

GAHC010153672023



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2026:GAU-AS:7241-

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

Case No. : CrI.A./267/2023

SATISH RAY (MANDAL) @ SATISH MANDAL @ SATISH CH RAY
S/O ANANDA MANDAL,
VILL.- KAYAKUCHI GAON, P.O.- NALIGAON, P.S.- BARPETA, DIST.-
BARPETA, ASSAM, PIN- 781352.

VERSUS

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

2:MILAN MANDAL
W/O MUNINDRA MANDAL
VILL.- KAYAKUCHI GAON
P.O.- NALIGAON
P.S.- BARPETA
DIST.- BARPETA
ASSAM
PIN- 781352

Advocates for the appellant : Mr. R. Ali. ... Advocate.

Advocate for the respondent No.1: Mr. R.R. Kaushik,
Addl. P.P., Assam.

Advocate for the respondent No.2: Mr. S.N. Tamuli,
Amicus Curiae.

:::BEFORE:::

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MR. JUSTICE SANJEEV KUMAR SHARMA

Date on which judgment is reserved : **21.05.2025**

Date of pronouncement of judgment : **26.05.2025**

Whether the pronouncement is of the operative part of the judgment ? : N/A

Whether the full judgment has been pronounced? : Yes

JUDGMENT & ORDER (CAV)

(M. Zothankhuma, J)

1. Heard Mr. R. Ali, learned counsel for the appellant. Also heard Mr. R. R. Kaushik, learned Addl. PP for the State and Mr. S. N. Tamuli, learned Amicus Curiae for the respondent No. 2.

2. This appeal has been made challenging the conviction of the appellant under Section 6 of the POCSO Act and Section 376(AB) of the IPC, vide the impugned judgment dated 20.06.2023, passed by the Court of the Additional Sessions Judge -cum- Special Judge (POCSO), Barpeta in Special POCSO Case No. 66/2020, for having caused aggravated penetrative sexual assault on the victim girl, aged 9 years. The appellant was thereafter sentenced to undergo rigorous imprisonment for 20 years and to pay a fine of Rs.10,000/-, in default, simple imprisonment for another year under Section 6 of the POCSO Act only, in view of Section 42 of the POCSO Act.

3. The appellant's counsel submits that the conviction of the appellant under Section 6 of the POCSO Act and Section 376(AB) IPC is not sustainable in law, in view of the fact that the testimony of the victim given before the learned Trial Court has not been corroborated by her statement recorded under Section 164 Cr.P.C. He submits that the victim in her 164 Cr.P.C statement has only stated

that the appellant had committed "bad act" on her after removing her clothes. The said use of the word "bad act" does not in any way conclusively prove that there had been sexual intercourse between the appellant and the victim. The word "bad act" can also mean many other things, other than sexual intercourse. Though the appellant in her evidence in the learned Trial Court has stated that the appellant had inserted his penis into the vagina of the victim, the same not being corroborated by the victim's statement under Section 164 Cr.P.C, due to the use of the word "bad act", the conviction of the appellant for an offence punishable under Section 6 of the POCSO Act could not be said to have been proved.

4. The learned counsel for the appellant further submits that the Doctor (PW-6), who examined the victim and the Medical Report does not prove that there was penetration of the vagina of the victim by the penis of the appellant, inasmuch as, the hymen was intact, though there was redness around the hymen and tenderness on touch. Further, the opinion of the Doctor was that there was no evidence of sexual intercourse detected at the time of examination nor were there any evidence of injury on her body or private parts, except for the redness around the hymen. In view of the medical evidence it could not be said that a case of rape had been made out against the appellant. In this respect, he has relied upon the judgment of this Court in the case of ***Manirul Islam vs. State of Assam & Another***, reported in ***2021 (3) GLT 128***. The learned counsel for the appellant in support of his submission has also relied upon the judgment of this Court in the case of ***Shah Alam (MD) vs. State of Assam & Another***, reported in ***2026 (2) GLT 1***.

5. The appellant counsel submits that in view of the above reasons, the impugned judgment should be set aside and the appellant should be acquitted from the charges framed against him.

6. Mr. R.R. Kaushik, learned Additional Public Prosecutor for the State and Mr. S.N. Tamuli, learned Amicus Curiae for the respondent no.2, on the other hand submit that there is no infirmity with the conviction of the appellant, in view of the victim having clearly stated in her testimony before the learned Trial Court that the appellant had inserted his penis into her vagina. Further, just because the hymen of the victim was intact and there was no evidence of injury on her body or private parts, did not mean that the victim had not been subjected to penetrative sexual assault. Further, when there is redness around the area of the hymen, it cannot be said that there was no penetration of the penis of the appellant into the vagina of the victim girl, inasmuch as, penetration to any extent into the private parts of the victim amounted to penetrative sexual assault. The learned counsels for the respondents submit that in view of the above reason, the impugned judgment should be upheld.

7. We have heard the learned counsels for the parties.

8. With regard to whether the statement of the victim under Section 164 Cr.P.C corroborated the evidence given by her in the Trial Court, we have to see the attending facts and circumstances at the time the victim stated "bad act" in her statement made under Section 164 Cr.P.C, to decide whether the word "bad act" connotes sexual intercourse.

9. In her statement made under Section 164 Cr.P.C, the victim stated that as

she was roaming around her neighbourhood , the appellant suddenly gagged her and pulled her into a plastic tent used for tethering cattle and goats. The appellant then gagged her with a sheet of cloth. The appellant took her inside the tent and tied her hands. The appellant thereafter removed the clothes the victim was clad in. The appellant then bit her cheek and touched her entire body. The appellant then removed her panties and committed "bad act" on her. As the appellant committed "bad act" on her, she became unconscious. After that, he went away leaving her there. Later, her family members, who were searching for her, found her. The use of the word "bad act" by itself can be said to include sexual intercourse and other illegal acts, as provided in Section 3 of the POCSO Act. It can be said that the word "bad act" also includes the touching/kissing of the private parts of a victim or the breast of the victim. Making the victim touch or kiss the private parts of the accused also comes within the meaning of "bad act." As such, unless the "bad act" is specified, it cannot be said with certainty that the "bad act" in respect of each individual case would always include sexual intercourse. In the absence of stating the specific act, it would be difficult to come to a finding that the use of the word "bad act" by itself would mean sexual intercourse. However, in this case, the victim had stated in her statement made under Section 164 Cr.P.C that the appellant had removed her clothes and also had removed her panties and then committed a "bad act". This "bad act" along with the attending facts and circumstances, in our view, could mean that sexual intercourse had taken place. The specific act done by the appellant is still not clear and is left open ended in the victim's Section 164 Cr.P.C statement. However, the victim, in her evidence, has clearly spelt out that the appellant put his penis into her vagina. Accordingly, it cannot be said that the victim's statement under Section 164 Cr.P.C

does not corroborate the testimony of the victim given before the learned Trial Court, that the appellant had inserted his penis into her vagina. The issue might have been different if the 'bad act' or 'bad deed' had been described differently in the evidence and another different specific act shown in the Section 164 Cr.P.C statement.

10. The victim PW-3 stated in her evidence that she was studying in Class-V and was 11 years old when the appellant took her into the cow shed built beside the road and tied her mouth and hands. The appellant planted kisses on her cheeks and touched different parts of her body. The appellant removed her pants and then removed his trouser and inserted his penis into her vagina. PW-3 then lost her senses and when she regained her senses she told her parents and relatives about the incident. Thereafter an FIR was lodged and she was taken for medical examinations and also brought to the Court where her statement was recorded

11. In her cross-examination, the victim has clearly stated that she did not state before the Police the way she had deposed in her testimony before the Court. She has also denied the fact that the appellant did not take her to the cow shed or that he did not commit any "bad act" on her after removing her pants.

12. The victim having clearly testified that the appellant had inserted his penis into her vagina, we do not find any reason to doubt the truthfulness of the said testimony, even though her statement under Section 164 Cr.P.C only spoke of a "bad act" being committed on her after the appellant took off her clothes and

his trouser. In the present case, the victim has not been confronted with her statement made under Section 164 Cr.P.C by suggesting to her that she had not been subjected to penetrative sexual assault, as she had not said the same in her Section 164 Cr.P.C statement. As such, there was no attempt to discredit the witness by the defense during cross-examination. Though the victim in her cross-examination has used the word "bad act" the same has already been clarified in her examination-in-chief where she had stated that after the appellant had removed her pants and his trouser, he had inserted his penis into her vagina. We are thus of the view that a reading of the said clarification into a statement made under Section 164 Cr.P.C shows that there has been corroboration of her testimony by way of her 164 Cr.P.C statement.

13. In the case of ***Shah Alam (supra)***, this Court had held the word "bad act" did not prove the allegation of a sexual act, inasmuch as, during the recording of her statement under Section 164 Cr.P.C before the Judicial Magistrate, the Judicial Magistrate had repeatedly asked the victim as to what she meant by using the word "bad act". The victim had remained silent and stated that her father would know. As such, it was in that context that this Court had held that a mere use of the word "bad act" did not point towards any offence of penetrative sexual assault being made out by the victim. The facts of the present case being different, the decision in ***Shah Alam (supra)*** is not applicable to the facts of this case, as it is settled law that a decision is only an authority for what it decides and not what logically follows from it. A little difference in facts changes the precedential value of a decision. In this case, the attending facts and circumstances while recoding the statement of the victim under Section 164 Cr.P.C and the evidence given by her are different than the

facts in ***Shah Alam (supra)***.

14. With regard to the stand taken by the appellant's counsel that the Doctor's evidence and the Medical Report did not prove that there had been any sexual intercourse as the hymen of the victim was intact, though there was redness around the hymen and tenderness on touch, it would be profitable to refer to various decisions of the Supreme Court.

15. In the case of ***State of Himachal Pradesh vs. Manga Singh***, reported in ***(2019) 16 SCC 759***, the Supreme Court held that merely because there was no rupture of the hymen, it cannot be said that there was no penetration. In a case of rape, it is not necessary that external injury is to be found on the body of the prosecutrix.

16. In the case of ***State of Punjab vs. Gurmit Singh***, reported in ***(1996) 2 SCC 384***, the Supreme Court has held that absence of injury in the private parts of the victim does not mean that rape had not occurred.

17. In the case of ***B.C. Deva @ Dyava vs. State of Karnataka***, reported in ***(2007) 12 SCC 122***, the Supreme Court held that though the report of the gynecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted.

18. In the case of ***Wahid Khan vs. State of Madhya Pradesh***, reported in

(2010) 2 SCC 9, the Supreme Court has held that just because hymen is intact does not mean that rape was not committed. Complete penetration is not necessary.

19. In the case of **Ranjit Hazarika vs. State of Assam**, reported in **(1998) 8 SCC 635**, the Supreme Court held that non-rupture of hymen or absence of injury on victim's private parts does not belie the testimony of the prosecutrix.

20. The opinion expressed by Modi in *Medical Jurisprudence and Toxicology* (Twenty First Edition), at page 369 reads as follows :

"Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape, is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

21. Keeping in view the fact that the victim was a child of only 9 years, there would have naturally been some injury and most likely, rupture of the hymen, if there was complete penetration of the penis. However, sexual intercourse in law

and the term penetrative sexual assault provided in Section 3 of the POCSO Act would also have to be held to mean the slightest degree of penetration of the vulva or the labia majora. Thus, the redness around the hymen and the tenderness to touch can be explained, in view of there being a slight degree of penetration, as per the testimony of the victim. This aspect of the matter has not been put to the Doctor by the appellant and as such, we are of the view that even though the evidence of Doctor is suggestive of the fact that there was no recent sexual intercourse, the evidence of the victim proves that there had been slight penetration of her private parts by the penis of the appellant.

22. In the case of ***Latesh @ Dadu Baburao Karlekar vs. State of Maharashtra***, the Supreme Court has held that oral evidence takes precedence over medical evidence, unless the latter completely refutes any possibility of such occurrence.

23. In view of the reasons stated above, we do not find any reason to interfere with the decision of the impugned judgment of the learned Trial Court. The appeal is accordingly dismissed.

24. Send back the TCR.

25. In appreciation of the assistance provided by Mr. S.N. Tamuli, learned Amicus Curiae for the appellant, his fees should be paid by the Gauhati High Court Legal Services Committee, as per norms.

JUDGE

JUDGE

Comparing Assistant

Kuntal Datta

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