



IN THE GAUHATI HIGH COURT

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

PRINCIPAL SEAT AT GUWAHATI

Case No. Crl. Appeal No.127/2023

Sri Arup Borah, Aged about 30 years,
Son of Shri Tilok Borah,
R/o Molong Gaon,
P.S. Jengraimukh,
District- Majuli, Assam.

.....*Appellant*

-Versus-

1. The State of Assam,
Represented by P.P. Assam.
2. Smti Junmoni Baruah
D/O Shri Sunil Baruah,
R/o of Village Bhakat Chapor;
P.S. Majuli, District- Majuli, Assam

.....*Respondents*

- B E F O R E -

HON'BLE MR. JUSTICE ROBIN PHUKAN

Advocate for the appellants : Mr. R. Chetri;

Advocate for the respondents : Mr. B. Sharma,
Addl. P.P., for respondent No.1;

Ms. Meghali Barman; for respondent No.2

Date of hearing : 28.05.2024

Date of judgment : **21.06.2024**

JUDGMENT & ORDER (CAV)

Heard Mr. R. Chetri, learned counsel for the appellant. Also heard Mr. B. Sharma, learned Addl. P.P. for respondent No.1 and Ms. Meghali Barman for the respondents No. 2.

2. In this appeal, under section 374(3) Cr.P.C. the appellant, namely, Shri Arup Borah, has challenged the correctness or otherwise of the judgment and order, dated 03.03.2023, passed by the learned Special Sessions Judge, Majuli, in Special Case No.36/2020, under section 6/10 of the POCSO Act, arising out of Jengraimukh P.S. Case No. 16/2020. It is to be noted here that vide impugned judgment and order, dated 03.03.2023, the learned Special Judge, Majuli had convicted the appellant under Section 10 of the POCSO Act and sentenced him to suffer rigorous imprisonment for five years and also to pay a fine of Rs.10,000/- (Rupees ten thousand) only, in default to suffer S.I. for one month.

3. The background facts, leading to filing of the present appeal, are adumbrated herein below:-

"On 12.08.2019, accused Papu Borah came to the house of the informant/victim girl, situated at Bhakat Chapari Gaon and on the pretext of taking her for outing; he took her to his house and started co-habiting with her as husband and wife and established physical relation with her forcefully. He also prevented her from talking with her family members and used to assault her when she tries to contact them. He also prevented her family members in visiting her. Thereafter, on 09.02.2020, at about 12 O'clock, accused Arup Borah, who happened to be the own brother of Papu Borah, entered into her room, while Papu Borah was absent and thereafter, he fastened her limbs and committed rape upon her. She then reported the matter to the mother of Papu Borah, but, she did not believe her and for the whole night she was assaulted by mother of Arup Borah and Numali Borah, the elder sister of Arup Borah. Thereafter, on 10.02.2020, she was ousted from their house by stating that she is a woman of loose morale. Thereafter, her father rescued her from the house of the accused.

Thereafter, she had instituted one complaint case; being Complaint Case No. 05/2020, before the court of learned Sub-Divisional Judicial Magistrate, Majuli on 11.02.2020. But, the learned Sub-Divisional Judicial Magistrate, Majuli had forwarded the said complaint to the Officer-in-Charge, Jengraimukh P.S. for registering a case and to investigate the same. Upon receipt of the said complaint, the Officer-in-Charge Jengraimukh P.S. had

registered a case, being Jengraimukh P.S. Case No. 16/2020, under sections- 366/376(2)(1)/323/506/34 I.P.C., read with section 6 of the POCSO Act, on 15/02/2020, and endorsed S.I. Kalyan Gogoi to investigate the case. The I.O. then visited the place of occurrence, examined the witnesses and drew sketch map of the place of occurrence. The I.O. also got the victim examined by Doctor and collected the report and also got her statement recorded in the court under Section 164 Cr.P.C. He also arrested accused Papu Borah and forwarded him to the court. Then on completion of investigation, the I.O. laid charge sheet, against accused Papu Borah to stand trial in the court under Section 363 IPC read with section 4 of the POCSO Act and prayed for discharging accused Arup Borah and Smti. Numali Borah from the liability of the case.

Upon the said charge sheet, the learned Special Judge, Majuli had issued notice to the informant and thereafter, had taken cognizance of the offence under Section 363 IPC, read with Section 4 of the POCSO Act against accused Papu Borah and Arup Borah and issued process to them. Thereafter, on appearance of accused persons the learned trial court, complying the provision of Section 207 Cr.P.C. and after hearing learned Advocates of both sides, had framed following charges against the Papu Borah as under:-

Firstly: That you, on 12.08.2019 and thereafter, at village Malong Gaon, under Jengraimukh P.S., committed penetrative sexual assault on the minor informant/victim more than once or repeatedly as defined under section 5(1) of the POCSO Act and thereby committed an offence an offence punishable under sections 6 of the POCSO Act;

The learned trial court also had framed charge against accused Arup Borah as under:-

Firstly: That you, in the last part of 2019, at village Malong Gaon, under Jengraimukh P.S., being relative of the victim through marriage or who is living in the same or shared household with the victim, committed sexual assault on the minor informant/victim more than once or repeatedly as defined under section 9(n) of the POCSO Act and thereby committed an offence an offence punishable under section 10 of the POCSO Act;

Then on being read and explained over the charges, both the accused persons pleaded not guilty to the same and claimed to be tried.

Thereafter, the prosecution side had examined as many as seventeen witnesses including the Doctor and the investigating officer (I/O) to establish the charges against the accused/appellants. Then closing the prosecution evidence, the learned trial court had examined the accused persons under Section 313 Cr.P.C. Thereafter, hearing learned Advocates of both sides, the learned trial court had found that the prosecution side had failed to establish the charges against the accused Papu Borah, and accordingly, acquitted him. But, the learned trial court had found the charge under Section 10 of the POCSO Act established against the accused/appellant Arup Borah beyond all reasonable doubt and accordingly, convicted and sentenced him as aforesaid."

4. Being highly aggrieved and dissatisfied the appellant has preferred the present appeal contending to set-aside the impugned judgment and order, dated 03.03.2023, inter-alia, on the following grounds:-

- (i) That, the evidence on record does not warrant conviction and sentence of the appellant under Section 10 of the POCSO Act;
- (ii) That, the learned trial court had erred both in law and facts in convicting the appellant;
- (iii) That, the learned trial court had failed to appreciate the evidence of the prosecution witnesses in its proper perspective and thereby arrived at an erroneous finding that resulted in serious miscarriage of justice;
- (iv) That, the learned trial court had failed to appreciate the fact that the victim had resided with accused Papu Borah as husband and wife wherein the present appellant also resided with his wife and children and only after returning from the house of her husband, on account of some dispute, she had lodged the case;
- (vi) That, the learned trial court had failed to appreciate that the investigating officer, having not found any materials against the present appellant had not forwarded the present appellant to stand trial;
- (vii) That, the learned trial Court had failed to take note of the serious contradictions and discrepancies in the evidence of the prosecution witnesses and on such count the impugned judgment and order is liable to be set aside;

- (viii) That, the learned trial court had failed to appreciate the fact that the appellant was not present at home on the night of occurrence and that he was working in a pendal on the occasion of Bhauna in Kothonia Gaon, as is evident from the evidence of P.W. 12, and 13, and as such, his conviction is liable to be set aside;
- (ix) That, the learned trial court had failed to appreciate the evidence of Doctor who had not found any external injury upon the victim;
- (x) That, learned Court below had failed to consider the fact that the seizure list are irregular and incomplete and that the learned trial court had ignored the established cannons of criminal jurisprudence;
- (xi) That, the learned trial court had failed to appreciate the fact that the Doctor, who had examined the victim, had not found any external injury on her person;
- (xii) That, the learned trial court had failed to consider that there was no circumstantial evidence against the appellant and that the finding of guilt, so recorded, is based on surmise and conjecture only.

5. Mr. Chetri, the learned counsel for the appellant, at the time of hearing, besides reiterating the grounds mentioned herein above, has canvassed following points for consideration of this court:-

- (i) That, there is considerable delay in lodging the FIR without any apparent explanation, which raise a reasonable doubt about the veracity of the entire prosecution story;
- (ii) That, there is no consistency in the version of the victim and she had stated different version at different point of time for which no reliance can be placed upon her testimony;
- (iii) That, on the relevant day the appellant was working at a different village, namely, Kothonia village, for whole night and this fact is established by none other than the witnesses examined by the prosecution. But, the learned trial court had ignored the same. Referring to two decisions of Hon'ble Supreme Court in **State of Kerela vs. Anilachandran @ Madhu and Others**, reported in **(2009) 13 SCC 565**, and in **Ritesh Chakarvarti vs. State of M.P.**, reported in **(2006) 12 SCC 321**, Mr. Chetri submits that even if the appellant has failed to prove the plea of alibi by adducing any evidence, yet, the prosecution side is not relieved from establishing the case beyond doubt; but the prosecution side has failed to prove the same beyond all reasonable doubt.

Under the above facts and circumstances, Mr. Chetri submits that the impugned judgment and order of conviction cannot sustain and therefore, it is contended to allow this appeal by setting aside the same.

6. Whereas, Mr. B. Sharma, the learned Addl. P.P. has supported the impugned judgment and order and submits that though the appellant has taken the plea of alibi, yet, he could not establish the same and he also did not adduce any evidence. Mr. Sharma, also submits that the evidence of the victim is clear and cogent and the same is sufficient to establish the charge against the appellant beyond all reasonable doubt, and therefore, it is contended to dismiss this appeal.

7. On the other hand, Ms. Meghali Barman, the learned Amicus Curie for the respondent No.2, submits that two prosecution witnesses i.e. P.W.12 and 13, though testified that on the relevant night the appellant was working with them in a pendal, yet, they have not stated about the time and as such it cannot be said that the appellant has succeeded in establishing the plea of alibi. Ms. Barman further submits that the appellant had not adduced any evidence to establish such plea. It is the further submission of Ms. Barman that the victim has not attained the age of 18 years at the relevant point of time and the said fact stands established from the birth certificate of the victim (Exhibit-P1). And on such count, Ms. Barman has contended to dismiss the appeal.

8. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the record of the learned trial court and also the case laws referred by Mr. Chetri, the learned counsel for the appellant.

9. Before a discussion is directed into the submissions, so advanced by the learned counsel of both side it would be appropriate to briefly refer to the evidence on the record of the learned trial court. As stated herein above, the prosecution side had examined as many as seventeen witnesses, including the Doctor and the investigating officer, to establish the charges against the accused/appellant.

10. The prosecution side has examined the victim girl as P.W.2. Her evidence reveals that on 12.08.2019, accused Papu Borah came to her house and despite objection of her brother he took her to Aauniati Satra. Thereafter, he forcefully took her to his house by showing a dagger. On reaching their house his mother, namely, Smt Mai Borah put vermillion on her forehead. Thereafter, she started co-habituating with Papu Borah as husband and wife. Then the family members of Papu Borah came to her parent's house for giving information about her relationship with Papu Borah and assured her parents that they will allow her to continue her study and also promised them to keep her properly. Thereafter, in absence of her husband, accused Arup Borah entered into her room, and thereafter, by putting clothes on her mouth, he committed rape upon her. She could not raise alarm as because he put clothes in her mouth. After commission of rape, accused Arup Borah had fled away from her room. She then reported the matter to her mother-in-law. Thereafter, her mother-in-law, namely, Smti Mai Borah and sister of the accused Arup Borah, namely, Smti Numoli Borah assaulted her. On the relevant day of occurrence, at about 3 pm her in-laws rang up her parents by

stating that his daughter is characterless and asked them to take her back. Later on, at about 8 pm her father and uncle came to the house of accused person and took her back to her parents' house. Thereafter, she had lodged an ejahar (Exhibit P-3). Her evidence also reveals that prior to the occurrence accused Arup Borah used to look at her with bad intention while she takes bath and sometimes he touches her cheek with bad intention. Her evidence also reveals that at the time of occurrence, she was 16 years old. Thereafter, police got her statement u/s 164 Cr.P.C. (Exhibit P-4) recorded in the court and also got her examined by Doctor.

11. Nothing tangible could be elicited in cross-examination of the victim. She denied the defence suggestion that she was 18 years old on 12.08.2019, and that the birth certificate, which she had submitted, is false and fabricated. She also denied having stated in her 164 Cr.P.C statement that she voluntarily went with the accused Papu Borah as she used to love him. However, she admitted that she was living as husband and wife with the accused Papu Borah from 12.08.2019 to 09.02.2020 and that after her marriage, her accused husband Papu Borah, after four days, went to Arunachal Pradesh for work. She denied that on the day of commission of rape upon her, accused Arup Borah was not at home. She also denied that on the relevant day of commission of offence, she had invited Ratan Saikia @ Mem, with whom she used to chat, and opened the back door for him to enter into her room, to have illicit relation.

12. Though her complaint, Exhibit-P3, lends corroboration to her evidence, yet, her statement, under Section 164 Cr.P.C., appears to be not consistent with her evidence, wherein she stated that after living together for about one month, her husband left for Arunachal for his work, then accused Arup Borah, on one night at about 12 pm, entered into her room and attempted to commit rape upon her by fastening her limbs and then she administered a leg blow to him then he fled away. This contradiction appears to be on material point. And it appears that the learned trial court on account of this, had framed charge against the accused/appellant under Section 10 of the POCSO Act instead of Section 6. Thus, there appears to be substance in the submission of Mr. Chetri, the learned counsel for the appellant that the learned trial court had overlooked this contradiction which raised reasonable doubt about the veracity of the evidence of the victim.

13. P.W.1 is Shri Sunil Baruah, the father of the informant/victim. His evidence reveals that he has not remembered the date of occurrence, but the same took place in the month of August 2019. At the time of occurrence, he was in Hyderabad and after two days of the occurrence he came to know that his daughter was kidnapped by accused Papu Borah. After three days of occurrence, his daughter, somehow, managed to inform her family members about her location. Then his younger brother Rajiv Baruah went to the house of accused Papu Borah to bring her back. However, the family members of the accused did not allow him. After one and half month, he returned home and contacted the

police of Majuli P.S. but, police did not show any interest in the case. Then in the month of February 2020, the family members of accused Papu Borah asked them to bring her back. Then he and his younger brother went to the house of the accused and reached there at about 8 pm. On reaching the house of the accused they found his daughter weeping. They also saw logs in the hands of the family members of the accused and then they suspected that the informant might have been harassed and assaulted by the family members of the accused. At that time accused Papu Borah was not at home. Then, immediately they contacted him, who asked them to take her back. Then he and his younger brother returned home with his daughter. On the next day, they went to Jengraimukh P.S., but, police did not register the case and advised them to approach the Court.

14. His evidence also reveals that at the time of occurrence, his daughter was 16 years old and police seized her birth certificate (Exhibit-P1), issued by Registrar of Birth and Death, Majuli, Kamalabari and the registration card of Board of Secondary Education, Assam (Exhibit-P2). Nothing tangible could be elicited in cross-examination of this witness. He categorically denied that at the time of occurrence his daughter was 18 years old. He also denied that on 09.02.2020, at night in the house of accused person one Ratan Saikia entered into the room of the victim girl X. He also denied that the accused and his family members did not torture his daughter, and that the accused persons did not establish illegal physical relationship with his daughter in his house.

15. P.W.3, Shri Debojit Bhuyan is a witness of seizure of some documents by police and he confirmed Exhibit-P5, the seizure list, in the court. He heard that accused Papu Borah took away the victim girl. He admitted having not aware of what were the certificates seized by the I.O.

16. P.W.4 - Smti Rumi Dutta is the wife of accused/appellant Arup Borah. Her evidence reveals that accused Papu Borah had love affairs with the informant and thereafter he eloped with the informant and brought to her house. After few days, accused Papu Borah left for his job in Arunachal Pradesh. After few days they heard that one Ratan @ Mem entered into the room of the informant at night. Then accused Arup Borah informed the family members of the informant about the same. Subsequently, the family members of the informant came and took her back to her parental house.

17. Thereafter, the prosecution side declared this witness hostile and cross-examined her, wherein she denied that there was no marriage between the informant and accused Papu Borah after she came to her house. She denied that accused Arup Borah, being her husband and accused Papu Borah, being younger brother of her husband, she had deposed falsely. In cross-examination by defence, she denied that accused Papu Borah and the victim were not living as husband and wife in their house.

18. P.W.4 is Shri Rajib Baruah, who testified that accused Papu Borah eloped his niece and after few months of elopement, they came to know the victim girl has been tortured both physically and mentally and thereafter, he and the father of the victim girl went to the house of the accused person and brought her back to her parent's house. It is elicited in cross-examination that he cannot say exactly how many months the victim stayed in the house of the accused. He denied that there was illicit relationship of the victim girl with another person and that one Ratan Saikia entered in the room of victim girl at night.

19. P.W.6, Smti Mai Borah is the mother of the accused Papu Borah and Arup Borah. Her evidence reveals that the victim girl was in her house for study purpose. Her evidence also reveals that no offences, as alleged, were committed by the accused persons. Her evidence also reveals that the entire allegation is false and no such occurrence of sexual assault by the accused persons upon the victim girl ever took place. Her evidence also reveals that on the relevant day of occurrence, another boy came to her house at midnight. Notably, this witness was not cross-examined.

20. P.W.7 is Smti Boby Saikia. Her evidence reveals that on the relevant day of occurrence, she asked the victim girl that who was inside her room with her and then she did not say anything, but, later on, she told that the clothes belonged to one Mem Saikia @ Ratan. Subsequently, she returned back to home as the said person namely Mem Saikia @ Ratan is her younger brother-in-law. It is elicited in her

cross-examination that the victim returned to her parental house and that she was not assaulted by anybody.

21. P.W.8 is Smti Bina Baruah and she is the mother of the victim. Her evidence reveals that on the relevant day of occurrence, while she was preparing food, at about 7:30 pm, she found her victim daughter missing and subsequently, she came to know that accused Papu Borah took his daughter away to his house and after few days he left for Arunachal Pradesh for his work, then after 3 months her daughter informed that the brother of accused Papu Borah looked her with bad intention and started torturing her. Having come to know the same her husband brought her back and filed a case against the accused person. She denied adducing false evidence in her cross-examination.

22. P.W.9 is Sri Mridul Saikia and his evidence reveals that on the relevant day, while he was returning home from school then he saw a gathering in the house of accused and then he entered into their house and found that the matter has already been resolved between the parties, and after sometime, the victim girl was brought back by her father. Cross-examination of this witness reveals that accused Papu Borah took the victim girl to his house and had been living for about 6 months.

23. P.W.10 is Sri Anil Neog, whose evidence reveals that the victim was taken away by one person of ujani Majuli. Then the father of the victim lodged an ejahar, and subsequently, brought back his victim daughter.

His evidence also reveals that at the time of occurrence, the victim appeared in H.S.L.C. examination. This witness is not cross-examined.

24. P.W.11 is Sri Purna Kt. Baruah, whose evidence reveals that one day he was called to the house of the accused persons and then the mother of the accused persons told him that on the relevant night of the occurrence, in the morning hours, one person went out of their house. The family of the accused persons also contacted the family members of the informant, who came afterwards and took the victim. It is elicited in her cross-examination that the victim failed twice in matriculation examination.

25. P.W.12 is Sri Pranjal Dutta. His evidence reveals that he heard that on the relevant night of occurrence, one unknown person came out of the house of accused. But, he cannot say from whom he heard about the occurrence. His evidence also reveals that accused Arup Borah was with him on that relevant night as he was his worker. Nothing tangible could be elicited in cross-examination of this witness.

26. P.W.13 is Sri Dhanonjoy Bora, whose evidence reveals that the victim was eloped by the accused. His evidence also reveals that on 09.02.2020, accused Arup Bora was with them by doing pendal work on the occasion of Bhauna. They returned back home after completion of their work on the next morning. After that he came to know that some occurrence took place, but he does not know what had happened.

27. P.W.14 is Smti Jili Baruah, whose evidence reveals that she heard that the victim girl fled away from home. On the next day, she went to her house and asked about it and the rest she do not know. This witness is not cross-examined.

28. P.W.15 is Shri Ratan Saikia, whose evidence reveals that the victim was married to accused Papu Borah. After that there were some rumors of the victim with the accused Arup Borah. Then the victim's parents were called and the victim was sent with her parents. His cross-examination reveals that the victim was married to accused Papu Borah for about six months. He denied in his cross-examination that he had stated before the police that, on 07.02.2020, at about 7 pm the victim called him, taking advantage of absence of any male persons in their house, and he went to the house of the victim girl and established physical relationship with her by entering from the back door of their house. He also denied having stated to police that the victim girl rang him over phone at around 10 pm to come to her bedroom.

29. P.W.16 is Dr. Gayatri Senapati who had examined the victim on 17.02.2022, on police requisition and found the following:

There was no recent sexual assault. Her age was in between 18 to 19 years. (According to radiological examination). She confirmed her report Ext.P-6 and her signature thereon.

In cross-examination it is elicited that the victim stated that she was married.

30. P.W.17 is S.I. Kalyan Gogoi, who had investigated the case. His evidence reveals that on 11.02.2020, on receipt of a complainant from the court of learned SDJM, Majuli for investigation, the O/C Jengraimukh P.S. registered a case on 15.02.2020 and entrusted him to investigate the same. Accordingly, he had visited the place of occurrence (P.O.) drawn a rough sketch map [Ext.P-6 (A)] of the P.O., examined the witnesses and seized certain documents for determination of the age of the victim, vide seizure list- Exhibit -P5. Thereafter, he had sent the victim for medical examination and collected the report and also got her statement u/s 164 Cr.P.C. recorded in the court. Thereafter, he had arrested the accused persons and forwarded them to the Court. Then on completion of the investigation he laid charge sheet (Exhibit-8), against the accused person u/s 363 IPC, r/w Sec 4 of the POCSO Act.

31. He confirmed that P.W.15 (Ratan Saikia) had stated that "on the relevant night the victim Junemoni Boruah informed and called me to her house in absence of their family members and accordingly, I went to her house and entered from the back door of their house. And thereafter I had sexual intercourse with her and came back to my house." Nothing tangible could be elicited in cross-examination of this witness, except, however, confirming some statements made before him by P.W.1, 2, 4, 5, 7, 11. But, it appears that the statements have no bearing upon the charges, so framed against the present accused/appellant and therefore, detail discussion is found to be not necessary here in this case.

32. It is worth mentioning in this context that accused Papu Borah, with whom the victim allegedly got married and who was charged under Section 6 of the POCSO Act is acquitted by the learned trial court. The present appellant was charged under Section 10 of the POCSO Act and also found to be guilty of the same and convicted under Section 10 of the POCSO Act. Therefore, the discussion of this court will confined only to the evidence on record concerning the charge of the present accused/appellant only.

33. It is well settled that in order to establish any charge under the POCSO Act the prosecution first has to establish that the victim is a child as defined under section 2(d) of the POCSO Act. Section 2 (d) define child as a person who has not completed 18 years. Section 34(2) of the POCSO Act provides that - If any question arises in any proceeding before the Special Court, whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination. As indicated in sub section (1) of Section 34 of the POSCO Act, the age of the victim could be determined by following the procedure contemplated in Section 94 of Juvenile Justice Act, 2015.

34. In the case of **Jarnail Singh vs. State of Haryana, reported in (2013) 7 SCC 263**, Hon'ble Supreme Court, while dealing with the issue of determination of age of a minor, has held that one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. Even though Rule 12 is strictly applicable only

to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a 'child' who is a victim of crime for, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime.

35. Again in the case of **State of MP v. Anoop Singh reported in (2015) 7 SCC 773**, it has been held by Hon'ble Supreme Court that Rule 12(3) of the Juvenile Justice (Care & Protection of Children) Rules, 2007 is applicable to determination of age of rape victim.

36. It is to be noted here that Rule 12(3) (b) of the 2007 Rules, which reads as:

"12. Procedure to be followed in determination of age.—

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining:-

- (a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;
- (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) And only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. And, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

37. Whereas, Section 94 of Juvenile Justice Act, 2015 provides for presumption and determination of age.-

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving

evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining-

- (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
- (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;
- (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

38. In the case in hand, the I.O. had seized the Birth Certificate (Exhibit-P1) issued by Registrar of Birth and Death, Majuli, Kamalabari and the registration card of Board of Secondary Education Assam (Exhibit-P2). Exhibit P1 is a document mentioned in Sub-section 2(i) and (ii) of Section 94 of the Juvenile Justice Act, 2015. A perusal of the same indicates that her dated of birth was 03.01.2004. The same stands corroborated from the Exhibit-P2, the registration card of Board of Secondary Education Assam. And as such she has not completed 18 years on the date of occurrence. Though, however, the medical evidence (P.W.16) indicates that her age was in between 18-19 years, the Birth Certificate is in second place, in order of precedence. And as such the same has to be accepted and perusal of the same indicates that she has not completed 18 years on the date of occurrence, concerning the present accused/appellant, which allegedly, took place on 09.02.2020 and also prior to that date. Notably, the accused/appellant has not seriously disputed the age of the victim.

39. Here in this case, admittedly, there is no eye witness to the occurrence, except however, the victim, since the same took place at about 12 o'clock at mid-night on 12.08.2019. And as such the evidence of the victim and of the Doctor are relevant. Besides, the evidence of P.W.12 and 13 are also relevant, as the accused/appellant had taken a plea of alibi, though not directly, but, the same appears from the trend of cross-examination of the prosecution witnesses.

40. As discussed here in above, the victim had categorically stated in her testimony that accused/appellant Arup Borah, in absence of her husband, entered into her room, and thereafter, having put clothes on her mouth, he committed rape upon her and that she could not raise alarm as because he put clothes in her mouth. Then after commission of rape, accused Arup Borah fled away from her room. She then reported the matter to her mother-in-law. Thereafter, her mother in law Mai Borah and sister of the accused Arup Borah namely Numoli Borah assaulted her. Her complaint, Exhibit-3, is also consistent with her version. Further, it appears from her evidence that prior to the occurrence, accused Arup Borah used to look at her with bad intention while she takes bath, and sometimes, he touches her cheek with bad intention.

41. Though, her complaint (Exhibit-P3), appears to be corroborating her evidence, yet, her statement under Section 164 Cr.P.C. appears to be not consistent with her evidence. In her statement under Section 164 Cr.P.C., she stated that accused Arup Borah, on one night, at about 12 O'clock, entered into her room and attempted to commit rape upon her by fastening her limbs and then she administered a leg blow to him and then he fled away. Then her mother-in-law came there and unfastened her limbs. While she reported the matter to her mother-in-law, she did not believe her and assaulted her, and Numali Borah, her sister-in-law also joined her mother-in-law in assaulting her.

42. The prosecution side has examined the mother-in-law of the victim as P.W.6. But, this witness has never supported the version of the victim.

She categorically stated that the entire allegation of sexual assault by the accused persons upon the victim is false. It is to be noted here that this witness was not declared hostile by the prosecution side, though she had not supported the prosecution case. It is fact that she is the mother of the accused/appellant and as such it cannot be expected that she will depose against her sons and speak the truth. In the motherly instinct of blood she had sacrificed the later (truth).

43. This contradiction in the evidence of the victim (P.W.2) with her statement under Section 164 Cr.P.C. (Exhibit-P3) appears to be on material point and the same cast a reasonable doubt in the mind, about the veracity of her version. She also could not state the date in her evidence before the court and in her statement under Section 164 Cr.P.C. (Exhibit-P4), though in the complaint (Exhibit-P3), she stated that the same took place on 09.02.2020. And if we consider the same in the light of medical evidence, then the doubt stands further fortified. It is to be noted here that the Doctor (P.W.16), had found no sign of recent sexual assault on the person of the victim on examination on 17.02.2020. Besides, she also could not state the date and time of looking at her with bad intention by accused Arup Borah while she takes bath and also about touching her cheek with bad intention.

44. Because of this reason and also because of absence of corroboration from independent witnesses, though her mother P.W.8 had deposed about the same being reported to her by the victim, had failed to inspire confidence. It is however well settled that to prove a particular

fact no particular number of witnesses are required as provided in Section 134 of the Evidence Act. Evidence of a single witness is sufficient to prove a fact, provided the same is wholly reliable and also is of sterling quality and able to inspire confidence of the court. Here in this case, having appreciated, analysed and assessed the evidence of the victim, with the yardstick of probabilities, its intrinsic value and the animus of the witness (victim), I find the same cannot be wholly relied upon as the same is not of the sterling quality, to act upon so as to record a conviction.

45. Thus, I find substance in the submission of Mr. Chetri, the learned counsel for the accused/appellant. The contradictions, so pointed out by him appear to be on material point and are sufficient to give rise suspicion about the veracity of her version. It is well settled that any benefit of doubt will always goes in favour of the accused and it is one of the cardinal principle of the criminal jurisprudence.

46. Another factor, that militate against the veracity of the version of the victim that the evidence of P.W.12 and 13 indicates that on the relevant night i.e. on 09.02.2020, accused/appellant was doing pendal work on the occasion of Bhauna on the relevant night. The evidence of P.W.12 Sri Pranjal Dutta had categorically stated that accused Arup Borah was with him on that relevant night as he was his worker. Close on the heel of P.W.12, Sri Dhanonjoy Bora (P.W-13) also stated that on 09.02.2020, accused Arup Borah was with them by doing pendal work on

the occasion of Bhauna and they returned back after completion of their work on the next morning.

47. It is a fact that the accused/appellant had not taken any plea of alibi in his examination under Section 313 Cr.P.C. But, it appears from the trend of cross-examination of the prosecution witnesses that such a plea was taken impliedly. Here the evidence of P.W. 12 and 13 reveals that the accused was doing pendal work on the occasion of Bhauna at a different village, namely, Kothonia village and they returned back after completion of their work in the next morning. The prosecution side has also not declared these two witnesses hostile. Nothing could be elicited in their cross-examination also to discredit their version. Therefore, their evidence cannot be brushed aside. And the same, thus, belied the prosecution version.

48. I have considered the submission of Mr. Chetri, the learned counsel for the appellant in respect of the plea of alibi and also gone through the case laws in **Anilachandran @ Madhu** (supra) and in **Ritesh Chakarvarti** (supra) and I find that the same also strengthened his submission. It is held that it is the duty of the accused to prove his defence and even if an alibi is not proved, the court shall not record a judgment of conviction unless the prosecution is found to have established its case.

49. Under the aforementioned facts and circumstances, I find that the prosecution side had failed to discharge its burden of proving under

Section 10 of the POCSO Act, against the accused/appellant beyond all reasonable doubt. Thus, there appears to be good and substantial reason to interfere with the impugned judgment and order of conviction and sentence dated 03.03.2023.

50. In the result, I find sufficient merit in this appeal and accordingly the same stands allowed. The impugned judgment and order of conviction and sentence dated 03.03.2023, stands set aside and quashed. The accused/appellant shall be released from jail hazot if not warranted in any other case. Send down the record of the learned court below with a copy of this judgment and order.

51. Before parting with, I would like to place on record the invaluable services rendered by Ms. Megali Barman as Amicus Curie. The registry shall pay the necessary remuneration to her as per Rule.

JUDGE

Comparing Assistant