GAHC010168662024

2026:GAU-AS:1529

**IN THE GAUHATI HIGH COURT**
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)**

**CRL.A(J) NO.87 OF 2024**

Md. Shah Alam
S/o- Md. Hanif Ali,
R/o- No. 2 Bongalbori,
P.S- Jagiroad,
District- Morigaon, Assam.

***.....Appellant***

**-Versus-**

**1.** The State of Assam,
Represented by the Public Prosecutor, Assam.

**2.** Ismail Ali,
S/o- Late Ali Hussain,
R/o- Vill- Luiyadal,
P.S.- Jagiroad,
District- Morigaon, Assam.

***.....Respondents***

**– B E F O R E –**

**HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA**
**HON'BLE MR. JUSTICE KAUSHIK GOSWAMI**

For the Appellant : Ms. B.R.A. Sultana, Legal Aid Counsel.

For the Respondent(s) : Ms. B. Bhuyan, Senior Counsel/Additional Public Prosecutor,

Assam.

Date of Hearing **:** 04.02.2026.

Date of Judgment **: 04.02.2026**.

## JUDGMENT & ORDER (ORAL)

**(***Kaushik Goswami, J***)**

Heard Ms. B.R.A. Sultana, learned Legal Aid Counsel for the appellant and Ms. B. Bhuyan, learned Senior Counsel/Additional Public Prosecutor, Assam appearing for the State respondent.

**2.** This appeal is directed against the judgment and order dated 07.06.2024 passed by the learned Additional Sessions Judge-cum-Special Judge (POCSO), Morigaon (hereinafter referred to as the "trial court") in POCSO Case No. 269/2023 under Section 376(3) of the Indian Penal Code (hereinafter referred to as the "IPC"), read with Section 6 of the Prevention of Children from Sexual Offences Act (hereinafter referred to as the "POCSO Act"), whereby the accused/appellant has been convicted to undergo rigorous imprisonment for 20 (twenty) years and also to pay a fine of Rs. 10,000/- (rupees ten thousand only), in default to undergo further rigorous imprisonment for 3 (three) months under Section 6 of the POCSO Act.

**3.** The prosecution case, as it unfolds from the F.I.R. lodged by the PW-2, i.e., the father of the victim, is that on 18.07.2023 the accused/appellant had taken his minor daughter/victim, aged about 14 years, to his house situated on the bank of the fishery behind their house by

luring her and then committed rape on her in the said house. Accordingly, a case was registered as Jagiroad P.S. Case No. 220/2023 under Section 376 (3) of the IPC read with Section 6 of the POCSO Act. Thereafter, the Investigating Officer, i.e., PW-7, investigated the case wherein he examined the victim, other witnesses, and the accused person and has also seized the school certificate of the victim proving the victim to be a minor, and after sending the victim for medical examination as well as recording her statement by the jurisdictional Judicial Magistrate under Section 164 of the Cr.P.C., submitted a charge-sheet vide Charge-Sheet No. 179/2023 under the aforesaid sections against the accused/appellant. The trial court thereafter framed charges under Section 376 (3) of the IPC read with Section 6 of the POCSO Act, and upon explaining the same to the accused/appellant, he pleaded not guilty and claimed to stand the trial.

**4.** During trial, the prosecution examined as many as 8 (eight) prosecution, witnesses including the victim/PW-1, informant/PW-2, mother/PW-3, Investigating Officer/PW-7, and the Medical Officer/PW-8, who examined the prosecutrix. Upon completion of recording the prosecution evidence, all the incriminating circumstances emerging therefrom were put to the accused/appellant under Section 313 of the Cr.P.C. examination, wherein the accused/appellant denied all the incriminating circumstances. The trial culminated in conviction. Situated thus, the present appeal has been preferred.

**5.** Ms. B.R.A. Sultana, learned Legal Aid Counsel for the appellant, submits that the medical evidence does not support sexual penetrative assault. The prosecutrix has made materially inconsistent statements at different stages. Her earliest versions before the police and the magistrate do not disclose ingredients of sexual intercourse. She further submits that her deposition before the trial court contains material improvements, and her parents' evidence also does not corroborate her version.

**6.** Ms. B. Bhuyan, learned Senior Counsel/Additional Public Prosecutor, Assam, on the other hand, submits that the prosecutrix has clearly described the sexual act in her deposition before the trial court. Hence, conviction can be based on her sole testimony, and absence of medical corroboration is not fatal. In support of her submissions, she relies upon the decisions of the Apex Court in the case of ***Wahid Khan –vs- State of Madhya Pradesh***, reported in ***(2010) 2 SCC 9***, and ***State of Uttar Pradesh –vs- Krishna Master and Ors.***, reported in ***(2010) 12 SCC 324***.

**7.** We have given our prudent consideration to the arguments advanced by the learned counsels appearing for the contending parties and have perused the material available on record. We have also carefully considered the case laws cited at the bar.

**8.** The point for determination is whether the prosecution has proved beyond reasonable doubt that the

accused/appellant committed aggravated penetrative sexual assault under Section 6 of the POCSO Act.

**9.** Section 3 which defines penetrative sexual assault reads as under: -

> *"3. Penetrative sexual assault.—A person is said to commit "penetrative sexual assault" if—*
>
> *(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or*
>
> *(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or*
>
> *(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or*
>
> *(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."*

**10.** Section 5 which defines aggravated penetrative sexual assault for which punishment is prescribed under Section 6 of the POCSO Act, reads as under:

> *"5. Aggravated penetrative sexual assault.—*
>
> *(a) ..*
>
> *(b) ..*
>
> *(c) ..*
>
> *(d) ..*
>
> *(e) ..*
>
> *(f) ..*
>
> *(g) ..*
>
> *(h) ..*
>
> *(i) ..*
>
> *(j) ..*

*(k) ..*

*(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or*

*(m) ..*

*(n) ..*

*(o) ..*

*(p) ..*

*(q) ..*

*(r) ..*

*(s) ..*

*(t) ..*

*(u) ..*

*is said to commit aggravated penetrative sexual assault."*

**11.** Reading the aforesaid provisions, it appears that whoever commits penetrative sexual assault on the child more than once or repeatedly is sufficient enough, amongst others, to constitute the offence of aggravated penetrative sexual assault. The core components defining penetrative sexual assault include, *inter alia*, insertion of the penis or of any object or other body parts into the vagina, mouth, urethra, or anus of a child and/or applying the mouth to the penis, vagina, or anus of the child and/or causing a child to commit any of the above-mentioned acts upon the perpetrator or any other person. If the assault is committed amongst others more than once or repeatedly, it becomes aggravated penetrative sexual assault, which carries harsher punishment.

**12.** The evidence of the victim/PW-1 is to the effect that on the date of occurrence, while she was cutting grass alone near a pond situated behind her house, the

accused/appellant, who is her cousin brother, came there and took the sickle from her hand to cut the grass for her. She further deposed that after sometime, the accused/appellant having taken her sickle to his room, where he stays alone, located near the pond, she followed him to bring her sickle; however, the accused/appellant refused to return the same, and when she entered inside his house, he opened her panty and also opened his own pants and thereafter made her lie down on his bed and inserted his penis into her vagina. Though she shouted, he did not leave her. She further deposed that after sometime the accused/appellant, having seen her father going by that way, left her, and thereafter when she came outside his house, her father having noticed her, questioned her, to which the accused/appellant replied that "it is nothing." She further deposed that after her father scolded her, she went home. She further deposed that before the said incident, on two earlier occasions also, the accused/appellant committed the same incident with her by inserting his penis inside her vagina in his house near the pond. She further deposed that the accused/appellant threatened her that he would kill her parents if she disclosed the incident to others; however, on the last day when her father scolded her, she went home and disclosed the incident to her mother, i.e., PW-3, and her mother thereafter reported the same to her father. She further deposed that when the accused/appellant had inserted his penis inside her vagina, she sustained hurt, and it caused her pain. She further deposed that on the first day when

the accused/appellant inserted his penis inside her vagina, blood came out from it. Thereafter, PW-2 lodged the F.I.R., and her statement was recorded by a Judicial Magistrate.

**12.1.** During cross-examination she clarified that there are residential houses near the pond. Upon being confronted with the fact that she did not state before the police and magistrate that blood came out from her vagina when the accused/appellant had first committed sexual intercourse with her, she admitted the same. Though she was confronted with the fact that she did not elaborate on the act of sexual intercourse allegedly having been committed by the accused/appellant as narrated by her in her evidence-in-chief before the police and the Judicial Magistrate, she denied the same.

**13.** The evidence of PW-2/informant/father is to the effect that the victim is 13 years old and that he had seen the accused/appellant and his daughter coming out from the house of the accused/appellant and that at that time the accused/appellant was trying to wear his pants and the victim was scratching her thigh. When he questioned them as to what they were doing, the victim ran home; however, he did not suspect anything and went for his own work. Thereafter, he came home after two hours and found the victim missing, and though he searched for her, he could not find her. She returned only in the evening. When he informed PW-3 about seeing the victim and the accused/appellant coming out together from the

accused/appellant's house, she scolded and beat the victim, and thereupon the victim said that the accused/appellant used to call her inside his room and used to insert his penis inside her vagina and that he had done the said act on two earlier occasions as well, and while the victim was disclosing the incident, he was present there. He accordingly lodged the F.I.R.

**13.1.** During cross-examination, when he was confronted with the fact that he did not state before police that he did not see the accused/appellant trying to wear his pants and his daughter scratching her thigh, he denied the same. Though suggestions were made to the effect that the accused/appellant had demanded a share of his land and that there is a land dispute between them, he denied the same.

**14.** The evidence of PW-3/mother is to the effect that upon PW-2 seeing the victim coming out from the accused/appellant's house, he scolded her and sent her back home, and after PW-2 returned home, when he started questioning her, she ran away from home. At night while searching, she found the victim hiding in the house of one of their neighbours, from where she brought her back home and slapped her. It was then when the victim told her that the accused/appellant used to offer her Rs. 10/-, Rs. 20/- and after taking her to his house used to commit sexual intercourse with her on three days. However, since the accused/appellant threatened to kill her, she did not disclose the said incident earlier to them.

She further exhibited the school certificate of the victim as exhibit P3 and the seizure list as P2.

**14.1.** During cross-examination, she clarified that the victim was hiding inside the house of one Rahela Khatun, from where she brought her back home and slapped her. She further clarified that the accused/appellant used to reside alone in his house and that the date of birth of the victim is 03.03.2010.

**15.** PW-4 and PW-5 are the aunts of the victim whose evidences are to the effect that they were present in their respective houses on the date of the incident, and PW-2 had informed them that the accused/appellant had committed a bad act with the victim inside his house near the fishery.

**15.1.** It has come out during the cross-examination of PW-4 that her house would be about 50-60 meters away from the house of the accused/appellant.

**16.** PW-6, who is the headmaster of the school where the victim was studying, exhibited the school certificate of the victim as Exhibit-P3 and the admission book/register as Exhibit-P4, wherein the victim's date of birth is recorded as 03.03.2010.

**17.** The cross-examination of PW-7, i.e., the Investigating Officer, reveals that the victim did not specify the act of sexual intercourse before her. She further clarified that PW-2 did not state before her that he saw the

accused/appellant trying to wear his pants and his daughter scratching her thigh while coming out from the accused/appellant's house.

**18.** The evidence of PW-8, who is the Medical Officer who had examined the victim, is to the effect that the hymen of the victim upon genital examination was found to be normal, and there was no evidence of any injury on her body or private parts. She further opined that "*On basis of physical examination, Radiological & Laboratory investigations; (i) No evidence of external injury or violence mark seen in her private parts of the body, (ii) No evidence of recent sexual intercourse found, (iii) Her age is radiologically in between 7-12 years*".

**18.1.** During cross-examination she clarified that she did not found any injury in the victim's vagina and her hymen was intact and that in cases of girls of 12-13 years, injury would have been found in case of rape. To a question put by the court to her she clarified that by entering "normal" against hymen, she meant that the hymen of the victim had been found to be intact.

**19.** What transpires from the above is that the prosecutrix, during giving her initial statement before the police, merely alleged that the accused committed a "bad act". No allegation of penetration or sexual act was made. In her statement under Section 164 of the Cr.P.C. before the Judicial Magistrate also, the prosecutrix stated that the accused committed a "bad act" and held her hand. Despite

repeatedly being asked by the jurisdictional Judicial Magistrate what she meant, she remained silent and stated that her father would know. No allegation of sexual act surfaced. The omission of the core ingredients of the offence of sexual penetrative assault under Section 6 of the POCSO Act in the earliest judicial statement assumes significance. During the trial, she described repeated penetrative acts, bleeding, and pain. This is a substantial improvement on the foundational aspect of penetration. The Apex Court in ***Mahendra Pratap Singh –vs- State of Uttar Pradesh***, reported in ***(2009) 11 SCC 334,*** has held that improvements on material particulars weaken evidentiary value. Similarly, in ***State of Rajasthan –vs- Smt. Kalki and Anr.***, reported in ***(1981) 2 SCC 752,*** the Apex Court has held that contradictions affecting the core of the prosecution case are fatal. It is true that conviction can rest on the sole testimony of the prosecutrix. However, in ***Rai Sandeep @ Deepu –vs- State (NCT of Delhi),*** reported in ***(2012) 8 SCC 21***, the Apex Court has held that such testimony must be of sterling quality, consistent, natural, and free from material contradictions. The present testimony does not meet that standard.

**20.** The father/PW-2 claimed to have seen the accused wearing his pants and the victim scratching her thigh but did not find anything suspicious and sent her home. This fact was not disclosed during the investigation. The mother spoke of threats to the victim, whereas the

victim spoke of threats to her parents. These inconsistencies weaken corroboration.

**21.** Despite allegations of repeated penetrative acts with bleeding and pain, medical examination showed the hymen to be intact and no injuries suggestive of recent penetration. ***In Radhu –vs- State of Madhya Pradesh***, reported in, ***(2007) 12 SCC 57***, the Apex Court has held that medical evidence gains significance where ocular testimony is doubtful.

**22.** The prosecutrix admitted following the accused/appellant alone to his house despite alleging earlier assaults. While not decisive alone, it adds to improbabilities.

**23.** The prosecutrix has deposed that she had shouted at the time of the alleged occurrence. However, evidence on record shows that PW-4 was present in her own house, situated at a distance of about 50-60 meters from the house of the accused/appellant. PW-4 has not stated that she heard any cries/alarm or distress call from the child at the relevant time. If the incident had occurred in the manner alleged, and the child had indeed raised alarm, it is necessarily expected that a person in such close proximity would have noticed or heard something unusual. The absence of any such supporting circumstance adds to the improbabilities in the prosecution case. While failure of independent witnesses to hear an occurrence is also not decisive, in the present case, where the prosecution case

already suffers from material inconsistencies, improvements, lack of medical support, and vague earliest disclosures, this circumstance assumes significance and further renders the version of the prosecutrix doubtful.

**24.** It appears that the Investigating Officer did not make any attempt to elicit what the expression "bad act" meant. The foundational allegation thus remained undefined. The record does not show provision of psychological assistance or support person. The child's inability to articulate the allegation assumes importance in this backdrop.

**25.** In ***Kali Ram –vs- State of Himachal Pradesh***, reported in ***(1973) 2 SCC 808***, it was held that if two views are possible, the one favouring the accused must be adopted. In ***Sharad Birdhichand Sarda –vs- State of Maharashtra***, reported in ***(1984) 4 SCC 116***, the Apex Court held that suspicion cannot replace proof. Even in sexual offences, benefit of doubt applies where evidence does not inspire confidence [Refer: - ***Narender Kumar – vs- State (NCT of Delhi)***, reported in ***(2012) 7 SCC 171***].

**26.** In view of the above, we are of the unhesitant view that the essential ingredient of Section 6 of the POCSO Act are not established on the evidence on record, and no case under the said provision is made out against the accused/appellant. This court has also considered whether the evidence on record, even if insufficient to establish the offence under Section 6 of the POCSO Act,

discloses the commission of any other criminal offence. As discussed earlier, the earliest versions of the prosecutrix disclose only a "bad act" and holding of hand. There is no consistent evidence of sexual touching with sexual intent available on record. No clear, consistent, and reliable evidence of sexual assault, sexual touching with sexual intent, use of criminal force with a sexual object, or any overt act constituting an offence under the IPC or the POCSO Act emerges from the trustworthy part of the prosecution evidence. The later improved version given during trial, having been found unreliable due to material contradictions, omissions, and improbabilities, cannot be selectively relied upon to sustain conviction for any lesser or different offence. In ***Shamnsaheb M. Multtani –vs- State of Karnataka***, reported in ***(2001) 2 SCC 577***, the Apex Court has held that conviction for lesser offence is permissible only when ingredients are clearly established. This is not the case here. Criminal conviction cannot rest on conjectures or on a part of testimony which is itself doubtful.

**27.** In criminal jurisprudence, the prosecution must establish foundational facts beyond reasonable doubt. Suspicion, however strong, cannot substitute legal proof. Upon appreciation of the evidence, we find that the prosecution case suffers from vague earlier disclosures. There is a lack of corroboration in the testimonies of the witnesses, and also the medical evidence does not support the version of the prosecutrix. The testimony of the

prosecutrix also does not inspire confidence and falls short of proof beyond a reasonable doubt.

**28.** Viewed thus, the cumulative effect of the infirmities noticed by this court makes it unsafe to hold that the accused/appellant committed any criminal offence whatsoever in the manner alleged. The learned trial court, while recording the conviction failed to properly appreciate material contradictions, omissions, and procedural lapses, and thus the impugned judgment suffers from serious infirmities warranting appellate interference.

**29.** That being so, the conviction recorded by the learned trial court cannot be sustained in law. Hence, the criminal appeal succeeds, and the same is accordingly allowed.

**30.** Accordingly, the judgment and order dated 07.06.2024 passed by the learned Additional Sessions Judge-cum-Special Judge (POCSO), Morigaon, in POCSO Case No. 269/2023 under Section 376(3) of the IPC read with Section 6 of the POCSO Act is hereby set aside and quashed.

**31.** The appellant is acquitted of all the charges and shall be released forthwith if not required in any other case.

**32.** Bail bonds stand discharged.

**33.** Before parting with the matter, this Court deems it necessary to observe that the present case discloses

serious deficiencies in the manner in which the investigation was conducted in a matter involving a child victim under the POCSO Act.

**34.** Despite the prosecutrix repeatedly having used the expression "bad act" in her earliest statements, the record does not indicate that the child was provided psychological counselling or emotional support to enable her to narrate the incident in a clear and comfortable manner. Further, there is no material to show that a support person was appointed to assist the child during the investigation and trial. The object of the POCSO framework is not only to punish offenders but also to ensure that a child victim is able to participate in the process without fear, confusion, or inhibition. Failure to provide such assistance defeats the very purpose of the child-friendly procedures contemplated under the Act.

**35.** This Court also expresses its dissatisfaction with the quality of investigation. Crucial aspects were not clarified at the earliest stage; material omissions remained unexplained; and the foundational facts of the alleged offence were not properly elicited. Such lapses result not only in prejudice to the accused but also in failure of justice to the child, as a defective investigation may lead to acquittal even where an offence might have occurred. Investigating agencies dealing with POCSO cases must be sensitized and trained to adopt child-friendly procedures, ensure counselling assistance where necessary, appoint support persons, and record clear, specific statements so

that truth emerges without ambiguity. Proper investigation is essential both for the protection of child victims and for ensuring that criminal justice is not defeated.

**36.** That apart, while perusing the Trial Court Records pertaining to the present case, we have noticed documents/case diary pertaining to another police case, i.e., Laharighat P.S. Case No.57/2023 under Section 376(3) IPC read with Section 6/17 of the POCSO Act and Section 9/10/11 of the Child Marriage Act, being available in the record sent. The accused person in Laharighat P.S. Case No.57/2023 is one Md. Saddam Hussain, s/o Alal Uddin, Village- Lelaibori, Laharighat, Morigaon, Assam. On the other hand, the appellant herein is one Md. Shah Alam, s/o Md. Hanif Ali, R/o No.2 Bongalbori, P.S. Jagiroad, Morigaon, Assam, relating to Jagiroad P.S. Case No.220/2023 under Section 376(3) IPC read with Section 6 of the POCSO Act. As such, it appears that along with the case diary pertaining to the case in hand, a wrong case diary has also been placed in the Trial Court Records pertaining to POCSO Case No.269/2023, which had been disposed of by the learned Special Judge (POCSO), Morigaon. Let the learned trial court return the same to the concerned police station to enable the said authority to place it in the appropriate case record.

**37.** Return the TCR along with a copy of this order.

**JUDGE** **JUDGE**

**Comparing Assistant**

Pranab Chandra Das

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