GAHC010085172019

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

Case No. : CRL.A(J)/24/2019

BALIN CHETIA
S/O. LT. THUNUKA CHETIA, R/O. VILL. NO.2 NALANI GAON, P.S. PENGAREE, DIST. TINSUKIA, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR. BHASKAR NATH, AMICUS CURIAE

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGEMENT AND ORDER (CAV)

Date : 24-07-2023

Heard Ms. B. Sarma, learned Amicus Curiae. Also heard Mr. R.R. Kaushik, learned Additional Public Prosecutor for the State/respondent No.1.

2. This appeal has been preferred challenging the judgment and order dated 18.12.2018 passed by the learned Special Judge, Tinsukia in POCSO Case No. 22(M)/2016, whereby the

accused/appellant was convicted under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (herein after referred as POCSO Act) and sentenced him to undergo rigorous imprisonment for 7(seven) years and to pay a fine of Rs. 10,000/- in default, simple imprisonment for 3(three) months.

3. The mother of the victim, Gogoi lodged an FIR on 27.10.2014 before the Officer-in-Charge, Pengaree P.S. stating inter alia that the accused/appellant committed rape on her 14 years old daughter for which she became pregnant. Later on, the wife of the appellant took her daughter to the government hospital secretly and her pregnancy was terminated. On receipt of the FIR, a case was registered vide Pengaree P.S. Case No. 54/14 under Section 376(D) IPC r/w Section 4 of POCSO Act and started investigation on the basis of the FIR. During investigation, the investigating officer visited the place of occurrence, recorded the statement of the witnesses and the accused was also arrested. The victim was examined by the doctor and her statement was also recorded by the learned Magistrate under Section 164 Cr.P.C. After completion of investigation, charge-sheet was submitted against the accused/appellant under Section 376 IPC r/w Section 4 of POCSO Act.

4. During trial, charge was framed under Section 376 IPC r/w Section 4 of POCSO Act against the accused/appellant which was read over and explained to the accused/appellant to which he pleaded not guilty and claimed to be tried.

5. The prosecution examined 9(nine) witnesses to prove the guilt of the accused/appellant. On the other hand, the accused/appellant also adduced 2(two) witnesses in support of his case. After completion of the trial, the statement of the accused/appellant was recorded under Section 313 Cr.P.C. wherein incriminating materials found in the evidence of the witnesses were put to him to which he denied the same and pleaded his innocence. After hearing the arguments advanced by the learned counsel for the parties, the learned Special Judge, Tinsukia convicted the accused/appellant as aforesaid. Hence, the appellant has preferred this appeal.

6. It was urged by Ms. B. Sarma, learned Amicus Curiae that the accused/appellant is the maternal uncle of the victim. The prosecution case is based on a concocted story and that there is lack of evidence on record to sustain the conviction recorded by the trial

court against the appellant. It is contended that other than the evidence of the victim, all other evidence of prosecution witnesses is hearsay evidence, which is not so much of value. Even the evidence of the victim cannot be said to be trustworthy and unimpeachable so as to prove the prosecution case.

7. It is further contended that since the victim is a child of tender age, who was susceptible to tutoring, as such, corroboration of her evidence was necessary, which was missing in the present case. It is also submitted by learned Amicus Curiae that there was no medical evidence to corroborate the claims made by the prosecution that the appellant had committed rape on the victim, as a result of which she became pregnant.

8. Learned Amicus Curiae for the appellant also argued that the accused was convicted for a period of 7 years in the year 2018 and he has completed more than 5 years in jail hazot. Under such backdrop, considering the evidence and the materials available on the record, the accused be acquitted on benefit of doubt.

9. In response, Mr. R.R. Kaushik, learned Additional Public Prosecutor has argued that there was sufficient evidence on record to sustain the conviction imposed by the trial court against the appellant. The evidence of the victim alone is sufficient to prove the prosecution case as per settled position of law. It was also contended by the learned Addl.P.P. that when a child of tender age had indeed stated before the trial court about the involvement of the appellant in the acts in question, the appellant deserved to be convicted and sentenced, as had been done by the trial court in that instant case.

10. Learned Addl.P.P. also submitted that under Section 29 of the POCSO Act presumption operated against the appellant and it was necessary for the appellant to prove the contrary, which he had failed to do so in the instant case. On this basis, it was submitted that the appeal deserves to be dismissed.

11. Having heard the submissions made by the parties, it appears that except the victim, there is no eye witness to the incident. The allegation made by the victim(P.W.2) against the appellant is that on the date of incident, her aunt (P.W.6) called her to her house on the pretext that her husband i.e. the appellant was not at home and requested her to stay with

her. On the same day, the accused came home at night and the victim was sleeping with the daughter of the appellant aged about 5/6 years. Her aunt was also sleeping in the same room in a separate bed and the accused/appellant gagged her(victim) mouth for which she woke up and he asked her not to cry otherwise he would kill by throttling and thereafter, the appellant established sexual intercourse with her. After five days or so, she felt pain in her abdomen. After 2(two) months, one day, she along with her mother and aunt, Riju(P.W.6) went to the market and from market her aunt stealthily took her to the doctor at Doomdooma and the doctor told that she was conceived and with the advice of P.W.6, doctor immediately aborted her pregnancy. Thereafter, her aunt disclosed all the facts to her mother whereupon her mother asked her about the incident. Then she disclosed her mother the entire incident. The victim(P.W.2) also stated in her deposition that she used to visit the house of her aunt on many occasions and that was the first time when the incident had happened. After the incident, they have no visiting terms with her aunt. After lodging of the FIR, she was medically examined and she was also produced before the Magistrate at Margherita for recording her statement under Section 164 Cr.P.C.

12. In her cross-examination, P.W.2 replied that the family of her aunt consists of two children and her uncle. She sued to visit the house of her aunt prior to the incident. Earlier, her uncle never did any bad act. When she visited the house of her aunt, she used to sleep with the daughter of her aunt at night. On the day of incident, there was no light inside the room. During the incident, due to darkness, she did not see the face of the person who gagged her mount but in the house of her aunt, there is no other male member except the appellant. The victim also stated that she did not disclose about the incident to any one even to her aunt. On re-examination by the prosecution, P.W.2 disclosed that she could recognize the accused from his voice when put his hand on her mouth and asked her to keep quiet and threatened to kill by throttling.

13. Except the victim, her mother was examined as P.W. 1 in the case. According to P.W.1, the appellant is the husband of her younger sister. On the date of incident, her younger sister called her daughter i.e. victim to stay in her house as her husband was not at home on that day. Accordingly, the victim went there, likewise, she was called her on many occasions also. After two months, her sister Riju told her that the victim was subjected to forcible sexual

intercourse by her husband to which she became pregnant and that her pregnancy was terminated. Her sister requested not to disclose about the fact to anybody. Thereafter, she enquired from her daughter and then she confirmed that she was forcibly raped by the accused/appellant as a result of which, she became pregnant. Thereafter, she was aborted by Riju Chetia(P.W.6), the sister of the informant (P.W.1). Then she lodged the FIR in the police station vide Ext. 1.

14. In her cross-examination, P.W.1 replied that her daughter never disclosed about the incident before her that the accused had committed rape on her. They had visiting terms with her sister prior to the incident.

15. The other witnesses like P.W.3, P.W.6 i.e. wife of the appellant and P.W. 7 did not support the case of prosecution, as such, they were declared hostile on the request of the public prosecutor.

16. P.W.4 is the grandfather of the victim. He deposed in his evidence that, he came to know about the incident when the informant and her sister i.e. wife of the appellant had taken the victim to the hospital and got her aborted. He also came to know from them that she was made pregnant by the accused/appellant. He had also confirmed about the incident from the victim.

17. In his cross-examination, P.W.4 replied that he personally asked the victim about the incident and she told him that it was the appellant who had committed rape upon her. But he did not state the said fact to the police.

18. P.W.5 is the neighbor of the appellant. He deposed in his evidence that on the date of incident, there was uproar in their village and then he came to know from the villagers that the appellant committed rape on the victim. The police came to the house of the appellant and at that time they were present.

19. In his cross-examination, P.W.5 replied that before arrival of police, he never heard of any such incident that the appellant committed rape on the victim.

20. According to P.W.6 who is the wife of the appellant, on the date of the alleged incident,

her husband was not at home as such, she called her niece i.e. the victim to stay with her and accordingly, she came to her house. The victim and her daughter slept together in the same bed in a room and she herself and her son were sleeping in another room and on the next day, the victim returned back home. After about one month, mother of the victim came to their house and told her that the victim was suffering from certain ailments and therefore, she was to consult the doctor. Accordingly, she (P.W.6) accompanied them to Doomdooma hospital. On reaching Doomdooma, she went to the market and the victim was taken to the doctor by her mother. After doing shopping, she returned home, leaving the victim and her mother at Doomdooma. After that, one day, police came to their house and then only she came to know that the victim had accused her husband of committing rape on her.

21. Two witnesses i.e. D.W.1 and D.W.2 were examined to prove the fact that the appellant was not present in his house on the date of alleged incident. D.W.1 deposed in her evidence that she is the elder sister of the appellant. On the date of incident, the appellant and his friend Janak Moran stayed in her house at Baghjan. On the next day at about 1 p.m., they left her house.

22. D.W.2 Janak Moran also stated that on the day of the alleged incident, he and the accused/appellant went to the house of his elder sister at Baghjan. Both of them spent the night in her house and next day, they returned back home. However, the accused/appellant was not examined himself as D.W. to prove his plea of alibi.

23. The medical officer who examined the victim on 28.10.2014 i.e. after termination of her pregnancy. According to P.W.8, the medical officer, on examination of the victim, she did not find any injury on the private parts of the victim but her hymen was found torn. The medical officer also stated that as per radiological report, the victim was above 14 years and below 21 years, on the date of her examination i.e. on 28.10.2014.

24. P.W.9 is the investigating officer. He deposed in his evidence that on 27.10.2014, he was working in Pengaree police station. On that day, on receipt of the ejahar from one Gogoi that her 14 years old daughter was made pregnant by a married man i.e. the appellant, then he registered a case vide Pengaree P.S. Case No. 54/14. During investigation, he recorded the statement of the informant, the victim and some other witnesses. The

informant handed over birth certificate of the victim and he seized the same vide Ext. 2. He visited the house of the victim and thereafter visited the place of occurrence i.e. the house of the appellant and prepared a sketch map vide Ext.5. Thereafter, he sent the victim girl to the hospital for medical examination and subsequently to the court for recording her statement under Section 164 Cr.P.C. Since the accused was absconding, he could apprehend him only on 14.06.2016. After completion of investigation, he submitted charge-sheet against the accused/appellant under Section 376 IPC r/w Section 4 of POCSO Act vide Ext. 6.

25. In his cross-examination, P.W.9 replied that in the ejahar it has not been disclosed as to on what date or in what month, the victim was made pregnant by the accused. The house of the informant is situated at a distance of about ten kilometers from the police station. In the sketch map, he mentioned that the houses of Kulen Chetia, Dipen Chetia and Ramesh Chetia are situated near the place of occurrence but he did not record their statements. On 27.05.2016, he collected the medical report of the victim girl.

26. It is an admitted fact that except the victim, there is no witness to the incident who could know about the fact that the accused/appellant had committed rape on the victim as a result of which, she became pregnant. According to the victim, when she felt pain on her stomach after two months of the incident, she informed her mother (P.W.1) and P.W.1 informed her sister (P.W.6) asking her to accompany them to the hospital. According to the victim, when she was examined by the doctor, her mother was not present, only her aunt (P.W.6) was present. After examination, doctor disclosed that she was carrying pregnancy and at the advice of her aunt, the doctor terminated her pregnancy. It appears that till such period, her mother i.e. P.W.1 did not know about the incident as the victim did not say anything in respect of committing of rape by the appellant towards her. When after coming from hospital, P.W.6 disclosed about the incident to P.W.1, then she came to know that the appellant had committed rape on her daughter. On being asked, her daughter i.e. the victim told her about the incident which creates doubt regarding veracity of her statement.

27. In cases concerning offences under the POCSO Act, the sheet anchor of the arguments made on behalf of the State is the presumption that operates against the accused under Section 29 of the POCSO Act. It is contended by the learned Addl.P.P. that the court

has to presume that the accused had committed the offence for which he is charged under the POCSO Act, unless the contrary is proved. On this basis, it is submitted that in the present case, it was for the appellant to have proved to the contrary and that the burden was entirely upon him, which he had failed to discharge and therefore, the conviction and sentence imposed by the trial court could not be disturbed.

28. In this backdrop, it is first necessary to examine the effect of presumption under Section 29 of the POCSO Act and the manner in which the accused could rebut such presumption. Section 29 of the POCSO Act reads as follows:-

> "S.29. Presumption as to certain offences-
>
> Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3,5,7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved."

29. A perusal of the above provision does show that it is for the accused to prove the contrary and in case he fails to do so, the presumption would operate against him leading to his conviction under the provisions of the POCSO Act. It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be countenanced that the presumption under Section 29 of the POCSO Act is absolute. It would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under Section 29 of the POCSO Act to operate. Otherwise, all that the prosecution would be required to do is to file a charge sheet against the accused under the provisions of the said Act and claim that the evidence of the prosecution witnesses would have to be accepted as gospel truth and further that the entire burden would be on the accused to prove to the contrary. Such a position of law or interpretation of the presumption under Section 29 of the POCSO Act cannot be accepted as it would clearly violate the constitutional mandate that no person shall be deprived of liberty except in accordance with procedure established by law.

30. The manner in which a presumption would operate against an accused has been

analysed and deliberated upon by courts because such a presumption is also provided for in various statutes, including the Prevention of Corruption Act, 1988. In the case of **Babu .vs. State of Kerala,** reported in **(2010) vol.9 SCC 189**, while examining as to in what manner presumption under a statute would operate against the accused, the Hon'ble Supreme Court has held as follows:-

"Burden of Proof and Doctrine of Innocence

Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like Negotiable Instruments Act, 1881; Prevention of Corruption Act, 1988; and Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those Statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact.

However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as those of statutes as referred to hereinabove, that the burden on proof is on the accused. The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution. (Vide: Hiten P. Dalal v. Bratindranath Banerjee, (2001) 6 SCC 16; Narendra Singh v. State of M.P., AIR 2004 SC 3249; Rajesh Ranjan Yadav v. CBI, AIR 2007 SC 451; Noor Aga v. State of Punjab & Anr., (2008) 16 SCC 417; and Krishna Janardhan Bhat v. Dattatraya G. Hegde, AIR 2008 SC 1325)."

31. In the case of **Sachin Baliram Kakde .vs. State of Maharashtra**, reported in **2016 ALL MR (CRI) 4049**, the Hon'ble Supreme Court in the context of presumption under Section 29 of the POCSO Act has held as follows:-

> "Thus, when a person is prosecuted for commission of the offence specified in the said section, the Court is required to presume that the said person has committed the said offence unless the contrary is proved.
>
> The presumption, however, cannot be said to be irrebuttable. In-fact, no presumption is irrebuttable in law, as this cannot be equated with conclusive proof. The provisions of section 29 of the POCSO Act mandates the Court to draw the presumption unless contrary is proved.
>
> One has to keep in mind, as expressed by an eminent jurist that presumptions are bats in law; they fly in a twilight but vanish in the light of facts."

32. In the case of **Amol Dudhram Barsagade .vs. State of Maharashtra,** reported in **2019 ALL MR (Cri) 435**, the Hon'ble Supreme Court has held as follows:-

> "5. The learned Additional Public Prosecutor Shri S.S. Doifode would strenuously contend that the statutory presumption under Section 29 of the POCSO Act is absolute. The date of birth of the victim 12.10.2001 is duly proved, and is indeed not challenged by the accused, and the victim, therefore, was a child within the meaning of Section 2(d) of the POCSO Act, is the submission. The submission that the statutory presumption under Section 29 of the POCSO Act is absolute, must be rejected, if the suggestion is that even if foundational facts are not established, the prosecution can invoke the statutory presumption. Such an interpretation of Section 29 of the POCSO Act would render the said provision vulnerable to the vice of unconstitutionality. The statutory presumption would stand activated only if the prosecution proves the foundational facts, and then, even if the statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond reasonable doubt. Suffice it if the accused is in a position to create a serious doubt about the veracity of the prosecution case or the accused brings on record material to render the prosecution

version highly improbable."

33. In the case of **Sahid Hossain Biswas .vs. State of West Bengal**, reported in **2017 180 AIC 294**, the Hon'ble Supreme Court has held as follows:-

"A conjoint reading of the statutory provision in the light of the definitions, as aforesaid, would show that in a prosecution under the POCSO Act an accused is to prove the contrary, that is, he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved [see Sait Tarajee Khimchand vs. Yelamarti Satyam, (1972) 4 SCC 562, Para-15]. In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary.

Once the foundation of the prosecution case is laid by leading legally admissible evidence, it becomes incumbent on the accused to establish from the evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through effective cross- examination or by exposing the patent absurdities or inherent infirmities in their version by an analysis of the special features of the case. However, the aforesaid statutory presumption cannot be read to mean that the prosecution version is to be treated as gospel truth in every case. The presumption does not take away the essential duty of the Court to analyse the evidence on record in the light of the special features of a particular case, eg. patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the prosecution case while determining whether the accused has discharged his onus and established his innocence in the given facts of a case. To hold otherwise, would compel the Court to

mechanically accept the mere ipse dixit of the prosecution and give a stamp of judicial approval to every prosecution, howsoever, patently absurd or inherently improbable it may be."

34. Keeping in mind the aforesaid position of law, the evidence of the prosecution witnesses in the present case will have to be examined. P.W.1 was the informant, being the mother of victim. The witnesses examined by the prosecution are not eyewitnesses to any of the acts attributed to the appellant in the present case. In fact, the nature of their evidence is such that it is clearly hearsay evidence. Though the victim alleged that the appellant had committed rape on her but she did not disclose the fact to her mother i.e. P.W.1 nor any other person. So the conviction against the appellant is solely based on the evidence of the victim. Being a child witness of tender age and the direct witness in support of the prosecution case, the evidence of P.W.2 i.e. the victim has to be evaluated with great care and caution.

35. In this context, the Hon'ble Supreme Court in the case of **Radhey Shyam .vs. State of Rajasthan,** reported in **(2014) vol. 5 SCC 389** has held as follows:-

"In Panchhi, (1998 SCC (Cri) 1561) after reiterating the same principles, this Court observed that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and, thus, a child witness is an easy prey to tutoring. This Court further observed that the courts have held that the evidence of a child witness must find adequate corroboration before it is relied upon. But, it is more a rule of practical wisdom than of law. It is not necessary to refer to other judgments cited by learned counsel because they reiterate the same principles. The conclusion which can be deduced from the relevant pronouncements of this Court is that the evidence of a child witness must be subjected to close scrutiny to rule out the possibility of tutoring. It can be relied upon if the court finds that the child witness has sufficient intelligence and understanding of the obligation of an oath. As a matter of caution, the court must find adequate corroboration to the child witness's evidence. If found, reliable and truthful and corroborated by other evidence on record, it can be accepted without

hesitation. We will scrutinize PW-2 Banwari's evidence in the light of the above principles."

36. In the case of **Lallu Manjhi and another .vs. State of Jharkhand**, reported in **(2003) vol.2 SCC 401**, the Hon'ble Supreme Court has held as follows:-

"The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable,

(ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon testimony of a single witness. {See - Vadivelu Thevar etc. v. State of Madras, AIR 1957 SC 614}."

37. Applying the aforesaid principles pertaining to appreciation of evidence of witnesses, particularly a child witness, it will have to be first examined as to under which category would the testimony of P.W.2 i.e. victim fall in the present case. If the testimony is found to be wholly reliable, there would be no necessity of corroboration and if it was found to be wholly unreliable, it would have to be discarded. But, if it was found neither wholly reliable nor wholly unreliable, it would definitely require corroboration.

38. A close scrutiny of the evidence of P.W.2, it reveals that though the victim used to visit the house of her aunt on a frequent manner but only on the date of incident, the appellant had committed rape on her. From the evidence of P.W.2 i.e. the victim, it cannot be ascertained when the incident took place. The FIR is also silent regarding approximate date of incident. According to the victim, the appellant established sexual intercourse with her only one day in a repeated manner. After five days or so, she felt pain in her abdomen. In spite of that she did not disclose the fact to her mother nor consulted any doctor what had happened to her.

39. It is alleged that after two months of the incident, the victim and her mother and P.W.6 went to the market. Her aunt i.e. P.W.6 stealthily took her to the doctor at Doomdooma and when doctor disclosed that she was pregnant, her pregnancy was terminated. Subsequently, her aunt(P.W.6) disclosed about the facts to her mother and then her mother (P.W.1) lodged the FIR. The medical report is totally silent whether she was carrying pregnancy on the date of examination i.e. after two months of the incident. The medical report is also silent whether pregnancy was terminated in recent time. According to P.W.8, the medical officer, as per radiological report, at the relevant time, the victim was above 14 years and below 21 years. It transpires that the victim might be of 18 years or more at the relevant time. No clarification was taken from P.W.8 regarding age gap between 14 to 21 years.

40. There is no explanation from the prosecution side why the victim did not disclose about the commission of rape by the accused/appellant immediately after the incident or about the pregnancy and termination of pregnancy to her mother. Apart from that P.W.2, the victim has not stated in detail about when the appellant had committed rape on her. There are no details about any days or dates regarding commission of rape by the accused/appellant. It is understandable that since the victim, a child witness of tender age, such details may not be expected, but some amount of specificity in the evidence would be required. The medical evidence, in the present case, is also of no assistance to the prosecution because the FIR was lodged on 27.10.2014, after two months of the incident i.e. after termination of pregnancy of the victim. The Doctor stated that she did not find any evidence of recent sexual forceful intercourse on the person of the victim. Therefore, there is clearly no medical evidence in the present case to demonstrate that the victim had suffered any such sexual assault alleged to be committed by the accused/appellant. Therefore, the only evidence in the present case was that of the child witness i.e. P.W.2, the victim.

41. Applying the aforesaid principles governing the manner in which the evidence of a solitary child witness is to be analysed and accepted in a criminal trial, it becomes evident that corroboration was required from other evidence and material on record. It is clear that P.W.1 i.e mother of the victim lodged the FIR and deposed before the court, on information allegedly given by the victim girl. There was no other prosecution witness who could support the statement of the child witness P.W.2 (victim). The medical evidence on record did not

show any corroboration of sexual assault on the victim. This creates serious doubt about the veracity of the statement made by the child witness (P.W.2) regarding commission of crime by the accused/appellant.

42. Under such backdrop, a reading of the evidence of the victim girl shows that it would not be safe to rely upon the sole testimony of the child witness (P.W.2) to convict the appellant in the present case. There is no corroboration to the evidence of the said child witness (P.W.2) and the evidence of other prosecution witnesses has also not been supported the prosecution case. As there is no medical evidence on record to support the case of prosecution that the victim was subjected to sexual assault by the accused/appellant, it becomes difficult to uphold the conviction imposed by the learned trial court against the accused/appellant.

43. A proper analysis of the evidence of the prosecution witnesses and the medical evidence brought on record by the prosecution shows that the foundational facts necessary in the present case to raise presumption under Section 29 of the POCSO Act, have not been established beyond reasonable doubt by the prosecution. The defence has been able to demonstrate that the prosecution story cannot be believed and that, therefore, the presumption would not operate. Under such backdrop, it would be unsafe to hold that the prosecution had proved its case against the appellant under the provisions of the POCSO Act or under Section 376 IPC.

44. In the light of the above, the instant appeal is allowed. The appellant is acquitted and set at liberty forthwith. The conviction and sentence recorded by the learned Special Judge, Tinsukia against the accused/appellant in connection with POCSO Case No. 22(M)/2016 under Section 4 of POCSO Act is hereby set aside. Consequently, the appellant shall be released from custody forthwith, if not required in any other case.

45. Send back the LCR.

JUDGE

Comparing Assistant