GAHC010025002024

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

Case No. : Crl.A./40/2024

PUSPA KANTA PEGU
S/O LATE LUJEN PEGU,
R/O SONALI JANAJATI NO. 2, KANGKAN GAON, P.S.- LEKHAPANI, DIST.- TINSUKIA, ASSAM.

VERSUS

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

2:RONOJ YIEN
S/O ARJUN YIEN

R/O SONALI JANAJATI NO. 2
KANGKAN GAON
P.S.- LEKHAPANI
DIST.- TINSUKIA
ASSAM
PIN- 786179

Advocate for the Petitioner : MR. A K HUSSAIN, MR A HAQUE,MR. B HUSSAIN

Advocate for the Respondent : PP, ASSAM, MS. M BARMAN, LEGAL AID COUNSEL, R-2

BEFORE

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

HON'BLE MRS. JUSTICE YARENJUNGLA LONGKUMER

Advocate for the Appellant : Shri A.K. Hussain
Advocate for the Respondents : Ms. B. Bhuyan, APP, Assam
Ms. M. Barman, Legal Aid Counsel-R/2

Date of Hearing : **30.04.2025**
Date of Judgment : **18.06.2025**

JUDGMENT & ORDER

(S.K. Medhi, J.)

The instant appeal has been preferred under Section 374 of the Code of Criminal Procedure, 1973 (Corresponding to Section 415 of Bharatiya Nagarik Suraksha Sanhita, 2023) against the judgment and order dated 10.01.2024 passed by the learned Special Judge (POCSO), Tinsukia in POCSO Case No. 50/2023 under Section 4(2) of Protection of Children from Sexual Offenses Act, 2012 (hereinafter POCSO Act), arising out of Lekhapani P.S. Case No. 33/2023 by which the appellant has been convicted and sentenced to undergo rigorous imprisonment for a period of 20 years and fine of Rs. 10,000/- (Rupees Ten Thousand) in default of fine to simple imprisonment of 4 months.

2. The criminal law was set into motion by lodging of an *Ejahar* by PW-1, who is the father of the victim on 12.04.2023. It has been stated that on 11.04.2023 his minor daughter aged about 12 years informed her female friends that she was forcefully sexually assaulted for past 7 or 8 months by the appellant and was also threatened not to disclose the matter to anybody. Accordingly, the information was lodged. Based on the said *Ejahar*, the FIR was registered and investigation was done, leading to laying

of a charge-sheet. The statement of the victim was also recorded under Section 164 of the Cr.PC (Corresponding to Section 183 of BNSS). The charges were, accordingly framed under Section 4(2) of the POCSO Act and on the accused pleading not guilty, the trial had begun, in which evidence of 9 nos. of prosecution witnesses were adduced.

3. PW1 is the informant, who is the father of the victim girl. He deposed that the incident took place about 4 months back. He said that the appellant had taken his victim daughter to his house on the pretext of returning a small pot belonging to her *Aita* (grandmother). Then, the appellant took her inside the T.V. room and the appellant pressed the mouth of the victim and inserted his urinating organ into the urinating organ of the victim. The victim accordingly told them about the incident. He had then lodged the *Ejahar* which was proved Exhibit P/1. He deposed that the present age of his daughter is about 13 years. He also stated that as per the material Exhibit 1, which is the birth certificate, proved in original by him, the date of birth of the victim is 13.12.2010. He is also a witness to the seizure of the wearing apparel of the victim which was proved as Exhibit P/2. He also deposed that the appellant had admitted his guilt.

4. On being cross examined, the PW1 deposed that he does not know how to read and write but, he knows how to put his signature. He deposed that he does not know the contents of Exhibit P/1 but he lodged the *Ejahar* about 3 days after the incident as he was at Liaka. He stated that the appellant is his neighbour and works as a quack. He further stated that he had previously taken treatment from the appellant for his kidney stone. He also mentioned that the victim suffered from Japanese encephalitis and she recieved treatment at AMCH, Dibrugarh, around 5 years back. He stated

that the victim told him about the incident in the presence of his neighbours Jugo Padon (PW7), Rakesh Pegu and Tekeswar Doley. He denied the suggestion that the appellant had not committed any such act on his daughter as deposed by him. He denied the suggestion that he had lodged the case falsely against the appellant as he had asked for the cost of treatment given to his daughter for Japanese encephalitis.

5. PW2 is the victim. Before being examined, the PW2 was asked certain questions to assess her level of understanding by the learned Trial Court and was satisfied. The victim deposed that she knows the appellant and used to call him *mama*. She deposed that the incident took place about 4 months ago. On the day of the incident, the appellant had called her to his house to bring a pot of lime. When she went to his house, the appellant had taken her to the T.V. room where he pressed her mouth, undressed her and inserted his urinating organ into her urinating organ. She narrated the incident to her elder sister after they came home. Thereafter, the police took her to the hospital for medical examination. She also told the Doctor about the incident and the police also sent her to the Court for recording her statement before the learned Magistrate, which has been proved as Exhibit P/3.

6. In her cross examination, she deposed that the appellant is their neighbour and her parents and elder sister had gone to Dodhia and they returned after 4 days. During that time, she had gone to the house of the appellant to bring the pot of lime after coming back from school. At the time of the incident, she was not under treatment of the appellant. She denied the suggestion that her statement before the Magistrate was tutored by her mother. She narrated the incident to her elder sister after 3 days of

the incident. After the incident, she had not gone to the house of the appellant. She confirmed the incident in the cross-examination.

7. PW3 is the mother of the victim, who deposed that the victim is her second child and the incident occurred about 4 months ago. On the day of the incident she was not at home as she had gone to Dodhia and returned only after 3 days. Upon her return, her elder daughter told her that, on the day of the incident, the victim had gone to the house of the appellant to bring a pot. Then the appellant had taken her inside the room, pulled down her pants and inserted his urinating organ into her urinating organ. Upon hearing this she asked the victim about the incident. The victim also confirmed the fact about the incident. She called their neighbours including Rakesh Pegu, Tukeswar Doley and Jugo Podum (PW7). The appellant admitted his guilt in front of them.

8. On being cross examined PW3 stated that there are 5 houses in between her house and the house of the appellant. Prior to the incident they were on visiting terms with the appellant. The appellant works as a quack and many years back, her victim daughter received treatment from the appellant. Furthermore, they also used to take medicine from his for small ailments. She came to know about the incident 3 days after returning from Dodhia. She further stated that her statement was recorded by the police, and during that time, she had informed the police that she came to know about the incident 3 days after it occurred. She clarified that she heard about the incident from her elder daughter, Manisha. She deposed of telling the police she checked the private part of the victim and saw swelling in her private part. PW3 denied the suggestion that the appellant had not committed any such act on the victim as deposed by her and also

denied the suggestion that they had lodged the case falsely against the appellant as he had asked for the cost of treatment from them.

9. PW4 is the Doctor who examined the victim. She deposed that on 12.04.2023 she was working as Senior M.O. at Tirap Gate State Dispensary. On that day, at about 12:00 Noon, she conducted the examination of the victim girl. The consent for examination was obtained from the mother of her victim. PW 4 deposed that the mother of the victim told her that on 28.03.2023, at around 2:00 PM when she was not at home, the victim was at home with her grandparents. The appellant came to their house and took the victim to his house and physically and sexually assaulted her. The victim told her that the accused inserted his private part into her private part and the victim had taken bath after coming home. PW4 deposed that upon examination, she found as follows:

1. The victim has not attained menarche.

2. Weight 30 kg.

3. Height 3 ft. 10 inch.

4. Total dentition - 24.

5. No external injury.

6. Pubic hair- absent.

7. Fourchette- discoloration due to frequent manhandling.

8. Vulva- healed tear of around 2 weeks old at 8 O'clock position.

9. Hymen - absent with old tear of around 2 weeks old.

10. Deflated vagina with bluish discoloration.

11. Supplied vaginal smear does not show any spermatozoa.

12. Urine beta HCG- negative.

13. USG normal.

14. As per radiological report the age of the victim was between 10 to 12 years.

PW4 proved the medical report as Exhibit P/4. On being cross examined, PW4 stated that the injury which she found in the private part of the victim cannot be caused by any other way, other than forceful penetration or fingering. She denied the suggestion that her report is not proper.

10. PW5 is the cousin of the victim. PW5 deposed that he knows the appellant as he was a neighbor. The incident took place in April 2023. The father of the victim had called for a village meeting, and attended the meeting. The father of the victim told him that the appellant had committed rape on the victim. The appellant also attended the meeting and had admitted his guilt in the same meeting. In his cross examination, PW5 confirmed that the appellant had admitted his guilt in the meeting and denied the suggestion that he has deposed before the Court as tutored by the informant.

11. PW6 is also a neighbor of the victim and the appellant. She was not cross examined as she stated that she did not know anything about the incident.

12. PW7 is Jugo Pudum, a neighbor of the appellant and the victim. He deposed that the incident took place in the month of April 2023. One day when he was at home, the father of the victim called him and told him that

the appellant had committed rape on the victim. He suggested to the father of the victim to approach the administration. A village meeting was held, and he also attended the meeting, in the meeting the appellant admitted his guilt. In his cross-examination, PW7 confirmed that the appellant had admitted his guilt in the meeting, he denied that he had deposed falsely against the appellant as he has cordial relations with the victim's family.

13. PW8 is the elder sister of the victim. She deposed that the incident took place in the month of April 2023. On the day of the incident, she and her parents had gone to attend a social function in her maternal aunt's place and her victim sister was with her grandparents at home. They returned home after 2 or 3 days. Upon returning home, she observed that her younger sister was looking somewhat depressed and was not happy. She asked her what had happened and assured her that she would not communicate the same to her parents. PW8 further deposed that her victim sister told her that the appellant had inserted his urinating organ into her urinating organ. Thereafter, she told her mother about the incident. Her mother also asked the victim about the incident and the victim confirmed the same. On being cross examined, PW8 confirmed that the appellant had committed the act as deposed by her. She also denied the suggestion that she had deposed falsely about the appellant inserting his urinating organ into the urinating organ of her sister.

14. PW9 is the Investigating Officer (I.O) of the case. He deposed that on 12.04.2023 he was working as In-Charge of Jagun Out Post. On the same day, on receipt of the *Ejahar* from PW 1, he made the G.D. Entry and forwarded the *Ejahar* to the Officer-in-Charge (O.C) of Lekhapani Police Station for registering a case. Upon registration of the case, the same was

endorsed to him for investigation. He deposed that he recorded the statement of the Informant (PW1). Then he visited the place of occurrence and prepared the sketch map of the Place of Occurrence, which was proved as Exhibit P 5. He also recorded the statement of victim along with the other witness. He sent the victim for medical examination and also sent the victim to the magistrate for recording her statement under Section 164 Cr.PC (Corresponding to Section 183 of BNSS). He arrested the appellant and forwarded him to the Court. He also seized the birth certificate of the victim as well as her wearing apparel. He proved Exhibit P 2 as the seizure list. He collected the medical report and the copy of the victim's statement under Section 164 Cr.PC (Corresponding to Section 183 of BNSS) and upon completion of the investigation he laid the charge sheet which he has proved as Exhibit P 6.

15. In his cross-examination, he stated that he prepared the sketch map has shown by the informant. He confirmed that the place of occurrence, as per the sketch map, was the T.V room, which only contained a television and did not have any bed or other furniture. He did not send the wearing apparel of the victim to the FSL. He also stated that in the *Ejahar,* the date of the incident is not mentioned. He stated that he did not record the statement of Rakesh Pegu and Tukeswar Doley, but he recorded the statement of Gandheswar Yein. He also stated that the victim did not state the exact date of the incident and she told him that she could not remember the date.

16. The aforesaid evidence and the materials on record were put to the appellant / accused in his examination under Section 313 of the Cr.PC (Corresponding to Section 351 BNSS), where he had denied the allegation.

However, in his response to question No. 26, he had made a statement that the family of the victim was trying to grab land from him, and accordingly false implication was made. Based on the aforesaid materials and the response of the accused in his examination under Section 313 of the Cr.PC, the impugned judgment has been passed, which is the subject matter of challenge in the present appeal.

17. We have heard Shri A.K. Hussain, learned counsel for the appellant. We have also heard Ms. B. Bhuyan, learned Senior Advocate and Additional Public Prosecutor for the State of Assam and Ms. M. Barman, learned Legal Aid Counsel for the respondent no. 2.

18. Shri Hussain, the learned counsel for the appellant has submitted that the prosecution case hinges around the solitary evidence of the alleged victim. He has submitted that such solitary evidence cannot be made the basis of conviction, more so when there are discrepancies in the said deposition. By drawing the attention of the Court to the evidence on record, more particularly that of the victim as PW2, the learned counsel has submitted that whereas in one of the versions, the victim had deposed that the appellant had called her, on the other hand, she had said that she had gone to the appellant on her own. He has also drawn the attention of the evidence of PW3 - the mother, who did not even state the date of the incident, i.e., 28.03.2023, in her deposition which is a crucial *lacuna*. He is also critical of the statement of the alleged victim recorded under Section 164 of the Cr.PC (Corresponding to Section 183 BNSS), wherein the dates have been stated to be 13/14.04.2023, whereas the FIR itself was lodged on 12.04.2023. He has submitted that such inconsistency which is with regard to the date of the alleged offence goes to the root of the case and

therefore the entire trial is vitiated.

19. The learned counsel for the appellant has also drawn the attention of this Court to the response of the appellant in his examination under Section 313 of the Cr.PC (Corresponding to Section 351 BNSS), wherein he has not only denied the allegation but had also given a reason for false implication. He has responded to question no. 26 that the family of the informant was trying to grab land and, in this connection, false allegations were made against him. He has submitted that the prosecution has projected the victim as the sterling witness and accordingly, the said victim who was examined as PW2 must pass the test of sterling witness as laid down in the case of ***Nirmal Premkumar and Anr. Vs. State, represented by Inspect of Police*** reported in ***2024 SCC OnLine 260***. He has submitted that the aspect of sterling witness has been clearly explained in the said case and wherein it has been laid down that a strict scrutiny is required of such evidence. He has submitted that PW2 would not pass the test laid down by the Hon'ble Supreme Court to be regarded as sterling witness.

20. He has also submitted that the evidence of the Doctor, who was examined as PW4 cannot be accepted *in toto* and such opinion is to be supported by other witnesses. In this regard, he has relied upon the case of ***Awadhesh and Anr. Vs. State of MP*** reported in ***(1988) 2 SCC 557*** and paragraph 10 of the same has been pressed into service which reads as follows.

> "***10.*** *... Though medical expert's opinion is not always final and binding, but in the instant case it corroborates other circumstances which indicate that the eyewitnesses had not seen the actual*

occurrence."

21. The learned counsel for the appellant therefore submits that the impugned conviction and sentence is not in accordance with law and accordingly, the present appeal is required to be allowed.

22. *Per contra*, Ms. Bhuyan, learned Senior Counsel and APP has submitted that the prosecution has been able to prove the case beyond all reasonable doubt and in this case, the victim herself had deposed in the Court as PW2 and such deposition is trustworthy and inspires confidence. The said victim had also recorded her statement under Section 164 of the Cr.PC (Corresponding to Section 183 BNSS) and there is substantial compliance of the same.

23. On the grounds of challenge which has been espoused by the appellant, the learned APP has submitted that there is no discrepancy of the evidence of the victim who was examined as PW2. It is submitted that before examining PW2, the learned Court had put certain questions to come to a conclusion about her ability to answer and the satisfaction was recorded. It is also submitted that apart from the statement recorded under Section 164 Cr.PC (Corresponding to Section 183 BNSS) of the victim, her initial statement was recorded by the Police on 12.04.2023 and on a comparison thereof, there is no discrepancy whatsoever. She has also pointed out that in her statement under Section 161 Cr.PC (Corresponding to Section 180 BNSS) the victim had mentioned 28th and 29th as the date on which the offence was committed. She has submitted that the status of a victim under a case of this nature is equivalent to that of an injured witness and the testimony of such an injured witness stands on a higher footing. She has submitted that the aspect that in her under Section 164

Cr.PC statement, the victim had stated the date to be 13th or 14th will not be of much relevance as, the same is apparently an inadvertent error inasmuch as the appellant was already arrested on 12.04.2023 and therefore, there is no question that the incident could have happened on 13th or 14th of April, 2023 when the appellant was already in custody. She has also highlighted the aspect that the occurrence was repeated, and it was not the first time that the appellant had indulged in the said offence. In the Section 164 Cr.PC statement, the victim had also stated that out of fear, she had not disclosed the incident initially. The injuries in the private parts were categorically stated by the victim in her statement under Section 164 Cr.PC, as well as by PW3.

24. In support of her submission, the learned APP has relied upon the case of ***State of UP Vs. Chottey Lal*** reported in ***(2011) 2 SCC 550*** in which it has been laid down that testimony of a prosecutrix is of immense importance wherein corroboration may not be necessary. In the said case, the status of women in India who are faced with such an offence has also been discussed. For ready reference, the relevant observations are extracted hereinbelow:

> "***22.*** *In the backdrop of the above legal position, with which we are in respectful agreement, the evidence of the prosecutrix needs to be analysed and examined carefully. But, before we do that, we state, as has been repeatedly stated by this Court, that a woman who is a victim of sexual assault is not an accomplice to the crime. Her evidence cannot be tested with suspicion as that of an accomplice. As a matter of fact, the evidence of the prosecutrix is similar to the evidence of an injured complainant or witness. The testimony of the prosecutrix, if*

found to be reliable, by itself, may be sufficient to convict the culprit and no corroboration of her evidence is necessary. In prosecutions of rape, the law does not require corroboration. The evidence of the prosecutrix may sustain a conviction. It is only by way of abundant caution that the court may look for some corroboration so as to satisfy its conscience and rule out any false accusations.

23. *In State of Maharashtra v. Chandraprakash Kewalchand Jain this Court at SCC p. 559 of the Report said: (SCC para 16)*

> *"16. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the*

case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

25. *In Vijay v. State of M.P., decided recently, this Court referred to the above two decisions of this Court in Chandraprakash Kewalchand Jain and Gurmit Singh and also few other decisions and observed as follows: (Vijay case, SCC p. 198, para 14)*

"14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

26. *The important thing that the court has to bear in mind is that what is lost by a rape victim is face. The victim loses value as a person. Ours is a conservative society and, therefore, a woman and more so a young unmarried woman will not put her reputation in peril by alleging falsely about forcible sexual assault. In examining the evidence of the prosecutrix the courts must be alive to the conditions prevalent in the Indian society and must not be swayed by beliefs in other countries.*

The courts must be sensitive and responsive to the plight of the female victim of sexual assault. Society's belief and value systems need to be kept uppermost in mind as rape is the worst form of women's oppression. A forcible sexual assault brings in humiliation, feeling of disgust, tremendous embarrassment, sense of shame, trauma and lifelong emotional scar to a victim and it is, therefore, most unlikely of a woman, and more so by a young woman, roping in somebody falsely in the crime of rape. The stigma that attaches to the victim of rape in Indian society ordinarily rules out the levelling of false accusations. An Indian woman traditionally will not concoct an untruthful story and bring charges of rape for the purpose of blackmail, hatred, spite or revenge.

27. *This Court has repeatedly laid down the guidelines as to how the evidence of the prosecutrix in the crime of rape should be evaluated by the court. The observations made in Bharwada Bhoginbhai Hirjibhai v. State of Gujarat deserve special mention as, in our view, these must be kept in mind invariably while dealing with a rape case. This Court observed as follows:*

> *"9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyse the argument in support of the need for corroboration and subject it to relentless and*

remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot, therefore, be identical."

28. *This Court went on to observe at SCC pp. 225-26: (Bharwada case, SCC para 10)*

"*10. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because—*

(1) A girl or a woman in the tradition-bound non-permissive

society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.

(2) She would be conscious of the danger of being ostracised by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours.

(3) She would have to brave the whole world.

(4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered.

(5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family.

(6) It would almost inevitably and almost invariably result in mental torture and suffering to herself.

(7) The fear of being taunted by others will always haunt her.

(8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition-bound society where by and large sex is taboo.

(9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy.

(10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would

also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour.

(11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence.

(12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross-examination by the counsel for the culprit, and the risk of being disbelieved, acts as a deterrent."

25. Supporting the case of the prosecution, Ms. M. Barman, learned Legal Aid Counsel for the respondent no. 2 has submitted that under the POCSO Act, there is a provision for presumption and reverse burden. She submits that the prosecution had successfully established the foundational facts and on shifting of the burden, such burden has not been discharged by the accused appellant in the instant case. She submits that in his response to his examination under Section 313 of the Cr.PC (Corresponding to Section 351 BNSS), the appellant took a plea that the case had been falsely instituted due to a land dispute or an intention to grab land. However, no evidence was adduced in that regard. She has also highlighted that irrespective of the fact that no defence evidence was adduced in the cross-examination, no questions which would form an acceptable defence was put to the prosecution witnesses and accordingly, no foundation was laid down for any defence by the appellant. She has submitted that the prosecution version is trustworthy which was also supported by the other

witnesses.

26. The rival submissions have been duly considered and the materials, including TCRs placed before this Court have been carefully examined.

27. The *Ejahar* was lodged on 12.04.2023 by the father of the victim who had deposed as PW1. In the said *Ejahar*, he had also stated about forced sexual assault on the victim for the past 7 to 8 years and immediately on the next day, i.e. 13.04.2023, the appellant was arrested. The victim was examined under Section 164 of the Cr.PC (Corresponding to Section 183 BNSS) on 19.04.2023, in which she had however stated the date of the incident as 13th or 14th April 2023. Though such dates, as stated above, are not consistent with the date stated in the *Ejahar* and the other witnesses, it clearly appears that the same is an inadvertent error committed by the victim when her statement was recorded under Section 164 of the Cr.PC. It has to be kept in mind that the victim was aged about 12 to 13 years and after an incident of such magnitude which was reported to the police, the mental aspect of the victim cannot be overlooked and therefore making a mistake so far as the dates are concerned has to be examined in the context of the other materials on record. As rightly pointed out by the learned APP, such mentioning of dates as 13th and 14th of April 2023 was apparently an inadvertent error inasmuch as, on 13.04.2023, the appellant was already arrested and therefore it was not possible for the incident to have occurred on 13th or 14th of April.

28. Be that as it may, the victim as PW2, had clearly narrated the events. This Court has also taken note of the fact that, prior to recording her substantive statement, the learned Trial Court had duly put preliminary questions to the victim in order to come to a satisfaction that the victim

was in a proper state of mind to make the deposition. She had deposed that the incident had happened when her parents and her elder sister had gone to some other place in connection with a marriage and she was alone with her grandparents and after their return, the incident was narrated, at first to the elder sister and thereafter to the mother who were respectively examined as PW8 and PW3. PW8, the elder sister, had narrated that they were not at home for 2-3 days and on reaching home, the victim was found to be unhappy and on asking, she had narrated the entire incident. The deposition of the mother of the victim as PW3 is consistent with the version of PW8 as well as PW2. She had narrated that her elder daughter had told her about the incident whereafter the incident was described by the victim herself. She had also narrated that she along with few other people including PW7 had confronted the appellant who had admitted to his guilt. In the cross-examination, she had also stated that on checking the private parts of the victim, it was found to be swelling. The aspect of extra-judicial confession was also corroborated by PW1 and 2, the parents as well as PW5 and PW7, who are neighbors. In fact, PW 5 had also stated in his cross-examination that the appellant was not manhandled.

29. In a matter pertaining to the POCSO Act, there is a provision of presumption and reverse burden in the form of Sections 29 and 30. However, it is well settled that such reverse burden would apply only after the prosecution is successful in laying the foundational facts and proving the same. In this connection, it may be relevant to refer to the case of ***Bhupen Kalita Vs. State of Assam*** reported in ***2020 (3) GLT 403*** in which the following were stated:

> "***71.*** *In the light of the discussions above, the following legal*

positions emerge in any proceeding under the POCSO Act.

(A) The prosecution has to prove the foundational facts of the offence charged against the accused, not based onproof beyond reasonable doubt, but on the basis of preponderance of probability.

(B) Accordingly, if the prosecution is not able to prove the foundational facts of the offence based on prepo-nderance of probability, the presumption under Section 29 of the Act cannot be invoked against the accused.

(C) If the prosecution is successful in establishing the foundational facts and the presumption is raised against the accused, the accused can rebut the same either by discrediting the prosecution witnesses through cross-examinationor by adducing his own evidence to demonstrate that the prosecution case is improbable based on the principle of preponderance of probability. However, if it relates to absence of culpable mental state, the accused has to prove the absence of such culpable mental state beyond reasonable doubt as provided under Section 30(2) of the Act.

(D) However, because of legal presumption against the accused, it may not suffice by merely trying to discredit the evidence of the prosecution through cross-examination, and the defence may be required to adduce evidence to dismantle the legal presumption against him and prove that he is not guilty. The accused would be expected to come forward with more positive evidence to establish his innocence tonegate the presumptionof guilt."

30. The aforesaid decision of the learned Single Judge was reiterated by a Division Bench in the case of ***Manirul Islam Vs. State of Assam*** reported in ***2021 (3) GLT 128***.

31. In the instant case, it is seen that the foundational facts were successfully established beyond all reasonable doubt by the prosecution. Though the learned counsel for the appellant had tried to impeach the evidence of the victim who had deposed as PW2, this Court has observed that apart from the wrong mentioning of the dates in her examination under Section 164 of the Cr.PC (Corresponding to Section 183 BNSS) which have already been discussed in detail above, the evidence is consistent with her narration of facts, both in her statement before the police and her statement under Section 164 Cr.PC. The evidence of the other witnesses, more particularly, PW3, her mother and PW8 corroborates the evidence of PW2. So far as the age of the victim is concerned, apart from the Birth Certificate which was proved by the PW1 as Mat. Exhibit 1, the Doctor in her deposition had stated that as per Radiological Report, the age of the victim was found to be 10 to 12 years and therefore there is no manner of doubt that the POCSO Act would be applicable in view of the allegation made against the appellant.

32. In the case of ***Chottey Lal*** (supra), which has been relied upon by the learned APP, it has been clearly laid down that the testimony of the prosecutrix can be the sole basis of a conviction and corroboration may not be necessary if such testimony appears to be trustworthy and inspires confidence. It may be mentioned that the facts of ***Chottey Lal*** (supra) would show that the accusation was under Section 376 IPC and the present

case is on a better footing where such accusation is under Section 4 of the POCSO Act, wherein there would also be an application of Sections 29 and 30 of the Act.

33. As regards the grounds of the appellant that in his examination under Section 313 of the Cr.PC (Corresponding to Section 351 BNSS), a defense was sought to be portrayed namely that there were some dispute regarding land grabbing which led to a false accusation. This Court has, however, seen that apart from making a mere statement in his response, the appellant had chosen not to adduce any evidence. This Court also finds force in the submission of Ms. Barman, the learned counsel for respondent no.2 that even in the cross-examination, no foundation was tried to be laid to make out a case of defense. No questions were put to any of the prosecution witness on the aspect of any land grabbing. This Court has also noticed that on the other hand, the records would suggest that a defense was tried to be projected that there were certain dues from the family of the informant to the appellant, as he had treated the victim earlier. It may be mentioned that the appellant is a village quack and used to provide treatments for certain diseases.

34. We have also noticed that the PWs 1, 3, 5 and 7 had deposed that the appellant had confessed before them about his involvement. As noted above, PW5 had also negated the suggestion given in the cross-examination that the appellant was manhandled. Though extra-judicial confession may be a weak piece of evidence, it can certainly be used for corroboration with the other materials on record and in the instant case, we find that the materials which were proved in the trial are sufficient by itself to come to a conclusion of guilt of the appellant. Therefore, the

extrajudicial confession which were made by the appellant and proved by PWs 1, 3, 5 and 7 would also be corroborating evidence. In any event, the instant case being based on direct evidence in the form of eyewitness wherein the victim herself had adduced evidence, such corroboration may not be even necessary.

35. In conspectus of the aforesaid discussion and the materials on record, we are of the view that the conclusion arrived at by the learned Special Judge (POCSO), Tinsukia in POCSO Case No. 50/2023 under Section 4(2) of POCSO Act arising out of Lekhapani P.S. Case No. 33/2023 vide judgment dated 10.01.2024 does not warrant any interference. Accordingly, the appeal stands dismissed.

36. Send back the TCRs.

37. Before parting, we deem it appropriate to place on record our appreciation for the valuable assistance rendered by Ms. M. Barman, the learned Legal Aid Counsel for the respondent no. 2. She would be entitled to the prescribed fee.

JUDGE **JUDGE**

Comparing Assistant