GAHC030002252020

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

Case No. : Crl.A./9/2020

State of Mizoram r/b The Secretary to the Government of Mizoram
Home Department, Aizawl, Mizoram

VERSUS

Lalramliana and Anr
s/o Lalnghaka(L), Mamit Vengthar, Mamit, Aizawl

Advocate for the Petitioner : Ms Linda L Fambawl (PP/Addl.PP, Mizoram)

Advocate for the Respondent : Mr B Lalramenga for R1

BEFORE

HONOURABLE MR. JUSTICE KAUSHIK GOSWAMI

JUDGEMENT & ORDER

Date : 29.02.2024

Heard Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor, Mizoram for appellant. Also heard Mr. B. Lalramenga, learned counsel for accused/respondent No. 1.

2. There is no representation on behalf of the respondent No. 2/ informant/victim, despite service of notice as evident from the affidavit of service filed by the appellant, a copy of which is furnished by Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor and kept in the file.

3. This criminal appeal under Section 378 of CrPC, 1973 is preferred against the impugned acquittal Judgment and Order dated 20.09.2019 passed by the learned Special Judge, POCSO, Aizawl Judicial District, Aizawl in Criminal Trial No. 1912 of 2016 registered under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (*hereinafter referred to as POCSO Act*), wherein the Trial Court acquitted the respondent by giving benefit of doubt.

4. The case of the prosecutrix is that on 08.09.2016, an FIR was lodged by the informant victim who is aged about 13 years stating that she was living at the house of the accused/respondent No. 1 for her primary education. It is alleged that on 05.09.2016, she accompanied the accused/respondent No. 1 in his vehicle who was going to Damcherra, to be dropped in the house, which is situated on the way. It is further alleged that the accused/respondent No. 1 stopped his vehicle at the outskirt of Bualzau Village while it was raining heavily and forcefully dragged the informant victim down towards the jhum hut, wherein he took off her pant and underwear. It is further alleged that the accused/respondent No. 1 touched the informant victim's breast and private parts. Accordingly, a case was registered under Section 6 of the POCSO Act, 2012.

5. Upon completion of investigation and submission of the chargesheet, the Court of Special Judge, POCSO, Aizawl Judicial District, Aizawl was pleased to frame charge under Section 4 of the POCSO Act, 2012 instead of Section 6 of the said Act.

6. Accordingly, the trial commenced wherein the prosecution examined 9 witnesses and the accused/respondent No. 1 examined two witnesses and the accused/respondent No. 1 was also examined under Section 313 of CrPC, 1973.

7. The Court of Special Judge, POCSO after hearing was pleased to acquit the accused/respondent No. 1 by it's Judgment and Order dated 20.09.2019.

8. Before adverting to the submissions made by the parties, the relevant evidences are dealt hereunder.

9. **PW-1**, is the victim (informant) minor girl who deposed to the effect that she stayed at the house of the accused/respondent No. 1 for studies and that on 5.09.2016 she accompanied the accused/respondent No. 1 while he was traveling by his vehicle to Damcherra to get dropped on the way at her father's house at Damdiai. She further deposed that the accused/respondent No. 1 stopped the vehicle on the way and took her out of the vehicle and made her sit forcibly inside a jhum hut while it was raining heavily. She further deposed that she was crying and the accused/respondent No. 1 put his hand inside her clothes and touched her breast and that he also forcibly took off her pant and underwear and told her to lie down. She further deposed that she refused and resisted him but the accused/respondent No. 1

forcibly caught her and since he could not insert his penis into her vagina, he inserted his finger inside her vagina and she felt pain. She further deposed that after some time the accused/respondent No. 1 got up and dressed himself and she also put her wearing apparel and continued to travel towards Damdiai. She further deposed that the accused/respondent No. 1 dropped her at her father's home at Damdiai and continued to drive towards Damcherra. She further deposed that on the next morning she told her grandmother about the incident. She further deposed that she told her father and grandmother that she does not want to continue with her studies and stay in the house of the accused/respondent No. 1. However, after the accused/respondent No. 1 came back, she was taken back to his house. She further deposed that when she reached back the house of the accused/respondent No. 1, she told his wife about the incident. She further deposed that on the next day when she went to school she could not concentrate on anything and started crying. She further deposed that she told her teacher about the incident when the teacher inquired as to why she was crying. She further deposed that thereafter she was taken to the District Child Protection Office and thereafter on 8.9.2016 she submitted FIR before the jurisdictional Police Station. She further exhibited the FIR and her signature.

During cross, she stated that she does not know when the FIR was written and who had written down the FIR.

10. PW-2 is the father of the informant victim, who deposed to the effect that on 5.9.2016, the informant victim was dropped by the accused/respondent No. 1 and that

the informant victim was crying in the night and when asked, she stated that she was having a headache. He further deposed that on the next date the accused/respondent No. 1 returned and took his daughter back to his house for her studies. He further deposed that after the accused/respondent No. 1 and his daughter left, his mother informed him that the informant victim had stated to her in the morning that she was sexually assaulted by the accused/respondent No. 1. He further deposed that on 07.09.2016, the Member Child Welfare Committee alongwith the informant victim came to his house and informed him that his daughter was sexually assaulted by the accused/respondent No. 1. He further deposed that the accused/respondent No. 1 and his wife came to his village and asked for his forgiveness. He further deposed that the informant victim submitted an FIR to the Police.

During cross, he further retreated that it was his mother who informed him about the incident.

11. PW-3 is the Protection Officer at the District Child Protection Unit who deposed to the effect that on 07.09.2016, the informant victim was produced in their office by her teacher. He further deposed that the informant victim stated to them that on 5.9.2016 while they were travelling towards Damcherra, the accused/respondent No. 1 sexually assaulted her at the jhum hut near Bualzau. He further deposed that on the same date i.e. 7.9.2016, when they took the informant victim to her father's house, her father requested them to take necessary action and steps. He further deposed that accordingly they admitted the informant victim at the shelter home for her safety

and thereafter it is learnt that on 08.09.2016, FIR was submitted by the father of the victim.

12. PW-4 is the teacher at the Government Middle School-I at Mamit where the informant victim was studying. She deposed that on 07.09.2016 during the first period since the informant victim was crying inside the classroom, her class teacher took her to the teacher's office. She further deposed that thereafter the headmaster of the school called her and asked her to take the informant victim to the District Child Protection Unit Office and accordingly she took her to the said office. She further deposed that during their way to the said office, the informant victim stated to her that the accused/respondent No. 1 had sexually assaulted her at a jhum hut by touching her breast and private parts.

During cross, she further clarifies that the informant victim told her that the accused/respondent No. 1 had just touched her private parts.

13. PW-5 and **PW-6** are the seizure witnesses in respect of the Baptismal Certificate seized by the Police.

14. PW-7 is the Medical Officer who examined the informant victim. She deposed that upon examining the informant victim, she did not find any bruises or laceration on the external genitalia and that her hymen was intact.

During cross, she opines that she could not discern any signs which would

indicate that the informant victim had been sexually assaulted.

15. PW-8 is the Medical Officer who examined the accused/respondent No. 1. He opines that the accused/respondent No. 1 was capable of having sex.

16. PW-9 is the Investigating Officer who investigated the case. He deposed to the effect that the informant victim on 8.9.2016 filed an FIR and stated that she had been staying in the house of the accused/respondent No.1 since May, 2016. On 05.09.2016 in the night she left with the accused/ respondent No.1 in his vehicle to go to Damcherra for marketing. On the way, as it was raining, the accused/respondent No.1 stopped the vehicle. He pulled her out and took her to the jhum hut below the road. Inside the jhum hut, he pulled off her pants and inserted his finger into her vagina. He also touched her breasts. Accordingly, a case was registered under Section 6 of the POCSO Act. He further deposed that he examined the informant victim and a number of witnesses and also forwarded the informant victim for recording her statement under Section 164 CrPC by Judicial Magistrate.

During cross, he further deposed that the case was registered on the basis of the statement of the informant victim and the FIR was filed on 08.09.2016. He further clarified that the FIR was written out by the informant victim in the Police Station and she signed it by herself on 8.9.2016. He further clarified that the ground for the delay in filing the FIR is not mentioned in the chargesheet.

17. DW -1 is the wife of the accused/respondent No. 1 who deposed to the effect

that after her husband and the informant victim returned back home, everything was normal. She further deposed that the informant victim's relatives approached them with demand for money to withdraw the case.

During cross, she clarifies that the informant victim never asked them for money and it was the paternal uncle of the informant victim namely, Pu Para who had asked for money. She further denied the suggestion that the informant victim told her about the sexual assault after returning back and that she had shouted at the accused/respondent No. 1 because of it.

18. DW-2 is the daughter of the respondent No.1 who deposed to the effect that after her father and the informant victim returned back home, everything was normal.

19. The respondent No.1 during his examination under 313 CrPC, denied the allegation of penetrative sexual assault. However, in reply to the question that his wife scolded him, after the informant victim told her about the sexual assault, he explained that his wife/DW-1 complained that he was very lecherous to which he replied that nothing had happened at all.

20. Mrs. Linda L. Fambawl, learned Addl. Public Prosecutor submits that the acquittal Judgment and Order dated 20.09.2019 is totally erroneous and perverse. She further submits that the Trial Court completely erred in law in disbelieving the informant victim only on the basis that the Medical Officer did not find any sign of sexual assault on the private parts of the informant victim. She further submits that the informant

victim is wholly trustworthy and absence of injury on her private parts is not fatal to the prosecution case.

In support of the aforesaid submission, she relies upon the decision of the Apex Court in the case of ***State of Uttar Pradesh Vs. Chhotey Lal*** reported in ***(2011) 2 SCC 550***.

21. She further submits that in order to bring home the charge of penetrative sexual assault, full penetration of the male organ or any part of the body into the vagina is not necessary. In support of the aforesaid submission, she relies upon the decision of the Gauhati High Court in the case of ***Bhupen Kalita Vs. State of Assam*** reported in ***(2020) 5 GLR 153***.

22. She further submits that in a case of penetrative sexual assault under POCSO Act, conviction can be made on the basis of the sole testimony of the victim. In support of the aforesaid submission, she relies upon the decision of the Apex Court in the case of***Ganesan Vs. State represented by its Inspector of Police*** reported in ***(2020) 10 SCC 573.***

23. Mr. B. Lalramenga, learned counsel for the accused/respondent No. 1 on the other hand submits that the appellant has failed to make out any case warranting interference from this Court as regards the acquittal granted by the Trial Court. He further submits that the informant victim is not trustworthy and that there are contradictions in her version especially with regard the filing of the FIR. He further

submits that the informant victim has improvised her version since the time of filing till the time of deposition in the Court. He further submits that she has not said anything about the accused/respondent No. 1 inserting his finger in her vagina in the FIR and also to the teacher who took her to the District Protection Unit Office. He further submits that since, the medical report does not indicate any sort of injury in the informant victim's private part, the allegations of penetrative sexual assault is not proved. He further submits that in view of the said variations and contradictions, the testimony of the informant victim is doubtful.

In support of the aforesaid submission, he relies upon the following judgments of the Apex Court:-

1) ***Santosh Prasad Alias Santosh Kumar Vs. State of Bihar***, ***(2020) 3 SCC 443***, ***para 5.2 to 5.6.***

2) ***Mussauddin Ahmed Vs. State of Assam, (2009) 14 SCC 541***, ***para 9 & 10.***

3) ***Lalliram& Another Vs. State of Madhya Pradesh, (2008) 10 SCC 69***, ***para 11, 12.***

4) ***Krishan Kumar Malik Vs. State of Haryana, (2011) 7 SCC 130***, ***para 31 & 32.***

24. He further submits that there is no explanation of delay in filing the FIR by the prosecution and hence the same is fatal to the prosecution case.

In support of the aforesaid submission, he relies upon the decision of the Gauhati High Court in the case of ***Manirul Islam Vs. State of Assam & Another***,

reported in ***2021 (3) GLT 128***, ***paras 33 and 34.***

25. I have heard the submissions made at the bar and I have perused the materials available on the record.

26. It is well settled that the procedure for dealing appeal from conviction and appeal from acquittal is identical and the powers of the Appellate Court in disposing of the appeals are in essence the same. Therefore, this Court has full powers to reappreciate the evidence and come to a conclusion whether the order of acquittal passed by the Trial Court is per se bad or not.

27. Pertinent to refer to paragraph 5 of the decision of the Apex Court in the case of ***Banwari Ram & Others Vs. State of U.P*** reported in ***(1998) 9 SCC 3*** is reproduced below as follows:-

> "***5. So far as the contention that the order of acquittal passed by the Sessions Judge has been reversed by the High Court without considering the reasons advanced by the learned Sessions Judge in support of the order of acquittal, we do not find any force with the same. It is now too well settled that under the Criminal Procedure Code there is no difference so far as the power of the appellate court is concerned to deal with an appeal from a conviction and that from an appeal against an order of acquittal excepting that an appeal against a conviction is as of right and lies to courts of different jurisdictions depending on the nature of sentence and kind of trial and the court in which the trial was held, whereas an appeal against an order of acquittal can be made only to the High Court with the leave of the court. The procedure for dealing with two kinds of appeals is identical and the powers of the appellate court in disposing of the appeals are in essence the same. The High Court, therefore, has full***

powers while hearing an appeal against order of acquittal, to reappreciate the evidence and to come to a conclusion whether the order of acquittal passed by the Sessions Judge was per se bad or not. If, however, on the evidence two views are reasonably possible, one supporting acquittal and the other indicating conviction then the High Court would not be justified in interfering with an order of acquittal merely because it takes the view that it would have taken the other view sitting as a trial court. It would, therefore, be correct to state that the High Court while reversing an order of acquittal must apply its mind to the reasons given by the trial court and find out whether such reasons are at all sustainable or not. But on examining the reasons advanced by the trial court as well as on reappreciating the evidence on record if the High Court is satisfied that the reasons given by the trial court for acquittal are totally unsustainable and the appreciation of evidence made by the trial court is per se bad then there would be no limitation on the power of the High Court to set aside an order of acquittal. If the impugned judgment of the High Court setting aside the acquittal of some of the accused persons by the learned Sessions Judge and convicting them under Sections 302/149 IPC is examined from the aforesaid standpoint we really do not find any infirmity with the same. The High Court has indicated the fallacy of the reasonings advanced by the learned Sessions Judge in acquitting some of the accused persons by holding that "the trial court having held those accused persons were members of an unlawful assembly, they could not be exonerated under Sections 302/149 and 307/149". On analysis of the evidence the High Court has come to the conclusion that those accused persons became the members of an unlawful assembly and had seen some of the members of that assembly to have equipped themselves with rifles and have been indiscriminately using them against the Army jawans. Some of the accused persons in fact were injured which establishes the fact of their being present at the place of occurrence and their presence is also otherwise established through the oral testimony of more than two prosecution witnesses. Once it is held that they were also members of an unlawful assembly they will be liable for the unlawful activities of the members of the said assembly, even if they might not have actually fired the guns. On the materials on record the High

Court has come to the conclusion that not only the persons concerned were members of an unlawful assembly but also their presence at the spot constituted sufficient encouragement for other members of the said assembly who indiscriminately started firing at the Army jawans. It is well settled that if an offence is committed by some members of an unlawful assembly then the other members of the assembly are also liable for the offence under Section 149 of the Indian Penal Code. We have also carefully scrutinised the judgment of the learned Sessions Judge as well as that of the High Court and we are of the considered opinion that the High Court was wholly justified in reversing an order of acquittal passed by the learned Sessions Judge and we do not find any error of law therein."

28. It appears from the deposition of PW-1 who is the informant victim in the instant case that she has been staying at the house of the accused/ respondent No.1 for the purpose of primary education. It further appears that on 05.09.2016 at 7.00 pm she accompanied the accused/respondent No.1 while he was going to Damcherra to be dropped at her father's house at Damdiai which comes on the way. It further appears that before reaching Damdiai, the accused/respondent No.1 suddenly stopped the vehicle and took her out of the vehicle and made her sit inside a jhum hut forcibly. It further appears that she started crying however the accused/respondent No.1 put his hand inside her clothes and touched her breast and thereafter forcibly took off her pant and undergarments and told her to lie down to which she refused and tried to resist back but the accused/respondent No.1 forcibly caught hold of her and he removed her pants and tried to insert his penis but he could not and therefore inserted his finger into her vagina to which she felt pain. It further appears that after some time the accused/respondent No.1 got up and dressed himself and she also

put her wearing apparel and they continued to travel towards Damdiai. It further appeared that she continued to cry inside the vehicle and when they reached her father's home, she went inside the house while the accused/respondent No.1 continued to drive towards Damcherra. It further appears that on the next morning she told her grandmother about the incident and also later on told her father and grandmother that she does not want to continue her studies and live at the house of the accused/respondent No.1. However, when the accused/respondent No.1 came back to pick her up she left with him. It further appears that when she came back to the house of the accused/respondent No.1, she also informed the wife of the accused/respondent No.1 about the incident. It further appears that on the next date when she went to school she was crying and when her teacher inquired, she informed the teacher about the incident.

29. It appears from the testimony of PW-2 who is the father of the informant victim that after the accused/respondent No.1 dropped the informant victim in his house the informant victim was crying and stated that she had a headache. It further appears that on the next date after the accused/respondent No.1 picked her up and took her back to his house, PW-2's mother informed him about the incident which was told to her on that morning by the informant victim. It further appears that on 7.09.2016, the Child Welfare Committee member brought the informant victim to his house and informed him about the sexual assault committed by the accused/respondent No.1.

30. It appears from the testimony of PW-3 who is the Protection Officer of the

District Child Unit that on 07.09.2016 the informant victim was produced before him by a teacher of the School where she was studying. It further appears that the informant victim told him about the sexual assault.

31. It appears from the testimony of PW-4 who is the teacher in the School where the informant victim was studying that on 07.09.2016 the informant victim was crying inside the class room and was taken by her class teacher to the teacher's office and thereafter the Headmaster called her to take the informant victim to the office of the District Child Protection Unit. It further appears that while she had taken the informant victim to the said office, the informant victim stated to her about the sexual assault committed by the accused/respondent No.1 by touching her breast and her private parts.

32. It appears from the testimony of the Medical Officer who examined the informant victim that there was no injury in her genital parts and her hymen was found intact. It further appears that the Medical Officer could not discern any signs which would indicate that the girl had been sexually assaulted.

33. The Trial Court relying on the aforesaid evidence of the Medical Officer disbelieved the version of the informant victim and acquitted the accused/respondent No.1.

34. In a case of sexual assault on a minor girl, what is important to keep in mind is that a minor girl that too of the age of 13 years at the time of occurrence would not

ordinarily lie about being sexually assaulted. Therefore, the version of the informant victim has to be considered with utmost care before discerning the same. In fact, if the version of the informant victim inspires confidence and appears to be trustworthy, credible, unblemished and of sterling quality, no further corroboration is required.

In ***Ganesan vs. State*** reported in ***(2020) 10 SCC 573***, relied by the appellant, the Apex Court has observed and held that where the testimony of victim is found reliable and trustworthy, reiterated, conviction on the basis of her testimony is permissible. The Apex Court observed as under:

> "***10.1. Whether, in the case involving sexual harassment, molestation, etc., can there be conviction on the sole evidence of the prosecutrix, in Vijay, it is observed in paras 9 to 14 as under:***
>
> ***"9. In State of Maharashtra v. Chandraprakash Kewalchand Jain this Court held that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Court observed as under: (SCC p. 559, 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 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.'

10. In State of U.P. v. Pappu this Court held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion. Absence of injury on the prosecutrix may not be a factor that leads the court to absolve the accused. This Court further held that there can be conviction on the sole testimony of the prosecutrix and in case, the court is not satisfied with the version of the prosecutrix, it can seek other evidence, direct or circumstantial, by which it may get assurance of her testimony. The Court held as under: (SCC p. 597, para 12).

'12. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it

difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do.'

11. In State of Punjab v. Gurmit Singh, this Court held that in cases involving sexual harassment, molestation, etc. the court is duty-bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof. The Court observed as under: (SCC pp. 394-96 & 403, paras 8 & 21)

'8. ... The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless

the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. ... Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. ... Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances.

21. ... The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations." (emphasis in original)

12. In State of Orissa v. ThakaraBesra, this Court held that rape not mere physical assault, rather it often distracts (sic destroys) the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.

13. In State of H.P. v. Raghubir Singh this Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. A similar view has been reiterated

by this Court in Wahid Khan v. State of M.P. placing reliance on an earlier judgment in Rameshwar v. State of Rajasthan.

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."

10.2. In Krishan Kumar Malik v. State of Haryana, it is observed and held by this Court that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient, provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

10.3. Who can be said to be a "sterling witness", has been dealt with and considered by this Court in Rai Sandeep v. State (NCT of Delhi). In para 22, it is observed and held as under: (SCC p. 29)

"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently

match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

In ***State (NCT of Delhi) v. Pankaj Chaudhary*** reported in ***(2019)11 SCC 575***, the Apex Court has observed and held as under;

"***29. It is now well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix if it inspires confidence. [Vishnu v. State of Maharashtra]. It is well-settled by a catena of decisions of this Court that there is no rule of law or practice that the evidence of the prosecutrix cannot be relied upon without corroboration and as such it has been laid down that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming." [State of Rajasthan v. N.K.].***

In ***Sham Singh v. State of Haryana*** reported in ***(2018) 18 SCC 34***, the Apex

Court has observed and held at para 6 and 7 as under;

"***6. We are conscious that the courts shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations or sexual assaults. [See State of Punjab v. Gurmit Singh3 (SCC p. 403, para 21).]***

7. It is also by now well settled that the courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual

assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. (See Ranjit Hazarika v. State of Assam4.)"

Therefore, the test is to take the testimony of the informant victim in the context of the facts of each case and to ascertain whether, her testimony can be said to be trustworthy, reliable, credible and is of sterling quality. In doing so, whether the surrounding circumstances deposed by her is supported by other witnesses or not and the manner in which she has recounted the incident right from the beginning to the end also amongst others to be taken into account.

35. It appears that the informant victim has been consistently maintaining her version as regards being sexually assaulted by the accused/respondent No.1. Though in the FIR she has not disclosed that the accused/respondent No.1 had inserted his finger into her vagina, later on while her statement was recorded under Section 164 CrPC, she has disclosed the said fact. From the deposition of PW 9, the Investigating Officer, it further appears that she has also disclosed the said fact in her statement recorded under Section 161 of CrPC.

36. It further appears that PW-2 has corroborated the statement of PW-1 to the effect that she told her grandmother immediately on the next date when she was alone with her that the accused//respondent No.1 had sexually assaulted her. Further it appears that PW-4 has corroborated the statement of PW-1 to the effect that while

she was crying on 07.09.2016 at school during the first class period, her teacher took her to the teacher's office and later on the Headmaster had asked PW-4 to take her to the office of the District Child Protection Unit and that during their way to the said office she disclosed to her as regard being sexually assaulted by the accused/respondent No.1.

37. It further appears that PW-3 who is the Protection Officer District Child Protection Unit corroborates the fact that PW-4 had produced the informant victim before them in their office and upon inquiring, informant victim disclosed the incident of sexual assault committed upon her by the accused/respondent No.1.

38. Therefore, PW Nos. 2, 3 and 4 supports the case of the prosecutrix. The informant victim being a girl of 13 years upon being sexually assaulted by the accused/respondent No.1 in whose house she was residing, is certainly in a traumatic condition and it is nothing unusual for her to feel uncomfortable to reveal the incident in the presence of the male member of the family. It appears that she was crying on the night of the date of occurrence and immediately on the next date she disclosed about it to her grandmother while her father was not there, and also was hesitant to go to live in the house of the respondent no.1 for studies as corroborated from the evidence of PW-2. It further appears that though, DW-1 in her deposition, denies that informant victim informed her about the incident after reaching back home, however the respondent no.1 in his examination under Section 313 of CrPC, confirms that his wife (DW-1) has said that the informant victim has complained that he was very

lecherous. It also appears that she was continuously crying and in fact when she was crying in her school on the second day after the incident, her teacher took her to the teachers' room. It is proved from the evidence of PW-4 (teacher) that while she had taken the informant victim to the office of the PW-3 (protection officer), the informant victim disclosed to her about the incident. It is also proved from the evidence of PW-3 that when PW-4 produced the informant victim before him in the office, the informant victim disclosed the incident of sexual assault. Surrounding circumstances in the light of the aforesaid depositions, stands supported.

39. Thus, in view of the continuity in the chain of events, supported by the other witnesses and the manner in which the informant victim had disclosed about the incident right from the beginning to the end, it conclusively proves that she is trustworthy.

It was submitted on behalf of the accused/respondent No. 1 that since the factum of penetrative sexual assault was not mentioned in the FIR and she had not disclosed the same to PW3 and PW4, the same is not credible. In this regard, this Court has to be mindful as how a child shall disclose incident of sexual abuse that too committed by a person in whose home, she is residing. In the case of ***Court on its Own Motion v. State*** reported in ***2018 SCC ONLINE DEL 10301***, the High Court of Delhi has held that children do not disclose in one go but do so in piece meal and that a seemingly contradictory initial account is not a reason in itself to disbelieve the subsequent accounts by the victims . Paragraphs 81 to 93 is reproduced hereunder for

ready reference:

"***81. The dynamics of child sexual abuse are the same internationally. First and foremost, it is essential to understand the manner in which the children recount. Children do not disclose in one go but do so in piece meal. To accord the same treatment to a child as one would to an adult would result in grave injustice.***

82. It needs no elaboration that the children would be reluctant and unlikely to disclose an entire adverse experience in proper detail in their first statement to the police, let alone the necessary details. The fear for themselves or their family; an apprehension that they would be disbelieved; inability to identify themselves as victims; pressure or threats from the perpetrator; relationship to the perpetrator; fear of embarrassment, shame or self-blame; fear of stigmatization; lack of trust with the investigating agency amongst other would be some of the reasons which would act as barriers to a child making a disclosure of a complete incident in a single meeting.

83. There is great variation in how disclosure is defined and studied. Disclosure is rarely a spontaneous event and it is more likely to occur:-

• slowly over time as part of a process. For some it is a process that reoccurs and is never finished. Children and young people disclose abuse in many different ways

• ranging from direct verbal statements to more subtle indirect methods. Some children will tell purposefully yet others will do so indirectly or only after being encouraged by others to talk Non-verbal disclosures are more common among young children and can come about through letter writing, role playing or drawing Bodily or physical signs of abuse can include stomach aches, encopresis

• enuresis, adverse reactions to yoghurt or milk, or soreness in the genitals Emotional signs of abuse include fear, anxiety, sadness, acting out

• without immediate cause, mood swings and reluctance to visit the perpetrator Behavioural signs can include sexualised playing with dolls, sexual

• experimentation, excessive masturbation, or drawing sexual acts.

However, such behaviours need to be considered in the context of individual, family and wider societal dynamics in which they occur Various models or stages of disclosure have been proposed including

• staged, social exchange and social cognitive models. The models agree that disclosure is an interactive and dynamic process that is influenced by the way children conceptualise and make decisions about whom to tell and the reactions they might receive.

84. Children may disclose spontaneously (disclosure as an event) or indirectly and slowly (disclosure as a process). The child's type of disclosure may be influenced by their developmental features, such as their age at the onset of abuse and/or their age at time of disclosure. For instance, younger children are more likely to spontaneously disclose than older children (Lippert, Cross, & Jones, 2009; London et al., 2005; Shackel, 2009). Understanding disclosure of abuse as a process may help adults to be patient and allow the child or young person to speak in their own way and their own time (Sorensen & Snow, 1991). It also helps adults maintain an awareness of any changes in behaviour or emotions that may indicate abuse is occurring or increasing. If you have suspicions that abuse is occurring, even if you are unsure, it is better to report your suspicions than to do nothing.

85. Some children and young people may disclose when asked or after participating in an intervention or education program (Shackel, 2009). Others may initially deny that they have been abused if asked directly, or say that they forget, only to disclose later. Children and young people may disclose, only to retract what they have said later; however, this is relatively uncommon. The child or young person might say he or she made a mistake, lied, or that the abuse actually happened to another child. In cases with a higher likelihood of actual

abuse, recantations are low (4-9% London et al., 2005). However, the stress of disclosing and receiving potentially negative responses from caregivers may lead some children to recant in an attempt to alleviate the stress (Hershkowitz, Lanes, & Lamb, 2007).

86. A recent qualitative study of disclosure among 60 young men and women in the United Kingdom observed eight forms of disclosure : direct, indirect verbal, partial verbal, accidental direct/verbal, prompted, non-verbal/behavioural, retracted and assisted. Partial disclosures were characterised by minimisation of the abuse, disclosing abuse of another person or disclosing other forms of abuse such as physical assault. Prompted disclosures were made in response to a direct inquiry about abuse while assisted disclosures involved a young person disclosing to another young person with the help of a friend. The authors note that children use a variety of techniques to disclose including direct or ambiguous verbal statements and non-verbal disclosure in the form of writing letters, reenacting abuse type situations or drawing pictures for adults. Physical or bodily signs of child sexual abuse can include stomach aches, encopresis, enuresis, adverse reactions to yoghurt or milk (due to resemblance to semen), or soreness in the genitals (Jensen, 2005). Emotional signs can encompass fear, anxiety, and sadness, acting out without immediate cause, mood swings and reluctance to visit the perpetrator. Behavioural signs include sexualised playing with dolls, sexual experimentation, excessive drawing sexual acts (Finkelhor, 1994; Jensen, 2005).

87. Where children are concerned, the disclosure normally would tend to be a process, rather than a single incident or episode. It would take multiple interviews for an investigator or an interviewer to even establish trust in the mind of the child. Unfortunately, we have been unable to evolve any guidelines with regard to investigation and prosecution of cases of child sexual abuse which are the subject matter of POCSO Act, 2012, though the Central Government has suggested the following in the POCSO Model Guidelines:

"The dynamics of child sexual abuse are such that often, children rarely disclose sexual abuse immediately after the event. Moreover,

disclosure tends to be a process rather than a single episode and is often initiated following a physical complaint or a change in behaviour. In such a situation, when the child finally discloses abuse, and a report is filed under the POCSO Act, 2012 more information will have to be gathered so that the child's statement may be recorded.

Information so obtained will become part of the evidence. However, given the experience that the child has gone through, he is likely to be mentally traumatised and possibly physically affected by the abuse. Very often, law enforcement officers interview children with adult interrogation techniques and without an understanding of child language or child development. This compromises the quality of evidence gathered from the child, and consequently, the quality of the investigation and trial that are based on this evidence.

The interviewing of such a child to gather evidence thus demands an understanding of a range of topics, such as the process of disclosure and child-centred developmentally-sensitive interviewing method, including language and concept formation. A child development expert may therefore have to be involved in the management of this process. The need for a professional with specialized training is identified because interviewing young children in the scope of an investigation is a skill that requires knowledge of child development, an understanding of the psychological impact sexual abuse has on children, and an understanding of police investigative procedures.

Such a person must have knowledge of the dynamics and the consequences of child sexual abuse, an ability to establish rapport with children and adolescents, and a capacity to maintain objectivity in the assessment process. In the case of a child who disabled/physically handicapped prior to the abuse, the expert would also need to have specialised knowledge of working with children with that particular type of disability, e.g. visual impairment, etc."

88. Mr. Dayan Krishnan, Id. Senior Counsel and amicus curiae has also placed the "Guidelines on Prosecuting Cases of Child Sexual Abuse" issued by the Director of Public Prosecutions, Crown Prosecution Services, in October, 2013 which contains the following guidelines:

"The statement taking stage

35. Particular care should be given when deciding how to take the victim's statement. A video recorded interview (and subsequent use of the live link in court) is often the most appropriate means but may not always be so. For example, if the abuse of the victim has been filmed and the victim does not want to be videoed as a consequence.

XXX XXXXXX

38. A victim of child sexual abuse may not give their best and fullest account during their first recorded (ABE) interview or statement. This may be for a variety of reasons: they could have been threatened; they might be fearful for themselves or their family; the offending may have been reported by others and they may be reluctant to cooperate at that stage. They might not have identified themselves as a victim or they could be fearful that the police will not believe their allegations. They may initially distrust the police and could well use the interview to test the credibility of the police.

39. The account given may take a number of interviews, with the child or young person giving their account piecemeal, sometimes saving the 'worst' till last, having satisfied themselves that they can trust the person to whom they are giving their account."

89. There is no reason why the same practice cannot be followed in India. This leaves the question of how to interpret the multiple statements made by the witness/victim.

90. In para 40 of the above guidelines, the Crown Prosecution Services (CPS), has taken the following view:

"40. Carefully thought out patient intervention by the police and other agencies can ultimately disrupt and break the link to the offender(s). A seemingly contradictory initial account is therefore not a reason in itself to disbelieve subsequent accounts given by the victim and these contradictory accounts should instead be seen as at least potentially symptomatic of the abuse."

91. The law allows the investigating agencies to record multiple statements of the victims. There is no prohibition on recording multiple statements by the police.

92. We may at this stage also advert to the provisions of Section 164 (5)(A) of the Cr. P.C. which mandates that the statement of a victim under Section 354, 354A-D, 376(1) and (2) as well as Section 376 A-E or Section 509 of the IPC shall be recorded as soon as the commission of the offence is brought to the notice of the police.

93. A seemingly contradictory initial account is not a reason in itself to disbelieve the subsequent accounts by the victims. The multiple statements placed by the investigating agency should be carefully scrutinized by the Trial Courts in order to ensure that complete justice is done.

94. The second question is accordingly answered.

Result

Q. No. 1: What is the legality of recording a statement or version of the incident enumerated by a victim of sexual offence by an NGO or a private counsellor and filing of such statement or counselling report along with a chargesheet before the trial court under Section 173 of the Cr.P.C.?

(i) A statement under the POCSO Act can be made only to a police officer or a magistrate, and;

(ii) Provisions of the POCSO Act or the JJ Act do not contemplate any report to be made by a counsellor. It further makes it explicitly clear that counselling report/notes of the counsellor (as well as any person or expert recognized under the POCSO Act and Rules of 2012 and the JJ Act) are confidential in nature and the same cannot be made a part of the chargesheet or otherwise on the trial court record.

Q. No. 2: What is the permissibility and legality of victim of recording of multiple statements/versions of a sexual assault, both women and children, by an investigating officer/judicial officer?

(i) The law allows the investigating agencies to record multiple statements of the victims. There is no prohibition on recording multiple statements by the police.

(ii) A seemingly contradictory initial account is not a reason in itself to disbelieve the subsequent accounts by the victims. The multiple statements placed by the investigating agency should be carefully scrutinized by the Trial Courts in order to ensure that complete justice is done."

40. Thus, it is not unnatural for the informant victim child not to disclose initially the factum of penetrative sexual assault while lodging the FIR. In this case, though she had disclosed the incident to her grandmother, and later to the wife of respondent No.1; without gaining any support from either. It is extremely unfortunate that despite her unwillingness, the informant victim's grandmother compelled her to go with the accused/respondent. No. 1 to live in his house. It is only natural for the informant victim child to feel uncomfortable in directly disclosing '*the act of digital insertion'* to her teacher PW 4 and to PW 3 who is a male officer especially in a context where her own grandmother had neither empathized with her situation nor had given her any support. Her statements as regarding the surrounding circumstances has been fully supported by the other witnesses, as discussed above. Therefore, merely because the informant victim child had not disclosed the fact with regards to the act of digital insertion, to PW3 and PW4 and at the time of filing the FIR, does not make her subsequent accounts of digital insertion unbelievable. In fact, she has reiterated the act of digital insertion into her vagina continuously, from the stage of giving her 161

statement to the police till her deposition during trial.

41. The argument of the accused/respondent No.1's counsel to the effect that since there were contradictions and variations in the statement of the victim child during cross-examination, with regard to the filing of the FIR, her testimony is not trustworthy, cannot be accepted. During her cross examination, she clarified that the FIR was not written down by herself. PW 9 (IO) during cross, has stated that the FIR was written out by the informant victim in the Police Station and she signed it by herself on 08.09.2016. However, it is proved from the testimony of both the informant victim and PW 9, that the informant victim has signed the FIR. Therefore, the question is whether this variation is fatal to the prosecution case. The said variation does not materially affect the prosecution case and does not create any doubt with regard to the testimony of the victim child specially relating to '*act of digital insertion*'. Therefore, the said variation is of no relevance. Pertinent to refer to the decision of the Apex Court in the case of ***Kuriya and anr. V. State of Rajasthan reported in 2012 vol. 10 SCC*** at page 433. Paragraphs 29 & 30 of the said decision is reproduced for ready reference;

> "***29. For instance PW 15, in his cross-examination, had stated before the Court that Laleng had twisted the neck of the deceased. According to the accused, it was not so recorded in his statement under Section 161, Ext. D-2 upon which he explained that he had stated before the police the same thing, but he does not know why the police did not take note of the same. Similarly, he also said that he had informed the police that the four named accused had dragged the body of the deceased and thrown it near the hand-pump outside their house, but he does not know why it was not so noted in***

Ext. D-2. There are some variations or insignificant improvements in the statements of PW 3 and PW 7. According to the learned counsel appearing for the appellants, these improvements are of such nature that they make the statement of these witnesses unbelievable and unreliable. We are again not impressed with this contention. The witnesses have stated that they had informed the police of what they stated under oath before the court, but why it was not so recorded in their statements under Section 161 recorded by the investigating officer would be a reason best known to the investigating officer. Strangely, when the investigating officer, PW 16, was being cross-examined, no such question was put to him as to why he did not completely record the statements of the witnesses or whether these witnesses had made such aforementioned statements. Improvements or variations in the statements of the witnesses should be of such nature that it would create a definite doubt in the mind of the court that the witnesses are trying to state something which is not true and which is not duly corroborated by the statements of the other witnesses. That is not the situation here. These improvements do not create any legal impediment in accepting the statements of PW 3, PW 4, PW 7 and PW 15 made under oath.

30. This Court has repeatedly taken the view that the discrepancies or improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened with reference to such minor or insignificant improvements. Reference in this regard can be made to the judgments of this Court in Kathi Bharat Vajsur v. State of Gujarat, Narayan

Chetanram Chaudhary v. State of Maharashtra, Gura Singh v. State of Rajasthans and Sukhchain Singh v. State of Haryana."

42. The next question that falls for consideration is that whether this Court is to disbelief the testimony of the informant victim as regards her allegation of penetrative sexual assault in the absence of any injuries noted in her vagina/genital part during medical examination.

43. Pertinent to refer to Section 3 of the POCSO Act, 2012, which is as follows:-

"***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*.**"

44. It is abundantly clear from the aforesaid provisions that in order to constitute offence of penetrative sexual assault under Section 3 of the said Act, full penetration is not required. The words "to any extent" in the said provision indicates that even if any object or a part of the body is inserted partly, an offence of penetrative sexual is

constituted.

45. In the case of ***State of Uttar Pradesh v. Chhotey Lal*** reported in ***(2011)2 SCC 550***, the Apex Court has held that evidence of prosecutrix alone is sufficient for sustaining a conviction and absence of injuries on the person of the prosecutrix is not sufficient to discredit her evidence. Paragraph 32 of the said decision is reproduced hereunder for ready reference:

> "***32. Although the lady doctor, PW 5 did not find any injury on the external or internal part of the body of the prosecutrix and opined that the prosecutrix was habitual to sexual intercourse, we are afraid that does not make the testimony of the prosecutrix unreliable. The fact of the matter is that the matter is that the prosecutrix was recovered almost after three weeks. Obviously the sign of forcible intercourse would not persist for that long a period. It is wrong to assume that in all cases of intercourse with the women against will or without consent, there would be some injury on the external or internal parts of the victim. The prosecutrix has clearly deposed that she was not in a position to put up any struggle as she was taken away from her village by two adult males. The absence of injuries on the person of the prosecutrix is not sufficient to discredit her evidence; she was a helpless victim. She did not and could not inform the neighbours where she was kept due to fear."***

46. In the case of ***Bhupen Kalita v. State of Assam***, reported in ***(2020) 5 GLR 153***, this Court has observed and held that in a given case even superficial penetration may amount to rape which may not necessarily involve full penetration or injury to the female sexual organ, if the testimony of the victim child is credible and trustworthy, the offence of sexual assault may be established. Paragraphs 100 to 104 is reproduced hereunder for ready reference:-

"***100. The use of the words "to any extent" in section 3(a) and (b) means the penetration may not be necessarily deep or injurious to the private parts and even a mild or peripheral penetration will constitute penetration within the ambit of section 3 of the POCSO Act.***

101. Thus, even if there is no full penetration of the male organ into the vagina and even if it is superficial, it can amount to penetrative sexual assault within the meaning of section 3 of the POCSO Act and punishable under section 4 of the Act.

102. The offences described under sections 3 and 5 of the POCSO also cover many aspects of "rape" as defined under section 376 IPC. It is now well settled that the slightest degree of penetration of the penis within the vulva labia majora or the vulva or pudenda without causing any injury or with or without emission of semen or even an attempt at penetration is sufficient to constitute rape.

As to what constitutes rape, the Hon'ble Supreme Court referring to a plethora of authorities, held in Madan Gopal Kakkad (supra) as follows:

"***37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty-first Edition) at page 369 which reads, thus:***

"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." (emphasis supplied)

38. In Parikh´s Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

"Sexual intercourse. - In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

39. In Encyclopaedia of Crime and Justice (Vol. 4) at page 1356, it is stated: "... [E]ven slight penetration is sufficient and emission is unnecessary!

40. In Halsbury's Statutes of England and Wales, (Fourth Edition), Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse within the meaning of section 44 of the Sexual Offences Act, 1956. Vide (1) R. v. Hughes, (1841) 9 C&P 752, (2) R. v. Lines, (1844) 1 Car &Kir and R. v. Nicholls, (1847) 9 LTOS 179

41. See also Harris's Criminal Law, (Twenty-second Edition) at page 465.

42. In American Jurisprudence, it is stated that slight penetration is sufficient to complete the crime of rape. Code 263 of Penal Code of California reads, thus:

"Rape; essentials - Penetration sufficient. - The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime."

43. The First Explanation to section 375 of Indian Penal Code which defines 'Rape' reads, thus:

"Explanation. - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

44. In interpreting the above Explanation whether complete penetration is necessary to constitute an offence of rape, various High Courts have taken a consistent view that even the slightest penetration is sufficient to make out an offence of rape and the depth of penetration is immaterial. Reference may be made to (1) Natha v. Emperor, (1925) 26 Crl. LJ 1185; (2) Abdul Majid v. Emperor, AIR 1927 Lah. 735 (2); (3) Mst. Jantan v. Emperor, (1934) 36 Punj. LR 35; (4) GhanashyamMisra v. State, 1957 Crl. LJ 469: AIR 1957 Ori. 78; (5) Das Bernard v. State, 1974 Crl. LJ 1098. Anthony, In re., AIR 1960 Mad. 308 it has been held that while there must be penetration in the technical sense, the slightest penetration would be sufficient and a complete act of sexual intercourse is not at all necessary. In Gour's The Penal Law of India, 6th Edn. 1955 (Vol. II), page 1678, it is observed, "Even vulval penetration has been held to be sufficient for a conviction of rape."

103. In view of the above, as even superficial penetration may amount to rape which may not necessarily involve full penetration or injury to the female sexual organ if the testimony of the victim child is credible and trustworthy, the offence of sexual assault may be established. In the present case, there is already medical evidence to the effect that there was abrasion, which is a kind of scratch and, thus, even if it is a very minor injury, it indicates that there was certain kind of manipulations that region of the body. The said medical evidence, thus, corroborates the testimony of the victim girl charging the appellant of sexually assaulting her.

104. It may be also mentioned that it is well settled that where the medical evidence is in variance with the ocular evidence, if the eye witness account is found to be reliable, such medical evidence, which is in the nature of an expert opinion could be ignored.

In this regard one may also note what the hon'ble Supreme Court had held in Hari Chand (supra) as follows:

"13. There was no reason for the High Court to discard the credible, cogent and trustworthy evidence of the eye witnesses. This was certainly not a case where medical evidence was at a variance

with the ocular evidence. The evidence of the eye witnesses regarding injuries caused by the firearms is amply corroborated by the evidence of the doctor who found four firearms' wounds. In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy.

14. "20. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye witnesses' account which had to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant'.

21. It is trite that where the eye witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence, the importance and primacy of the quality of the trial process. Eyewitnesses' account would require a careful independent assessment and evaluation for [their] credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit worthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

In the present case, as mentioned above, the medical evidence cannot be said to be in variance with the testimony of the victim girl. In fact, it corroborates the testimony of the victim girl."

47. Therefore, what transpires from the above, is that to bring home the charge of penetrative sexual assault, full penetration of the penis or full insertion of any object

or part of body into the vagina is not required; even part penetration/insertion, which may not necessarily cause injury or bruises to the genitals, is sufficient for the purpose of the law.

48. It appears from the testimony of PW-1 that since the accused could not insert his penis into her vagina, he inserted his finger, upon which she "*felt pain*". She clearly deposed that she experienced physical pain while the accused/respondent No.1 inserted his finger into her vagina, following which he got up and dressed himself. It is thus obvious that there was insertion of the finger of the accused/respondent No.1 into the informant victim's vagina, notwithstanding the extent to which such finger was inserted. As such, in a case where there was superficial digital insertion, a medical examination would not necessarily detect any sign of physical injuries in the genital area of the child. Additionally, superficial digital insertion may not cause tear of the hymen.

In view of the above, charge of penetrative sexual assault is made out the moment there is some degree of insertion. Therefore, non-tear of the hymen is of no consequence.

49. This Court is of the opinion that the informant victim is trustworthy and her evidence is to be believed. Having come to the said conclusion, this Court need not look for any corroboration.

It is well settled that this Court has power to convert the acquittal into

conviction, however, if the Trial Court's judgment is based on evidence and the view taken by Trial Court in favour of the accused/respondent No.1 is possible, the High Court would not be justified in interfering only on the ground that a different view could also be taken.

In the present case, the finding of the Trial Court to the effect that "*the absence of any sign of laceration, bruise, scratch mark, etc on the external and internal body of the victim raises suspicions and doubt on the evidence of the victim and does not inspire confidence*" is manifestly erroneous, and not a possible view.

50. In view of the above, the findings of the Trial Court are palpably wrong, manifestly erroneous and demonstrably not sustainable and therefore, the Trial Court Judgment acquitting the accused/respondent No.1 is per se bad and is liable to be interfered with.

51. Now the question that comes for consideration is what is the offence that the accused/respondent No.1 has committed. Though the case of the prosecution from the beginning is that the accused/respondent No.1 has committed the offence under Section 5(n) of the POCSO Act, 2012, the Trial Court while framing charges has charged the accused/respondent No.1 under Section 4 of the POCSO Act.

52. Section 4 of the POCSO Act, 2012 is quoted hereunder for ready reference;

> "***4. Punishment for penetrative sexual assault.-[1(1)] Whoever commits penetrative sexual assault shall be punished with***

imprisonment of either description for a term which shall not be less than [ten years] but which may extend to imprisonment for life, and shall also be liable to fine.

[(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.]"

53. Section 5(n) of the POCSO Act, 2012 is quoted hereunder for ready reference:-

"***(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or***"

54. Section 6 of the POCSO Act, 2012 is quoted hereunder for ready reference:

"***6. Punishment for aggravated penetrative sexual assault.-(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.***

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim."

55. It is clear from the above provision of law that whoever being a person who is

living in the same or shared household with the child, commits penetrative sexual assault on such child, is said to have commit aggravated penetrative sexual assault. Admittedly in this case, the informant victim was living with the accused/respondent No.1 in his house at the time of the offence alleged to have been committed.

56. In this regard, pertinent to refer to the question Nos. 1 and 4 put to the accused/respondent No. 1 during examination under 313 CrPC.

"*IN THE COURT OF SPECIAL JUDGE,*
POCSO ACT
AIZAWL, MIZORAM

Examination of accused form
(u/s 313 Cr.PC)
ANNEXURE-3
In the court of SPECIAL Judge, POCSO ACT
Present SHRI JOEL JOSEPH DENGA

SC No. 201 of 2016
Criminal Trial No. 1912 of 2016
U/S 6 of POCSO Act
Ref: Mamit P.S. C/No. 38/2016 dt. 8.9.2016
Statement of Accused Lalramliana aged about yrs
S/0 Lalnghaka (L)
Resident of District - MamitVengthar, P.S. Mamit

District - Mamit State Mizoram recorded on this 5th September, 2018 in the language known to him.

Q1. ***It is in evidence that X who was born on 15.6.2003 is the oldest daughter of Liannghawra. Her father was living at Damdiai and X was living in Tripura. You asked Liannghawra to let X stay with you so she is started living in your house in Mamit from May, 2016 and used to go to school there. What do you have to say in explanation?***

Ans: It is true.

Q4. ***It is in evidence that you attempted to have penetrative sexual***

intercourse with X but could not because she struggled. You then inserted your finger into her vagina. What do you have to say in explanation?

Ans: It is not true.

(SIGNATURE OF ACCUSED)
(JOEL JOSEPH DENGA) Special Judge,
POSCO Act, Aizawl Judicial District."

57. Thus, the case of the prosecution to the effect that the victim was living in the house of the accused/respondent No.1 from May 2016 till the date of the incident stands corroborated by the statement of the accused/respondent No.1 recorded under Section 313 CrPC.

58. As such, since the accused/respondent No. 1 had committed penetrative sexual assault on the informant victim, when she was living in his house, this is an offence under Section 5(n) of the POCSO Act and therefore the punishment has to be under Section 6 of the Act.

59. It is therefore clear that the Trial Court has framed the wrong charge and has conducted the trial. However, it appears that the prosecution from the beginning to the conclusion of the trial, treated it to be case under Section 6 of the POCSO Act. In fact, it appears from the judgment that the Special Public Prosecutor during submission of written arguments has prosecuted and prayed for punishment under section 6 of the POCSO Act whereas, the defence counsel has also made submission for defence under section 4 of the POCSO Act.

60. Be that as it may, it is evident that the Trial Court has framed the wrong charge

and has conducted the trial. In such a situation, the accused/respondent No.1 cannot be convicted under a provision of law prescribing higher punishment without giving him an opportunity.

61. As such, the Judgment and Order dated 20.09.2019 passed by the learned Special Judge, POCSO, Aizawl Judicial District, Aizawl in Criminal Trial No. 1912 of 2016 is set aside and quashed.

62. In view of the above, I am of the considered view that the matter be remanded back to the Trial Court for re-framing the charge.

63. Accordingly, it is directed that the matter be remanded back to the Trial Court for reframing the charge in accordance with law.

64. It is further provided that upon reframing the charge, the Trial Court shall after considering all the materials available on record and by giving due opportunity to both parties, including adducing additional evidence, dispose of the case in accordance with law.

65. In terms of the aforesaid order, the accused/respondent No. 1 is directed to appear before the Trial Court on 22.04.2024.

66. Let the registry immediately send back the LCR alongwith a copy of the judgment and order of this Court to the Trial Court for doing the needful.

67. It is expected that the Trial Court, shall conclude the proceedings preferably

within a period of three months from the date fixed for appearance of the accused/respondent No.1 i.e. **22.04.2024**.

With the above direction and observation, the appeal stands allowed.

JUDGE

Comparing Assistant