the police had taken her anywhere else. On the following day, her father took her to Court. She had seen the document marked as Ext.P-5 and Ext.P-5(1) and P-5(2) were her signatures. She had stated that she was called to Court and asked to put her signature. She does not remember if she was asked anything. She also does not remember if the person who took her signature was a male or female. She had stated that she had failed in Class-IX in 2019, and she had again failed in Class-IX then the incident took place and then she left her studies and took admission in Class-IX again in 2021 and she was issued a student registration card from Board of Secondary Education, Assam. She had not brought her said registration card where the date of her birth is recorded as 12.01.2005. She had exhibited student registration card issued by Board of Secondary Education, Assam in the year 2019 where her date of birth is 12.01.2005. In her cross-examination, PW-2 had admitted that before the incident leading to this case, there was a Court case between her father and the appellant. She denied that because of the said case the two families are not in talking terms but she had admitted that they are not in visiting terms. She had denied that she did not tell the I.O. that (i) the incident leading to this case had taken place in a field near the house of the appellant; or (ii) that her younger sister 'A' had also gone with her to the grazing field; or (iii) that it had become dark and there was a drizzle; or (iv) that the appellant came and gagged her mouth with a cloth and had dragged her to nearby bushes; or (v) that her said sister was in the field where cows were grazing; or (vi) that the appellant had kept her detained there for one hour and

that after much struggle she could free herself from the clutches of the appellant; or (vii) that then she had gone home and that when she reached home, her father was in the residence. She had agreed that she had entered into a marriage agreement with Kuran Ali, whose father's name is Isop Ali of village C (name withheld) and it was denied that she was living with him. She had admitted that Resminara Begum was her elder brother's wife and she also happens to be her mother's brother's daughter. She had denied that the appellant did not rape her and that she had falsely implicated him because of existing family dispute and grudge.

11) The Sub-Divisional Medical and Health Officer, JSB Civil Hospital, who was examined as PW-3 had stated in her examination-in-chief that on 06.01.2020, while she was working at the said hospital, when at 11.30 a.m., on police requisition, pursuant to Basugaon P.S. GDE No. 139 dated 05.01.2020, she had medically examined X, a 15 year old Muslim girl after taking consent of her father. The victim gave a history of kidnapping on 05.01.2020 at 5.00 p.m., history of sexual assault and returning to her home on 06.01.2020. Amongst other medical conditions, she had stated that she did not find any injury on her body or on her private parts. Her hymen was absent and on examination, there was pain in her vagina but there was no tear of bleeding. Vaginal smear was taken but gave negative result for spermatozoa. Evidence of struggle and tears and evidence of stains (blood, saliva, semen, etc.) was NIL. Urine for HCG test gave negative result. The age of the victim girl was between 15 to 17 years and that it could not be ascertained if the victim had been subjected to any sexual assault or not. She had exhibited radiological examination report and two x-ray plates as Ext.P-5, Ext.P-5₁ and Ext.P-5₂ corresponding to the radiological examination. She had exhibited pregnancy test report and vaginal swab test

report as Ext.P-6. In her cross-examination, she had stated that the victim was produced before her on 06.01.2020 and then she had examined her.

12) The I.O. was examined as PW-4. He had stated that on 05.01.2020, he was working as 2nd Officer in-charge of Basugaon P.S. when on receipt of written first information from Y, Harin Chandra Deka, the then Officer-in-Charge had registered Basugaon P.S. Case No. 2/2020 and entrusted him with the investigation of the case, whose signature was exhibited as Ext.P-1(2), which he knew as he had worked with him. The said Harin Chandra Deka had prepared the written first information report, which was exhibited as Ext.P-2, whose signature was exhibited as Ext.P-2(2). He had narrated the steps he had taken for investigation, arrest of the appellant, seizure of birth certificate, etc. He had exhibited statement of the victim under section 164 CrPC as Ext.P-6 and his signature thereon as Ext.P-6(1), sketch map of the place of occurrence as Ext.P-7 and his signature thereon as Ext.P-7(1). He had also recorded the statement of three other witnesses, namely, Akbar Ali Ahmed, Abbas Ali Ahmed and Amir Hamja. He had exhibited the birth certificate of the victim as Mat. Ext.1, which was seized vide Ext.P-4. On completion of investigation, he had submitted the charge-sheet, which was exhibited as Ext.P-8, and his signature thereon as Ext.P-8(1). He had identified the appellant standing in the dock as the accused. In his cross-examination, the PW-4 had stated that the FIR was lodged at 9.00 p.m. and he was entrusted with investigation at 9.00 p.m., and he visited the place of occurrence on 07.01.2020. He had examined the informant immediately on entrustment of investigation. He left police station at 9.45 p.m. and arrested the appellant and brought him to police station at 10.00 p.m. after his medical check-up, and that the village of the appellant is about 2 ½ km. from Basugaon P.S. The victim was brought to the police station by the

informant on 06.01.2020 and he had examined her and on the same day, she was sent for medico-legal examination and for recording her statement under section 164 CrPC. He had described the places portrayed in the sketch map (Ext.P-7), marked with letters- A, B, C, D and E. He had stated that 'D', denoting the house of Nur Islam was at a distance of around 500 m. from the place of occurrence and 'E' was the house of Akbar Ali Ahmed and there was no other house around the place of occurrence. He had visited the place of occurrence at 2.10 p.m. He had not verified the authenticity of the birth certificate (Mat. Ext.1). He had further stated in his cross-examination that in her statement the victim had not stated to him that the incident leading to this case had taken place in a field near the house of the appellant; that her younger sister 'A' had also gone with her to the grazing field; that it had become dark and there was a drizzle; that the appellant came and gagged her mouth with a cloth and had dragged her to nearby bush; that her said sister was in the field where cows were grazing; that the appellant had kept her detained there for one hour and after much struggle she could free herself from his clutches; and then she had gone to her residence; that her aforesaid younger sister had already gone to her home; and that when she reached home, her father was in the residence.

13) The learned Trial Court had examined Resminara Khatun as CW-1. In her examination-in-chief, she had stated that her father was the informant of the case. The victim X was her younger sister. She had accompanied her father to the police station when he had lodged the case. She had stated that the person against whom the case is instituted was present in Court. She knew him by face as he was from the same locality. His house was 2-3 minutes' walk from her residence. She had stated that the incident took place about $2\frac{1}{2}$ years back at around 5 p.m. in a field half a km. away from their residence. The victim had

gone there to bring back the cows left for grazing. She had stated that she had not accompanied the victim there but the victim was accompanied by A, her younger sister. At about 5 p.m., when victim came back to the residence, she told them that the appellant had grabbed her hands. At that time their father was present in the house. Then all of them went to the police station. The police had recorded her statement and took her signature on a paper which was Ext.P-4 and she had exhibited her signature as Ext.P-4(1). She does not remember if anything was written on the said exhibit at that time. She does not know why her signature was taken and she only knew that her signature was taken to make her a witness. The police had taken the birth certificate from her father in her presence. In her cross-examination, she had stated that she is the wife of Rabiul Hussain and that the informant Y was not her father. She was Y's neighbour. The informant had two sons and 4 daughters and she was not one of them and Y happens to be her father's sister's husband. The informant had two brothers and that her husband was informant's son and her husband had another brother named Safikul Hussain. She had also stated that the victim had entered into a marriage agreement with one Quran Ali and she stays in his residence sometimes and sometimes she stays in the house of her father. She had stated that there was no field near their residence. The police had recorded her statement at around 8.00 p.m. at the police station and she came back to her house with her father-in-law, the complainant at 10:00 pm. She had denied that the police had not recorded her statement and she had denied that her statement that the victim had told that the appellant had grabbed her hands was false. She had denied that she had falsely impersonated as daughter of the informant. She had admitted that she was not that Resminara Khatun who is informant's neighbour.

14) A, the sister of the victim, who is the minor daughter of the informant aged 13 years was examined by the learned Trial Court as CW-2 without administering oath, after putting some questions and arriving at a satisfaction that she was a competent witness. In her examination-in-chief, CW-2 had stated that they are 4 sisters and 2 brothers. X, is her elder sister, who is admitted in Class-X, but she does not attend her school. She knows the appellant, who had come to Court. On the day of the incident she and her said sister had gone to bring back their cows which were left for grazing near the house of appellant. As it was about to be dark, she came back to her residence and told the victim that she was afraid of being there in darkness. She does not remember if she brought the cows back or not. After some time, her said sister came back in house crying. When she had come back, her father was in the house. Her sister told her father that the appellant had did something bad to her. She does not know what the appellant had done. She had heard from her sister. She did not know anything more about the incident. In her cross-examination, CW-2 had stated that she did not know at what time they had gone to bring their cows. There were around 5-6 cows, tied with ropes. She did not remember if she had brought the cows back. The victim resided at their house and she had not married Quran Ali, but had entered into an agreement for marriage with him and she does not go to his house. She had denied that she had incriminated the appellant as tutored by her father and she had also denied that she did not go with her sister to bring the cows back and she had denied that the victim had not stated that the appellant had done bad thing to her.

15) On conclusion of examination of PWs and CWs, the appellant was examined under section 313 CrPC by putting before him the incriminating

materials appearing against him. The appellant had denied all the allegations against him and had stated that he was falsely implicated. He had stated that victim's father already had an enmity with him and had lodged a false case which was amicably settled and he was acquitted and he has been falsely implicated once again.

16) The learned Trial Court had relied on the evidence of the PW-1, PW-2 and PW-3 and the birth certificate of PW-2 (Mat. Ext.1) and held that the victim, who was born on 12.01.2005, was a minor. The learned Trial Court found the evidence of PWs and CW-2 trustworthy and it was held that the available evidence corroborates that the appellant had committed penetrative sexual assault on the victim. It was held that the appellant could not rebut the presumption and therefore, the appellant was held guilty and convicted for committing offence punishable under section 376(3) IPC read with section 4 of the POCSO Act.

17) The learned counsel for the appellant had submitted that the trial was conducted by the learned Special Judge in the absence of the Special Public Prosecutor, Public Prosecutor or Addl. Public Prosecutor, which is evident from the order-sheet of Trial Court. Accordingly, it was submitted that the learned Special Judge had opened the trial, examined the witnesses and *suo motu* took a call to examine CW-1 and CW-2. It was also submitted that in the absence of any Public Prosecutor, the learned Trial Court had put questions to the PWs and CWs to elicit answers. Accordingly, it was submitted that the learned Special Judge had assumed the role of the prosecutor and judge, which has vitiated the trial and has caused immense prejudice to the appellant.

18) It was submitted that due to illegality committed by the learned Trial Court in acting as prosecutor, the trial was vitiated. However, as the

appellant had faced complete trial and convicted, the provision of section 300 CrPC bars a fresh trial for the same offence and thus, it was submitted that this Court ought not to remand the matter back to the learned Trial Court for a fresh trial because by now the prosecution witnesses are fully aware of the defence of the appellant and that there is every likelihood that the said PWs and CWs would plug all the holes during fresh trial and/or re-trial.

19) The learned counsel for the appellant had submitted that there were glaring contradictions in the statement of the witnesses and those contradictions were exposed during cross-examination of the PWs and CWs. Hence, he prays for acquittal of the appellant.

20) The learned Addl. P.P. and the learned counsel for the complainant/ informant (respondent no.2) have painstakingly referred to the evidence on record and have supported the judgment impugned in this appeal. It was submitted that minor inconsistencies in the evidence of witnesses and minor contradictions in version of the witnesses are not sufficient for the Court to interfere with the conviction and sentence of the appellant.

21) On examination of the TCR, it is revealed that as per order of the learned Trial Court dated 23.05.2022, the person who had appeared as Resminara Khatun and examined by Court as CW-1 was sent to jail for misleading the Court. Although she was the daughter-in-law of the complainant, she had masqueraded as his neighbour and during cross-examination she got exposed. Therefore, the evidence of CW-1 has lost all its credibility.

22) The TCR also reveals that in the absence of the learned Public Prosecutor, the charges were framed and explained to the appellant vide order dated 14.03.2022. The learned Special Judge, having perused the case diary,

arrived at a conclusion that the I.O. had not listed (i) Resminara Khatun, seizure witness and 'A', sister of victim who had accompanied the victim as witnesses and therefore, it was held that they should be examined as witness. Further, an order was passed, directing the Officer-In-Charge of Basugaon P.S. to ensure presence of witnesses and to direct the informant to produce the original birth certificate. Thus, in the absence of the Public Prosecutor, the learned Special Judge had chalked out the case management plan. It is also seen that PWs and CWs were examined on 05.05.2022, 23.05.2022, 31.05.2022, 22.06.2022, and 26.07.2022. The appellant was examined on 18.08.2022 under section 313 CrPC in the absence of Public Prosecutor. The argument of the appellant's side was also heard on 07.11.2022 in the absence of the Public Prosecutor. Moreover, judgment was delivered on 05.12.2022, in the absence of the Public Prosecutor.

23) On a perusal of the evidence on record, it is seen that there are glaring inconsistencies in the evidence of the witnesses, which are as follows:-

1. Version of witnesses on time of various material events:-

- a. The PW-1 has stated that he had taken his victim daughter to the police at 07.00 p.m. on the day of incident. She was taken to Kajalgaon Civil Hospital at around 10.00 to 10.30 p.m., they returned to Basugaon P.S. at around 11.30 p.m. to 12.00 midnight. He did not take note of the time of reaching back home.
- b. PW-2, i.e. the victim had stated that the incident took place around 5:30 p.m. to 6.00 p.m. She was kept detained by the appellant for about 1 (one) hour. Then after struggle, she escaped and reached home. Therefore, assuming that the victim took 10-15 minutes to return to her home from the place of occurrence, and taking into

account 1 (one) hour detention, the estimated time when the victim could return home is around 7.15 p.m., on reaching home the victim narrated the incident to her father, who took her to police station. Police recorded her statement and she was taken to Kajalgaon Civil Hospital, where she was medically examined and she had narrated the incident to the doctor. On the next day, she was taken to the Court.

- c. PW-3 had stated that on 06.01.2020, at about 11.30 a.m., on police requisition, she had examined the victim. The victim gave a history of kidnapping and sexual assault on 05.01.2020 at 5.00 p.m., and return to her home on 06.01.2020.
- d. PW-4, who is the I.O., had stated that FIR was lodged at 9.00 p.m. He had left the police station to apprehend the appellant at 9.45 p.m. and the appellant was brought to the police station at 10.00. from his village, which is around $2\frac{1}{2}$ km. from the police station, got him medically examined and brought him back to police station at 10.45 p.m. The informant brought the victim to police station on 06.01.2020 in the morning and he had examined her and forwarded for medico-legal examination.
- e. CW-1 had stated that the victim came back to the residence at 5.00 p.m. and narrated the incident and then all of them went to the police station.
- f. CW-2 had stated that it was about to be dark, so she had come back to the residence and she had told her victim sister that she was afraid to be there in darkness.

2. Place of occurrence:

- a. PW nos. 1, 2 and 4, as well as CW nos. 1 and 2 have all stated in their evidence that the victim had gone to the grazing field where they had left their cows to graze. There the appellant had gagged her, dragged her to a bush and committed penetrative sexual assault.
- b. However, in contrast, in her statement under section 164 CrPC, (Ext.P-5), the victim had stated that she had gone to the paddy field to bring their cattle, where the appellant had hugged her, kissed her and by pulling her clothes, made her naked, took her photos, when she tried to shout, he clogged her mouth and bite he on her chest, beaten her, and had committed sexual intercourse forcefully. The appellant was with her for about 1 (one) hour and thereafter, he allowed the victim to come home. She came home and told everything to her elder brother.
- c. As per the statement recorded by the I.O. under section 161 CrPC, the victim had stated that the appellant while finding her alone in the field, had removed her clothes and wanted to take her photos and then he forcefully raped her and then he went away.
- d. CW-2 does not state in her evidence that when she was in the field where their cows were grazing, there was a drizzle. Thus, there are different versions of the place of occurrence, existence of drizzle at the time of occurrence.

3. Recording of statement of victim under section 161 CrPC

- a. As per the victim (PW-2), she did not give the date and time when

her statement was recorded by the police. However, it appears from the sequence of events narrated in her evidence-in- chief that she had informed her father of the incident, and her father took her to the police station and then the police had recorded her statement and she was brought to Kajalgaon Civil Hospital, where she was examined. From her statement, it it appears that she was examined by the I.O. on the day of incident i.e. 05.01.2020.

- b. In contrast, the I.O. (PW-4) had stated that the victim was brought to the police station by her father in the morning of 06.01.2020. As per the TCR, which contains a copy of the case diary, the victim was brought to the police station at 7.30 a.m. on 06.01.2020 and then the I.O. had recorded her statement.
- c. Thus, in her statement under section 161 Cr.P.C. before the I.O., she does not state about the presence of CW-2. She does not state about any kidnapping or struggle or detaining for one hour by the appellant. Moreover, the victim gives a contradictory version of the date and time of recording of her statement by the I.O.

4. Recording of statement of victim under section 164 CrPC:

- a. The PW-1 did not state when the victim was taken before the Magistrate for recording of her statement under section 164 CrPC.
- b. PW-2, the victim had stated that on the following day of the incident, she was called to the Court and she was asked to put her signature [Ext.P-5(1) and Ext. P-(2)] on Ext.5. She does not remember if the person who took her signature was a male or female.

- c. PW-4 had stated that he had sent the victim to the Court for recording her statement under section 164 CrPC vide Ext.P-6, containing his signature as Ext.P-6(1).
- d. Thus, as per the evidence of PW-2, the victim, it leads to a presumption that she had signed a pre-recorded statement as she did not state that she had deposed in a Court i.e. before a Magistrate. She also does not know if the person who took her signature was a male or a female.

5. Medical evidence of the victim:

- a. The doctor examining the victim did not find any injury on the body of the victim or on her private part. The hymen of the victim was absent, but there was no tear or bleeding seen. Vaginal smear gave negative result for spermatozoa. There is a medical finding that there was no evidence of struggle, stains, tears, saliva and semen. Moreover, it could not be ascertained if the victim was subjected to any sexual assault.
- b. The victim had stated in her statement recorded under section 164 CrPC that the appellant had beaten her up. The same is not supported by the medico-legal examination report. Similarly, the allegation of bite by appellant on her chest as stated under section 164 CrPC is also not found in the medico-legal report.
- c. Although the hymen of the victim was torn, but there was no sign of tear or bleeding.
- d. The PW-3 had stated that the victim had given history of sexual assault on 05.01.2020 and that she had returned back home on

06.01.2020. This part of the uncontroverted evidence of PW-3 makes the evidence of PW nos. 1, 2, 4, and CW nos. 1 and 2 doubtful as to the veracity of their hearsay evidence.

6. Presence of CW-2 at the place of occurrence:

- a. The victim, in her statement under section 161 CrPC did not state that she had gone to the field with CW-2 to bring their cows. The improved version about the presence of CW-2 at the field where their cows were left for grazing is introduced for the first time when her statement is recorded under section 164 Cr.P.C.
- b. The complainant (PW-1), who is the father of the victim did not state in his evidence that the victim was accompanied with 'A', his youngest daughter (i.e. CW-2). The I.O. (PW-4) had stated in his cross-examination that in her statement the victim did not state that his younger sister 'A' had also gone to the grazing field.

7. Previous enmity of the appellant with the father of the victim:

Although the appellant has not called and proved any record of the earlier case where the appellant was acquitted after compromise, but in his cross-examination, the complainant (PW-1), who is the father of the victim, had admitted about the previous case where the appellant was acquitted. Similarly, the victim (PW-2) had also admitted about the previous Court case between her father and the appellant.

Findings and Decision:-

24) Thus, on analysis of the evidence of the PWs and CWs, there are contradictions in the evidence of PW nos. 1, 2 and CW-2 regarding the time of

occurrence and time of reporting and also the examination of victim by the I.O. Although discrepancy in each of these three points, individually is not glaring, but their cumulative effect is glaring, when juxtaposed with the statement of the victim under section 161 CrPC as well as with the evidence of PW-3 i.e. the Doctor. Although the statement of the victim under section 161 CrPC was not exhibited, but we were compelled to read and take note of the same as because the evidence of the PW nos. 1 and 2 and CWs no.1 and 2 were not found trustworthy and moreover, on the strength of such evidence, the appellant has been sentenced to undergo imprisonment for 20 years. The rough English translation of the statement of the victim before the I.O., which is available in the TCR, is as follows:-

“My name and address as stated above is correct. My age is 15 years. I am reading in Class-IX standard. Yesterday evening at about 5.00 pm I had gone to the field to bring cows. Finding me alone in the field, Md. Nuru Sikdar of my village removed my clothes and wanted to take my photographs from mobile. Thereafter, he forcibly raped me and went away. I returned to my residence and told the incident to my father. This is what I have to state.”

25) Thus, from the first statement of the victim before the I.O., which was recorded at 7.30 a.m. on 06.01.2020, It can be noticed that the victim does not state that (i) she was kidnapped, (ii) her mouth was gagged with a cloth, (iii) she was dragged to bush, (iv) she was beaten-up, (v) she was detained by the appellant for 1 (one) hour; (vi) while going to the field, she was accompanied with her minor sister (CW-2); and (vii) there was a drizzle.

26) While the CW-2 had stated in her examination-in-chief that she had informed the victim that she was afraid to remain in the field in darkness so she had returned back. If said statement of CW-2 is to be believed, then the victim had left CW-2 alone in the field. However, the victim (PW-2) had stated

that by the time she struggled and freed herself and escaped, her sister was already gone.

27) As per the medical evidence of PW-3, on examination of the victim, no sign of struggle or any external injury was found. Although the hymen was torn, but the tear was not recent. We also take note of the cross-examination of CW-2, where CW-2 had admitted that the victim (PW-2) was married. Thus, old torn hymen and absence of any tell-tale sign of bleeding in the vicinity of the torn hymen makes the prosecution case highly doubtful because as per PW-2, she had entered into a marriage agreement with one Quran Ali, the CW-1 and CW-2 also support the defence case that the victim (PW-2) was married. The learned counsel for the complainant/ informant (respondent no.2) and the learned Addl. P.P. could not bring home any material to show that if a full grown adult would forcibly rape a minor girl after dragging her to a bush, there would be no tell-tale sign of any external injuries whatsoever.

28) The English translated statement of the victim that was made under section 161 CrPC has been extracted herein before. During her examination under section 164 CrPC, the victim had stated that the appellant had removed her clothes and took her photographs. She tried to shout but her mouth was gagged. The learned counsel for complainant/informant (Respondent no.2) and the learned Addl. P.P. could not explain how the appellant could gag the mouth of the victim and take her photographs at the same time. However, during her examination-in-chief, as PW-2, the victim has abandoned the story that the appellant had taken her naked photographs.

29) The I.O. had arrested the appellant on the same night of the occurrence i.e. on 05.01.2020. The statement of the victim was recorded by the

I.O. under section 161 CrPC at 7.30 am. on 06.01.2020 and her statement under section 164 CrPC was recorded before the Magistrate on 06.01.2020, which was duly entered in the case diary. However, although, the I.O. did not seize the mobile phone of the appellant and therefore, there was no occasion for the I.O. to send the mobile phone for its forensic examination to find out if any photograph of the victim was taken during the time-line when the alleged offence was committed.

30) We have already mentioned herein before that the evidence of CW-1 is discarded because the person who was examined as CW-1 was an imposter and the learned Trial Court had her arrested and sent to jail for misleading the Court. Thus, the complainant and the victim had created false evidence through CW-1.

31) Although the I.O. had arrested the appellant within few hours of the time of incident and had conducted his medical examination before bringing him to the police station, his medical report was not exhibited to show that his private part had any sign of recent forcible rape or that any scratches or sign of struggle by the victim was found on the body of the appellant.

32) The I.O. did not seize the wearing apparels of the victim or the appellant and did not sent them for forensic examination to ascertain if any stain of blood or semen was available there.

33) We again reiterate that the evidence of the CW-1 has been discarded for the reasons assigned herein before, We may also mention herein that the various inconsistencies and contradictions in the evidence of the PWs and CW-2 in respect of (1) time of various material events; (2) place of occurrence; (3) statement of the victim recorded under section 161 CrPC; (4)

statement of the victim recorded under section 164 CrPC; (5) medical evidence in respect of the victim; (6) presence of CW-2 at the place of occurrence, are sufficient for this Court to hold that the prosecution has not been able to make out any case to sustain the conviction of the appellant for committing penetrative sexual assault on 'X', the minor victim. In so far as CW-1 is concerned, the I.O. did not include her as a witness. But the learned Trial Court had examined her as CW-1, and from her evidence, it has been exposed that the PW-1, the father of the minor victim had planted CW-1 as witness in an attempt to frame the appellant of raping 'X', his minor daughter.

34) The Court is conscious of the fact that under section 29 of the POCSO Act, 2012, presumption of offence under section 3, 5, 7 and 9 of POCSO Act can be taken. However, in this case in hand, the statement of the victim does not inspire any confidence of the Court regarding commission of any offence by the appellant in the absence of any clinching evidence against the appellant. Therefore, this is not a case where the prosecution could bring home the presence and/or existence of any ingredients of commission of offence punishable under section 4 of the POCSO Act. Hence, by cross-examination of the PWs and CW-2, the appellant has been able to disprove the commission of any offence.

35) Although it is well settled that even on the sole testimony of the victim, the perpetrator of rape on a minor girl can be sustained. However, in this case in hand, the prosecution has failed to prove the existence of any circumstances which will give rise to presumption that the appellant had committed rape on the minor victim.

36) Moreover, the manner in which the learned Trial Court had conducted the entire trial without the assistance of Public Prosecutor at any

stage of trial since framing of charges has demonstrated that the learned Trial Court had failed to act fairly and in the process, the neutrality of the learned Trial Court is questionable. However, the said issue is left open to be decided in a more appropriate case because in the considered opinion of the Court, the prosecution has failed to prove that the appellant had committed the offence of committing penetrative sexual assault on the minor victim.

37) Accordingly, we have no hesitation to set aside and quash the conviction of the appellant as well as the sentence of imprisonment and fine awarded against him. We find that the appellant is entitled to the benefit of doubt. Accordingly, this appeal is allowed and the appellant is acquitted forthwith.

38) The appellant is entitled to be released forthwith if not otherwise wanted in any other case.

39) Let the TCR be returned.

JUDGE

JUDGE

Comparing Assistant