



GAHC010134242022



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

CRIMINAL APPEAL [I] NO. 74/2022

Santosh Tanti

.....Appellant

-VERSUS-

The State of Assam and another

.....Respondents

Advocates :

Appellant : Ms. A. Devi, Legal Aid Counsel
Respondent no. 1 : Ms. S.H. Borah, Additional Public Prosecutor
Respondent no. 2 : Ms. P. Saha, Legal Aid Counsel
Date of Hearing : 30.05.2024
Date of Judgment & Order : 14.06.2024



BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT & ORDER

[M. Choudhury, J]

The instant criminal appeal from Jail under Section 383, Code of Criminal Procedure, 1973 [‘the CrPC’ or ‘the Code’, for short] is preferred to assail a Judgment and Order dated 01.02.2022 passed by the Court of learned Special Judge, POCSO, Golaghat [‘the Special Court’, for short] in Special [POCSO] Case no. 32/2020. By the Judgment and Order dated 01.02.2022, the accused-appellant has been convicted for the offence under Section 6, Prevention of Children from Sexual Offences [POCSO] Act, 2012. For finding him guilty of the charge of committing the offence of aggravated penetrative sexual assault on his own minor daughter [hereinafter referred to as ‘the victim’, at places, for easy reference], the accused-appellant has been sentenced to undergo imprisonment for a period of twenty years and to pay a fine of Rs. 5,000/-, in default of payment of fine, to undergo rigorous imprisonment for a period of another three months. It has been ordered that the period undergone by the accused-appellant in custody shall be set-off from the total period of sentence imposed against him.

2. The investigation was set into motion on institution of a First Information Report [FIR] by the mother [P.W.8] of the victim [P.W.7] before the Officer In-Charge, Bogijan Police Station on 06.07.2020. In the FIR, the informant [P.W.8] reported that she being a permanent employee of Bogijan Tea Estate, used to go for her works in the morning and return home in the afternoon. The informant [P.W.8] had inter alia stated that at around 03-00 p.m. on 06.07.2020, she was giving bath to her daughter, aged 9 years. At that time, the daughter informed her that she was feeling pain in her vagina and blood was coming out of it. On being so informed, the informant [P.W.8] examined the vagina of her daughter and noticed that blood was coming out of it and it had become red and swollen. On making query, the daughter



informed her that her father had committed sexual assault on her in the evening hours on 04.07.2020.

3. On receipt of the FIR [Ext.-2] at 05-10 p.m. on 06.07.2020, the Officer In-Charge, Bogijan Police Station registered the same as Bogijan Police Station Case no. 31/2020 [corresponding G.R. Case no. 720/2020] for the offences under Section 376AB, Indian Penal Code [IPC] r/w Section 4, POCSO Act, 2012 and took up the investigation of the case as its Investigating Officer [I.O.]. Prior to lodging of the FIR [Ext.-2] by the informant [P.W.8], the Officer In-Charge, Bogijan Police Station received a telephonic information from a resident of Natun Line, Bogijan Tea Estate - P.W.2 to the effect that the local people of Natun Line, Bogijan Tea Estate had kept the accused tied up on an allegation that he had allegedly sexually assaulted his minor daughter and a lot of people had gathered at the place. On receipt of the said information, the I.O. [P.W.9] registered the information as Bogijan Police Station General Diary Entry no. 94 dated 06.07.2020 [Ext.-1-1] at 04-10 p.m. and proceeded to the spot with support staff.
4. After recording the General Diary Entry no. 94 [Ext.-1-1], the I.O. [P.W.9] visited the spot and took the accused into custody after preliminary enquiry. Thereafter, the I.O. [P.W.9] took the accused with him to the Police Station. Subsequently on the same day, that is, on 06.07.2020, the informant [P.W.8] lodged the FIR [Ext.-2] with the afore-stated allegations. On receipt of the FIR [Ext.-2], it was registered as Bogijan Police Station Case no. 31/2020 and investigation ensued. During the course of investigation, the I.O. [P.W.9] visited the Place of Occurrence [P.O.] on 06.07.2020 and drew a Sketch Map of the P.O. [Ext.-3]. The I.O. [P.W.9] also recorded the statements of the available witnesses under Section 161, CrPC. On the following day, the victim was forwarded to Swahid Kushal Konwar Civil Hospital, Golaghat for her medical examination and accordingly, the victim [P.W.7] was medically examined by the Medical & Health Officer-I [P.W.6], Swahid Kushal Konwar Civil Hospital, Golaghat at about 12-30 p.m. on 07.07.2020. After completion of medical examination of the victim [P.W.7], the Medical & Health Officer-I [P.W.6] reported the findings in a Medical Examination Report [Ext.-1]. On 07.07.2020 itself, the I.O. [P.W.9] produced the victim [P.W.7] before the Court of learned Chief Judicial Magistrate, Golaghat for recording her statement under Section 164, CrPC. By an



Order dated 07.07.2020 [Ext.-C], the learned Chief Judicial Magistrate, Golaghat forwarded the victim [P.W.7] and the case records of G.R. Case no. 720/2020 to the learned Judicial Magistrate, 1st Class, Golaghat for recording the victim's [P.W.7] statement under Section 164, CrPC and dispose of the custody matter relating to the victim [P.W.7]. Accordingly, the learned Judicial Magistrate, 1st Class, Golaghat recorded the statement of the victim [P.W.7] under Section 164, CrPC [Ext.-E] on 07.07.2020. By an Order dated 07.07.2020 [Ext.-D], the learned Judicial Magistrate, 1st Class, Golaghat gave the custody of the victim [P.W.7] to the informant-mother [P.W.8]. On 07.07.2020, the I.O. [P.W.9] also got the medical examination of the accused done at the Swahid Kushal Konwar Civil Hospital, Golaghat.

5. The I.O. [P.W.9] upon completion of investigation, submitted a charge sheet under Section 173[2], CrPC vide Charge-Sheet no. 28/2020 [Ext.-5] on 31.07.2020 before the Court of learned Chief Judicial Magistrate, Goalghat in connection with Bogijan Police Station Case no. 31/2020 [G.R. Case no. 720/2020] finding a prima facie case for the offences under Sections 376AB, IPC and Section 4, POCSO Act well established against the accused. On submission of the Charge-Sheet, the Court of learned Chief Judicial Magistrate, Goalghat transmitted the case records of G.R. Case no. 720/2020 to the Court of learned Special Judge, Golaghat. On receipt of the case records of G.R. Case no. 720/2020, the learned Special Court registered the same as Special [POCSO] Case no. 32/2020.
6. Upon causing production of the accused before it from Jail custody, the learned Special Court furnished copies to him as per the provisions of Section 207, CrPC. As the accused submitted that he was not in a position to engage a counsel at his own cost to defend his case during the trial, the learned Special Court appointed a Legal Aid Counsel to defend the case on behalf of the accused during the trial. Thereafter, the learned Special Public Prosecutor opened the case for prosecution. After hearing the learned Special Public Prosecutor and the learned Legal Aid Counsel for the defence and perusal of the materials on record, the learned Special Judge, on 17.12.2020, framed the following charges against the accused :-

***That you on 04.07.2020, in the afternoon, at Sotiana Pathar,
Natun Line, under Bogijan Police Station, District -***



Golaghat, committed penetrative sexual assault upon the victim girl, aged about 9 years, and thereby you committed an offence punishable under Section 4 of POCSO Act and within the cognizance of this Court.

That you on 04.07.2020, in the afternoon, at Sotiana Pathar, Natun Line, under Bogijan Police Station, District - Golaghat, committed penetrative rape on the victim xxx [actual name withheld], who was under twelve years of age, and thereby you committed an offence punishable under Section 376AB of IPC and within the cognizance of the Court of Sessions.

7. When the charges were read over and explained to the accused, he pleaded not guilty and claimed to be tried. During the course of the trial, the learned Special Judge reached a view that in view of the accusations leveled against the accused, the charge under Section 4, POCSO Act would require alteration to Section 6, POCSO Act. Accordingly, on 30.10.2021, the learned Special Court after hearing the parties, altered the charge from Section 4 to Section 6 as under :-

That you the accused person on 04.07.2020, in the afternoon, Sotiana Pathar, Natun Line, under Bogijan Police Station, District - Golaghat, being the father of alleged victim xxx [although the actual name and description is stated to the accused, to protect her identity actual name is not disclosed here] committed penetrative sexual attack with the aforesaid alleged victim, and thereby committed an offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and within my cognizance.

As in the meantime, few of the prosecution witnesses after examination-in-chief and cross-examination were discharged, the parties were asked on the point whether they would like to recall those witnesses, already discharged, for further examination after alteration of the charge. It was observed by the learned Special Court that the parties, more particularly, the defence had expressed not to recall the prosecution



witnesses already discharged, for further examination in view of alteration of the charge. Consequently, the trial proceeded further with the examination of the remaining prosecution witnesses.

8. During the course of the trial, the prosecution side examined nine nos. of witnesses and exhibited a number of documents to bring home the charges against the accused. The learned Special Court examined one witness as Court Witness, C.W.1. After closure of the evidence from the prosecution side, the accused was examined under Section 313, CrPC and his plea was denial. The defence did not adduce any evidence. After appreciation of the evidence on record and hearing the learned counsel for the parties, the learned Special Court has convicted the accused for the offence, mentioned above, and he has been sentenced in the manner, indicated above.
9. We have heard Ms. A. Devi, learned Legal Aid Counsel for the appellant; Ms. S.H. Bora, learned Additional Public Prosecutor for the respondent no. 1, State of Assam; and Ms. P. Saha, learned Legal Aid Counsel for the respondent no. 2-informant.
10. Ms. Devi, learned Legal Aid Counsel appearing for the accused-appellant has submitted that the mandatory procedure prescribed in Section 53A, CrPC was not followed by the investigating authority during the investigation as a medical examination of the accused would have determined the falsity in the case of the prosecution. Ms. Devi has referred to the decision in *Rahim Beg vs. the State of Uttar Pradesh*, reported in *AIR 1973 SC 343* in this connection. The learned Legal Aid Counsel has submitted that the prosecution witness, P.W.5 who was an aunt of the victim, was declared hostile by the prosecution. It has been urged that there was a delay of two days in lodging the FIR and there was no explanation for such delay. It has been contended that the testimony of the victim was not consistent as a departure was made by the victim in the court from her previous statement. Therefore, her testimony was not worthy of credence. The learned Legal Aid Counsel has also questioned the conduct of the informant [P.W.8] by submitting that the informant had a relationship outside the marriage and after the alleged incident, the informant started living with another person. It has been submitted that the accused had provided a plausible explanation as regards the reason for foisting a false case



against him by the informant. It has been contended that the accused was taken into custody prior to registration of the FIR in the case, meaning thereby, the investigation preceded the FIR. The learned Legal Aid Counsel has contended that as there are several lacunae in the prosecution case, the accused-appellant deserves to be acquitted of the charge.

11. Ms. Borah, learned Additional Public Prosecutor has supported the conviction and sentence of the accused-appellant. By referring to the provisions contained in Section 53A of the Code, Ms. Borah has submitted that the medical examination of a person accused on a charge of committing rape thereunder is not mandatory. In support of such submissions, reliance has been placed in the decisions in [i] *Krishan Kumar Malik vs. State of Haryana*, [2011] 7 SCC 130; [ii] *Sunil vs. State of Madhya Pradesh*, [2017] 4 SCC 393; [iii] *Rajendra Pralhadrao Wasnik vs. State of Maharashtra*, [2019] 12 SCC 460; and [iv] *Veerendra vs. State of Madhya Pradesh*, [2022] 8 SCC 668. It has been contended that the versions of the victim was consistent throughout and there was no departure in the testimony of the victim given in the court from her previous statement on material points. Moreover, the ocular evidence of the victim and the informant-mother are consistent with the medical evidence. As there is no dispute as regards the minority of the victim and the prosecution was successful in establishing a case much beyond the foundational facts, the presumption under Section 29, POCSO Act had got operational. It was, thus, incumbent upon the accused to rebut the charge as per the required standard and he had failed abjectly in rebutting the charge. There was sufficient explanation in the evidence on record regarding lodging of the FIR after two days of the incident and such delayed lodging of the FIR did not affect the prosecution case in any manner whatsoever. Ms. Bora has contended that the FIR did not suffer from any infirmity to create any dent in the prosecution case.
12. Ms. Saha, learned Legal Aid Counsel appearing for the respondent no. 2-informant has adopted the submissions of the learned Additional Public Prosecutor. Ms. Saha has submitted that as the act on the part of the accused was a morally depraved and abhorrent one and as such kind of crime is heinous, the conviction and sentence passed against the accused is to be maintained.



13. We have given due consideration to the submissions of the learned counsel for the parties and have also gone through the evidence/materials including the testimonies of the witnesses and the documentary evidence, led during the trial and available in the case records of Special [POCSO] Case no. 32/2020, in original. We have also considered the decisions referred to by the learned counsel for the parties in support of their respective submissions.
14. As mentioned above, a total of nine witnesses were examined by the prosecution including the Medical Officer [P.W.6] and the I.O. [P.W.9]. The victim was examined as P.W.7 and the informant-mother was examined as P.W.8. The prosecution witnesses – P.W.2, P.W.3 & P.W.4 – are co-villagers. P.W.1 is a younger brother of the accused and P.W.5 is the wife of P.W.1.
15. In his testimony, P.W.2 stated that he knew both the informant and the accused. As regards the incident, P.W.2 deposed that the incident took place about eight months earlier. He stated that when he found that the villagers were assaulting the accused on the allegation of sexually assaulting his minor victim daughter, he telephonically informed the Police. He heard that the victim [P.W.7] was in between seven to nine years at the time of the alleged incident. He further stated that he did not ask any person about the incident. During cross-examination, P.W.2 stated that the accused resided at a distance of about half kilometre from his house. He further stated that he did not know about the incident.
16. P.W.3 is a tea garden worker and a resident of the same locality as that of the accused, the informant, P.W.1, P.W.4 and P.W.5. P.W.3 stated that she knew the accused, the informant and the victim. In her deposition, P.W.3 deposed that at the time of the incident, the age of the victim [P.W.7] was nine years. P.W.3 further stated that she had only heard from the informant [P.W.8] that the accused had raped her daughter [P.W.7]. In her cross-examination, P.W.3 stated that her house was after three houses from the house of the accused. P.W.3 further stated that the accused and the informant [P.W.8] did not stay together and the informant [P.W.8] used to stay at her mother's house.



17. In her testimony, P.W.4 stated that she knew the accused, the informant and the victim. P.W.4 stated that the accused was her neighbour. On the incident, P.W.4 stated that on the relevant day, she after coming back from her work, heard that the accused committed bad act on his daughter. She did not, however, ask the informant [P.W.8] and her daughter [P.W.7] about the incident. P.W.4 feigned ignorance about the age of the victim [P.W.7]. During cross-examination, P.W.4 stated that her house was near the house of the accused. P.W.4 further stated that the informant [P.W.8] used to stay separately from the accused. She also stated that the accused and the informant [P.W.8] used to have quarrels some time but she was not much aware about the affairs in the house of the accused.

18. P.W.1 who is an younger brother of the accused and an uncle of the victim [P.W.7], deposed that the incident took place during day-time on the relevant day. He went for his duty on that day. After reaching his home from duty, he saw people assaulting the accused by tying him with an electric post. The people also tried to assault him and his wife [P.W.5] by telling him that the accused committed bad work with his daughter. In his testimony, P.W.1 further deposed that the informant [P.W.8] and her daughter [P.W.7] used to stay in the paternal house of the informant [P.W.8]. The victim [P.W.7] used to visit their house sometimes. On the day of the alleged incident, the victim [P.W.7] was with the accused. On that very day, the informant [P.W.8] came and lodged the case against the accused. At the time of the incident, the age of the victim [P.W.7] might be nine years. When P.W.1 was cross-examined, he stated that he, his wife [P.W.5] and the accused used to stay in the same house. The distance between their house and the house of the informant [P.W.8] was one kilometre. As regards the relationship between the accused and the informant [P.W.8], P.W.1 stated that their relationship was not cordial as they used to quarrel. P.W.1 also stated that the victim [P.W.7] did not tell anything about the incident to him when he asked her about it. P.W.1 suspected that the informant [P.W.8] might have lodged a false case as the relationship between her and the accused was not good. He further stated that after the incident, the informant [P.W.8] had left with another person.

19. The witness, P.W.5 is the wife of P.W.1 and a sister-in-law of the informant [P.W.8] and the accused. Being so, P.W.5 knew the accused, the informant [P.W.8] and the



victim [P.W.7]. As regards the incident, P.W.5 stated that the incident took place about eight months earlier. When P.W.5 deposed to the effect that she did not hear anything regarding the incident, the prosecution declared the witness as a hostile one and sought permission from the court to cross-examine the witness. On grant of such permission, P.W.5 was cross-examined by the prosecution. When P.W.5 was confronted with a marked part of her previous statement recorded by the I.O., P.W.5 admitted about making the marked part in her previous statement before the Police. The contradiction was thereby, brought on record. Thereafter, when the I.O. [P.W.11] was examined, the marked part of P.W.5's previous statement recorded under Section 161, CrPC was brought to his attention for the purpose of contradiction. The I.O. [P.W.11] referring to P.W.5's previous statement, deposed about making of such statement by P.W.5. Such marked part of P.W.5's previous statement was exhibited as Ext.-4. The contradiction was thereby, proved. However, when P.W.5 was again cross-examined by the defence, she denied about making such marked part [Ext.-4] in her previous statement before the Police reiterating that she did not know anything about the incident.

20. The Doctor, P.W.6 was posted as the Medical & Health Officer-I at Swahid Kushal Konwar Civil Hospital, Golaghat on 07.07.2020. P.W.6 deposed to the effect that at about 12-30 p.m. on 07.07.2020, she examined the victim [P.W.7], aged nine years, in connection with Bogijan Police Station Case no. 31/2020 and in reference to Emergency Registration no. 125, on being escorted and identified by a Woman Police Constable [WPC]. With prior consent, she examined the victim [P.W.7] and found the following :-

<i>Identification Mark</i>	<i>:- Mole near Left Clavicle.</i>
<i>Height</i>	<i>:- 126 cm.</i>
<i>Weight</i>	<i>:- 23 kg.</i>
<i>Teeth</i>	<i>:- UL-10, LL-11.</i>
<i>Breasts</i>	<i>:- Not developed.</i>
<i>Axillary and Pubic hairs</i>	<i>:- Not present.</i>
<i>Pre-abdominal examination</i>	<i>:- Soft.</i>
<i>External genitalia</i>	<i>:- Lacerated wound seen on left side of Labia minora. No active</i>



bleeding seen at the time of examination.

Introitus :- Accommodate one finger.

X-Ray not done.

Vaginal smear for presence of spermatozoa was taken vide Laboratory no. 6 and spermatozoa not seen.

P.W.6 further stated that after examining the victim [P.W.7] medically, she made the Medical Examination Report [Ext.-1] wherein she recorded the following opinion :- [i] sign of recent sexual intercourse not seen; and [ii] injury seen on her private part. Apart from exhibiting the Medical Examination Report [Ext.-1], P.W.6 identified her signature therein as Ext.-1[1]. When P.W.6 was cross-examined, P.W.6 stated that X-Ray on the person of the victim was not done. P.W.6 further stated that there was lacerated wound on the private part of the victim and such type of injury might be caused due to fall or injury sustained otherwise.

21. As the learned Legal Aid Counsel has raised a contention that the procedure prescribed in Section 53A, CrPC was not followed by the investigating authority whereas such procedure is mandatory, a deliberation on the said aspect, at first, appears necessary. Section 53A, CrPC has prescribed for examination of person accused of rape by medical practitioner. As per sub-section [1] of Section 53A, when a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed, by any other registered medical practitioner acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose. The definition of 'examination' is provided in Explanation [a] to Section 53 of the Code. As per Explanation [a], 'examination' shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling



and such other tests which the registered medical practitioner thinks necessary in a particular case.

21.1. In *Krishan Kumar Malik* [supra], it has been observed to the effect that after incorporation of Section 53A in the Code w.e.f. 23.06.2006, it has become necessary for the prosecution to go in for DNA test in cases of alleged rape, facilitating the prosecution to prove its case against the accused. Following *Krishan Kumar Malik*, the Hon'ble Supreme Court in *Sunil* [supra] has observed in the following manner :-

4. *From the provisions of Section 53-A of the Code and the decision of this Court in Krishan Kumar, [2011] 7 SCC 130, it does not follow that failure to conduct the DNA test of the samples taken from the accused or prove the report of DNA profiling as in the present case would necessarily result in the failure of the prosecution case. As held in Krishan Kumar [para 44], Section 53-A really 'facilitates the prosecution to prove its case'. A positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative i.e. favouring the accused or if DNA profiling had not been done in a given case, the weight of the other materials and evidence on record will still have to be considered. It is to the other materials brought on record by the prosecution that we may now turn to.*

21.2. The Hon'ble Supreme Court of India in *Veerendra* [supra] has considered a contention raised on behalf of the appellant therein that he was not subjected to any medical examination as per the procedure prescribed in Section 53A, CrPC. Expositing on the aspect, the Hon'ble Supreme Court has observed as under :-

45. *The above extracted provision under Section 53-A[1] CrPC would go to show that it provides for a detailed examination, [which term has been explained under Explanation [a] to Section 53-A CrPC], of a person accused of an offence of rape or attempt to commit rape, by a*



registered medical practitioner employed in a hospital run by the Government or by a Local authority and in the absence of such a practitioner within the radius of 16 Km from the place where the offence has been committed, by any other registered medical practitioner. It is the said legal provision and the undisputed factual position of non-conduct of DNA profiling of the samples of the appellant that made him to take up the contention of violation of Section 53-A CrPC. In the said circumstances, he would further contend that there is absence of conclusive evidence to connect him with the samples taken from the body of the deceased. Certainly, non-conduct of DNA profiling in terms of the provisions under Section 53-A CrPC, is a flaw in the investigation. But then, the question emerged from the aforesaid indisputable position of not holding DNA profiling is whether the conviction of the appellant for the said offences, is liable to be set aside on that sole score.

46. *There can be no doubt with respect to the position that a fair investigation is necessary for a fair trial. Hence, it is the duty of the investigating agency to protect the rights of both the accused and the victim by adhering to the prescribed procedures in the matter of investigation and thereby to ensure a fair, competent and effective investigation. Even while holding so, we cannot be oblivious of the well-nigh settled position that solely on account of defects or shortcomings in investigation an accused is not entitled to get acquitted. In other words, it also cannot be the sole reason for interference with a judgment of conviction if rest of the evidence is cogent enough to sustain the same.*

21.3. In *Rajendra Pralhadrao Wasnik* [supra], the Hon'ble Supreme Court has held that Section 53A, CrPC is not mandatory.

21.4. It follows from the above observations in *Sunil* [supra], *Veerendra* [supra] and *Rajendra Pralhadrao Wasnik* [supra] that non-examination of the accused as per



the procedure prescribed in Section 53A, CrPC is, at best, a flaw in the investigation. But for such shortcoming in the investigation, an accused is not entitled to be acquitted by interfering with a judgment of conviction. The Hon'ble Supreme Court has gone on to observe that even in the absence of 'examination' of the accused under Section 53A of the Code, the trial court and/or the appellate court has a duty to weigh the other materials and evidence on record to come to a conclusion on guilt or otherwise of the accused.

- 21.5. It is discernible that examination of a person accused of committing an offence of rape or an attempt to commit rape is not mandatory. Such examination can be made if there are reasonable grounds for believing that an examination of a person arrested on a charge of committing an offence of rape or an attempt to commit rape will afford evidence as to the commission of such offence and its purpose is to facilitate the prosecution to prove its case. Such kind of examination albeit is a step in the course of investigation to facilitate the prosecution to prove its case. In view of such position in law, the contention of the learned Amicus Curiae that non-examination of the accused following the procedure prescribed in Section 53A, CrPC by the investigating authority is fatal for the prosecution is found not acceptable. Non-examination of the accused under Section 53A, CrPC would not deter the trial court and/or for that matter, an appellate court from weighing and evaluating the other materials and evidence on record to find out about sufficiency to reach a conclusion as regards guilt or otherwise of the accused.
22. The law is well settled that a victim of sexual assault is a competent witness under Section 118 of the Evidence Act and her evidence should be received in similar manner as that of an injured in a case of physical violence. A woman complaining of having been a victim of sexual assault is not an accomplice after the crime. There is no caveat in law that her testimony cannot be acted upon without corroboration in material particulars. Such a victim stands, in fact, at a higher platform than an injured witness. In case of an injured witness, ordinarily there is injury on the physical form, while in a case of sexual assault, it is both physical as well as psychological and emotional.



23. It is also settled law that a child witness if found competent to depose on the facts and to be reliable one, his evidence could be the basis of conviction. Even in the absence of oath, the evidence of a child witness can be considered under Section 118 of the Evidence Act, subject to the rider that such child witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and the credibility depends upon the facts and circumstances of each case. In *State of Uttar Pradesh vs. Krishna Master, [2010] 12 SCC 324*, the Hon'ble Supreme Court has held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill-will against any person. Therefore, there must be something on record to satisfy the court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of serious nature.
24. There can be conviction on the basis of the sole testimony of a victim of sexual assault and in case, the court is not satisfied with the version of the victim of alleged sexual assault, it can seek corroboration from other evidence – direct or circumstantial – from which it may get assurance about her testimony. Taking the above principles into consideration, it is necessary to refer to the versions of the alleged victim [P.W.7] and the informant-mother [P.W.8] in the present case.
25. The victim was examined as P.W.7. In her testimony, P.W.7 deposed to the effect that the informant [P.W.8] was her mother and the accused was her father. As regards the incident, P.W.7 testified to the effect that the incident had occurred at around 03-00 p.m. on the date of the incident when she was alone in the house. According to P.W.7, the accused came to the house at about 03-00 p.m. and committed bad act with her. The accused laid her on the bed and removed her wearing apparels upto her chest. The accused opened her pant and also lifted her



upper garment. The accused then unzipped his pant and inserted his penis into her place of urination. The accused threatened her not to disclose the incident to anyone, else, he would kill her. On the following day of the incident, her mother [P.W.8] called her to the house of her parents. On being so called, she [P.W.7] went there and narrated the incident to her mother [P.W.8]. Thereafter, her mother [P.W.8] informed the matter to the Village Defence Party [VDP] and to the Police. Thereafter, Police personnel came and took her father with them. P.W.7 stated that she was examined by Police and was also sent to a doctor for medical examination. The Police also got her statement recorded before the court. P.W.7 stated that her age was ten years at the time of the incident. P.W.7 further stated that three months earlier to the incident, the accused drove her mother [P.W.8] out of the house.

- 25.1. In cross-examination, P.W.7 stated that, at the time of giving testimony, she was staying with her mother [P.W.8]. P.W.7 stated that there were other houses near the house of her father and her two uncles' houses were situated adjacent to her father's house. Her grandmother used to reside separately from the house of her father. P.W.7 further stated that her uncle and aunt used to reside together in the house of her father and at the time of the incident, they were present in the house.
26. P.W.8 is the mother of the victim [P.W.7] and the informant in the case. In her deposition, P.W.8 stated that the victim [P.W.7] is her daughter. As regards the accused, P.W.8 stated that he was her former husband. Narrating about the incident, P.W.8 deposed that at the time of the incident, she was residing in her parental house because the accused after subjecting her to physical assault, drove her out of his house. The house of her parents was near to the house of the accused. She further stated that her daughter [P.W.7] and her son were staying with the accused. As she was always eager to meet her children she used to call her children, through the villagers, to meet her. After about two days, both her daughter [P.W.7] and son came to the nearby river to bath and she was with them. At the time of bathing, her daughter [P.W.7] complained about pain in her lower abdomen. When P.W.8 asked her daughter [P.W.7], her daughter [P.W.7] told her that when she was cooking rice, her father took her to the bed and committed sexual intercourse with her. P.W.8 stated that she saw radish abrasion in the private parts of her daughter [P.W.7] and it was found swollen. She reported the matter to the Secretary of the Tea Garden,



who advised her to inform the VDP of the village. When she approached the VDP, she was told to file a case with the Police. P.W.8 further deposed that the Police took her daughter [P.W.7] to court for recording her statement and also to the doctor for her medical examination. She lodged the FIR [Ext.-2] with the Police in the meantime. P.W.8 stated that her daughter [P.W.7] was aged about nine years at the time of the incident. P.W.8 further stated that the younger brother of the accused, that is, P.W.1 threatened her and her children with death in view of the case filed by her.

- 26.1. During her cross-examination, P.W.8 stated that she filed the case against the accused after being advised by the VDP. She admitted that the case was filed after about three days from the date of the incident. During cross-examination, P.W.8 was asked by the defence by confronting her to the effect that some of the facts deposed by her in evidence-in-chief were not stated by her in her previous statement recorded by Police and P.W.8 categorically denied the same. No part from P.W.8's previous statement was kept marked by the defence at the stage of cross-examination. Noticeably, when I.O. of the case was examined as P.W.11, he was not examined specifically in reference to any marked part of the previous statement of P.W.8 recorded by him. P.W.8 denied suggestions that she had deposed falsely against the accused; that she had quarrel with the accused as she was then having an affair with her present husband; and that she filed the case falsely as she intended to marry her present husband. P.W.8 stated that she also reported the matter to the brother of the accused.
27. One of the vital issues which needs delving is the age of the victim [P.W.7] at the time of the incident. As regards the age of the victim [P.W.7], P.W.2 stated that the victim [P.W.7] was in between seven to nine years at the time of the incident. P.W.3 deposed that at the time of the incident, the age of the victim [P.W.7] was nine years. P.W.1 who was the uncle of the victim [P.W.7], stated that at the time of the incident, the age of the victim [P.W.7] might be nine years. The Doctor [P.W.6] who examined the victim [P.W.7] on 07.07.2020, recorded the age of the victim as nine years in the Medical Examination Report [Ext.-1] wherein it was further recorded that X-ray was not done. P.W.6 did not make any further comment on the age of the victim [P.W.7]. The victim [P.W.7] stated before the court that her age was ten years at the time of the incident. The informant-mother [P.W.8] of the victim stated that



her daughter [P.W.7] was aged about nine years at the time of the incident. None of the afore-mentioned witnesses was confronted by the defence on the issue of age of the victim [P.W.7] on the date of the incident. The accused is the father of the victim [P.W.7]. The parents are unquestionably the best persons to testify about the age and/or date of birth of their children. As such, the accused was in the best position to know about the age and/or date of birth of his daughter, that is, the victim [P.W.7]. Non-confrontation with the afore-mentioned prosecution witnesses by the defence, during their depositions, on the issue of age of the victim [P.W.7] at the time of the incident, goes to establish that the victim [P.W.7] was a minor on the date of the incident is not a disputed one from the standpoint of the accused.

- 27.1. In fact, a question was put to the accused during his examination under Section 313, CrPC to the effect that from the testimonies of the victim [P.W.7] and other prosecution witnesses it appeared that at the time of the incident, the age of his daughter, that is, the victim [P.W.7] was only nine years. When the accused was asked to offer his comment to the question, the accused replied in the affirmative by stating that his daughter, that is, the victim [P.W.7] was nine years old at the time of the incident.
- 27.2. It is settled principle of law that the statement of an accused under Section 313, CrPC can be used as evidence against the accused, in so far as it supports the case of the prosecution. Where the statement of the accused under Section 313, CrPC is in line with the case of the prosecution, then certainly the onus on the prosecution is reduced. Thus, it can be safely concluded that the victim [P.W.7] was a child, as defined in Section 2[d] of the POCSO Act, 2012, at the time of the incident.
28. It has been argued by the learned Legal Aid Counsel appearing for the accused-appellant that there was some delay in lodging the FIR [Ext.-2] in that the FIR [Ext.-2] lodged on 06.07.2020 had mentioned that the incident of sexual assault had occurred on 04.07.2020. It has been observed in *Ramdass and others vs. State of Maharashtra*, reported in [2007] 2 SCC 170, that mere delay in lodging the first information report is not necessarily fatal to the case of the prosecution. However, the fact that the report was lodged belatedly in a relevant fact of which the court must take notice. This fact has to be considered in the light of other facts and



circumstances of the case, and in a given case the court may be satisfied that the delay in lodging the report has been sufficiently explained. In the light of the totality of the evidence, the court of fact has to consider whether the delay in lodging the report has adversely affected the case of the prosecution. That is a matter of appreciation of evidence. There may be cases where there is direct evidence to explain the delay. Even in the absence of direct explanation there may be circumstances appearing on record which provide a reasonable explanation for the delay. There may also be cases where on account of fear and threats, witnesses may avoid going to the police station immediately. In the ultimate analysis, what is the affect of delay in lodging the report with the police is a matter of appreciation of evidence, and the court must consider the delay in the background of the facts and circumstances of each case. Different cases have different facts and it is the totality of evidence and the impact that it has on the mind of the court that is important. No straight jacket formula can be evolved in such matters, and each case must rest on its own facts. Thus, mere delay in lodging of the report may not by itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the facts and circumstances in each case and is a matter of appreciation of evidence by the court.

- 28.1. Both the victim [P.W.7] and the informant-mother [P.W.8] stated that her mother/she [P.W.8] was driven out of the matrimonial home by the accused after subjecting her [P.W.8] to physical assaults. On being so driven out, she [P.W.8] had to take shelter in her parental home. P.W.8 further stated that thereafter, her minor daughter [P.W.7] and her son were staying with the accused. The fact that the mother [P.W.8] of the victim [P.W.7] was residing separately from the accused at the relevant time was admitted by the accused himself in his statement made under Section 313, CrPC. The accused was asked to offer his comment to a question that from the evidence of the victim [P.W.7] and the informant-wife [P.W.8], it appeared that his wife on being driven out by him, had been staying in her parental home and the victim [P.W.7] had been staying with him. The accused had answered the question in the affirmative by stating that his minor daughter [P.W.7] was residing with him and his wife [P.W.8] was residing in her parental house. As per the testimony of the victim [P.W.7], the incident of sexual assault had occurred in the house of the accused. As per the testimony of the informant [P.W.8], it was on



06.07.2020 she was able to meet both her children when they came for bathing in the nearby river. It was when the victim-daughter [P.W.7] and the informant-mother [P.W.8] were taking bath together in the nearby river, the victim [P.W.7] complaining pain in her abdomen disclosed to her mother [P.W.8] that she was subjected to sexual assault by her father two days earlier. The victim [P.W.7] was categorical in her testimony that after she was sexually assaulted by her father, she was threatened by him not to disclose about it putting fear in her that else, she would be killed. In such situation, it was normal for a minor like her to maintain silence until she meets her most trusted person, that is, her mother [P.W.8]. There is no cogent material in the evidence that the victim [P.W.7] and her mother [P.W.8] met at any time during the interregnum. The informant [P.W.8] after noticing reddish and swollen abrasion in the private parts of the victim [P.W.7] lodged the FIR [Ext.-2] on 06.07.2020 after a consultation with the VDP. In such backdrop, in our considered view, it cannot be said that there was delay in lodgment of the FIR [Ext.-2] as the circumstances emerging from the records had itself provided the answer as to why the FIR [Ext.-2] was lodged after two days of the incident of sexual assault.

29. The victim [P.W.7], in her testimony, narrated about the incident which occurred on 04.07.2020. P.W.7 testified to the effect that the incident occurred at about 03-00 p.m. on that day when she was alone in the house. At that time, the accused came to the house. The accused first laid her on the bed and removed her wearing apparels upto her chest. The accused then opened her pant and also lifted her upper garment. Thereafter, the accused unzipped his pant and inserted his penis into her place of urination [vagina]. The statement of the victim [P.W.7] was recorded under Section 164, CrPC on 07.07.2020 by learned Judicial Magistrate, 1st Class, Golaghat. The victim [P.W.7] in her deposition made before the court, had affirmed that her statement was recorded before the court. The defence did not confront the victim [P.W.7] with her such previous statement recorded under Section 164, CrPC when she was cross-examined. The defence did not also confront the victim [P.W.7] with her previous statement recorded by the I.O. under Section 161, CrPC to bring out any contradiction/omission on any material point.
- 29.1. The learned Judicial Magistrate, 1st Class, Golaghat who recorded the statement of the victim [P.W.7] under Section 164, CrPC on 07.07.2020 was examined as a Court



Witness, C.W.1 by the learned trial court. Apart from exhibiting Ext.-C and Ext.-D, C.W.1 also exhibited the previous statement of the victim [P.W.7] recorded under Section 164, CrPC as Ext.-E. C.W.1 stated that the victim [P.W.7] had put her thumb impression on Ext.-E. C.W.1 also exhibited her signature in Ext.-E as Ext.-E[1]. The witness, C.W.1 was not confronted by the defence with regard to the manner and procedure followed in recording the victim's [P.W.7] statement under Section 164, CrPC. Only a suggestion was put to C.W.1 to the effect that the thumb impression appearing in Ext.-E was not of the victim [P.W.7] and the said suggestion was categorically denied by C.W.1.

- 29.2. In her previous statement recorded under Section 164, CrPC [Ext.-E], the victim [P.W.7] stated that the incident took place at around 03-00 p.m. on 04.07.2020. At that time, she was cooking rice. Her father was also at home at that point of time. Her father threw her on the bed and removed her clothes. Thereafter, her father committed bad act with her after gagging her. The testimony of the victim [P.W.7] made before the court and her statement recorded under Section 164, CrPC [Ext.-E] are found to be consistent on the material point of committing penetrative sexual assault on her by her father, that is, the accused.
30. From the testimony of the informant-mother [P.W.8], it is found that she met her daughter [P.W.7] after two days of the incident when her daughter [P.W.7] and her son came for bathing in the river nearby her parental house, where she used to reside after being driven out of her matrimonial home by the accused. According to P.W.8, her daughter [P.W.7] disclosed about the incident to her when they were at bath. The victim [P.W.7] complained about pain in her lower abdomen. On being queried, her daughter [P.W.7] told that when she was cooking rice, her father took her over to the bed and committed sexual assault on her. P.W.8 stated that she saw reddish abrasion in the private parts of her daughter [P.W.7] and it was found swollen.
31. The testimony of the informant-mother [P.W.8] had corroborated the testimony of the victim-daughter [P.W.7] with both testifying in similar line that on the relevant date when the victim [P.W.7] was alone in the house with her father in the house,



the victim [P.W.7] was taken to the bed by her father and after undressing her to an extent, her father inserted his penis into the vagina.

32. On an evaluation of the testimonies of the victim [P.W.7] and the informant-mother [P.W.8] in its entirety and the other documentary evidence including the FIR [Ext.-2], we are of the considered view that the defence has not been able to elicit anything to discredit the said two witnesses on any material point in respect of the incident of sexual assault on the victim [P.W.7] by the accused. The accused himself had admitted during his examination under Section 313, CrPC that his daughter [P.W.7] used to reside with him in his house, without her mother [P.W.8], at the relevant time. The testimony of the victim [P.W.7] given before the Court is found consistent with her previous statement recorded under Section 164, CrPC [Ext.-E] on the material points. The informant-mother [P.W.7] during her testimony did not deviate from the version given in the FIR [Ext.-2] on material points.
33. The victim [P.W.7] was examined medically on 07.07.2020 by the Medical & Health Officer-I [P.W.6] posted at Swahid Kushal Konwar Civil Hospital, Golaghat. After medical examination, P.W.6 recorded his findings in the Medical Examination Report [Ext.-1]. In the Medical Examination Report [Ext.-1], P.W.6 after examining external genitalia of the victim [P.W.7], recorded that there was lacerated wound in the left side of labia minora. When cross-examined, P.W.6 reiterated that there was lacerated wound in the private part of the victim [P.W.7].
34. The offence of rape is held to be a crime and not a medical diagnosis to be made by the medical officer treating the victim. It has been observed by Modi in 'A Textbook of Medical Jurisprudence and Toxicology', Twenty Seventh Edition, at page 859, that the issue of whether rape has occurred or not is a legal conclusion, not a medical one. It is a charge made by the investigating officer on a complaint by the victim. The only statement that can be made by the medical officer is whether there is evidence of recent sexual activity and about injuries noticed in and around the private parts or bite marks noticed in any part of the body. The duty of the medical officer extends principally to assist the prosecution with appropriate medical evidence.



34.1. The Hon'ble Supreme Court of India in the case of *Madan Gopal Kakkad vs. Naval Dubey and another*, reported in [1992] 3 SCC 204, has reproduced the opinion expressed by Modi in the following words in 'Medical Jurisprudence and Toxicology', Twenty First Edition :

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.

35. Section 375 of the Penal Code has defined the offence of rape as part of sexual offences. As per Clause [a] of Section 375, a man is said to commit 'rape' if he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person. After taking note of the definition of rape provided in Section 375, IPC and discussing several authorities of



Medical Jurisprudence, the Hon'ble Supreme Court in *Madan Gopal Kakkad* [supra] has gone on to observe as under :

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.*

...

* * * * *

46. *In the case on hand, there is acceptable and reliable evidence that there was slight penetration though not a complete penetration. The following evidence found in the deposition of PW 13 irrefragably proves the offence of rape committed by the respondent :*

“Nawal uncle untied his pyjama and took out his male organ and put it inside my vagina and clutched me ... Nawal Chacha put his male organ inside my vagina and since it was fat it kept slipping out. After that my vagina was paining.

... When Nawal uncle held apart, then there was some white liquid coming out from his male organ ...

Nawal Chacha pressed my mouth so I could not scream.”

47. *In the cross-examination, the following answer is given :*

“I suffered pain by what Nawal Chacha did ...”

48. *When the evidence of PW 1 is taken with the evidence of medical officer who found an abrasion on the medial side of Labia majora and redness present around the Labia minora with white discharge even after 5 days, it can be safely concluded that there was partial penetration within the*



Labia majora or the vulva or pudenda which in the legal sense is sufficient to constitute the offence of rape. ...

36. As per Section 2[1][f] of the POCSO Act, 'penetrative sexual assault', has the same meaning as assigned to it in Section 3. Section 2[1][a] has provided that 'aggravated penetrative sexual assault' has the same meaning as assigned to it in Section 5 thereof. Clause [a] of Section 3 which has described 'penetrative sexual assault', has provided that a person is said to commit 'penetrative sexual assault' if he penetrate his penis, to any extent, into the vagina, mouth, urethra or anus of a child or make the child to do so with him or any other person. The provision contained in Clause [a] of Section 3 of the POCSO Act is *pari materia* of Section 375 of the Penal Code. As per Section 5[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.
37. As per Oxford Dictionary of English, Third Edition, 'vulva' is the female external genitals; the external opening of the vagina. 'Labia' is the inner and outer folds of the vulva. 'Labia majora' is the larger outer folds of the vulva and 'labia minora' is the smaller inner folds of the vulva. As per the anatomy of the vulva, the outer folds are called labia majora and the inner folds are called the labia minora. These skin folds protects the opening of the urethra and the vagina. The urethra is the tube that carries urine out of the body.
38. The learned Special Court before recording the deposition of the victim [P.W.8] got itself satisfied as to whether the victim [P.W.8] had the intellectual capacity to understand questions and to give rational answers to them by putting a nos. of questions to her and considering the responses received against them. Similar was the situation before C.W.1. Having regard to versions of the victim [P.W.7], the initial stage, it is found to inspire confidence requiring no corroboration.
39. In presence of such evidence/materials on record, the presumption under Section 29 of the POCSO Act, which gets operational on establishing the foundational facts by the prosecution, got clearly operational in the present case. The onus had, thus,



shifted to the accused to rebut the presumption and to prove that he had not committed the offence. The accused had failed to discharge the onus.

40. On a comprehensive analysis of the oral testimonies of the victim [P.W.7] and the informant-mother [P.W.8] together with the medical evidence emerging from the Medical Examination Report [Ext.-1] and the evidence of the Doctor [P.W.6] who had examined the victim [P.W.7] after three days of the incident on 07.07.2020, the above view gets strengthened and it can be safely concluded in the present case that there was penetrative sexual assault on the victim [P.W.7]. Such view is fortified by the fact that on medical examination of the victim [P.W.7] on 07.07.2020, that is, after three days of the incident, there was a lacerated wound in the left side of labia minora. The presence of a lacerated wound in the labia minora of the victim even after three days of the incident is a clear pointer to the fact that the victim [P.W.7] had suffered penetrative sexual assault at the hands of her own father.
41. The decision in *Rahim Beg* [supra] pertains to non-detection of any injury on the male organ of the accused persons by the doctor, who examined them, and the allegations against them was commission of rape of a minor girl, who was found to be virgin and whose hymen was found intact. In view of the non-mandatory nature of the provision of Section 53A, CrPC and in view of other evidence/materials on record including the presence of injury in the private part of the victim in the present case, the decision in *Rahim Beg* [supra], referred to by the learned Legal Aid Counsel, is not of any assistance to the case of the accused-appellant.
42. It has emerged from the materials on record that when the accused was being tied up by the people from the neighbourhood on 06.07.2020 on the allegation that he had sexually assaulted his minor daughter, the matter was informed by P.W.2 telephonically to Bogijan Police Station. P.W.1 stated that on 06.07.2020, the local people were assaulting the accused by tying him with an electric post. On receipt of the telephonic information given by P.W.2 from mobile no. 7086124825, the I.O. [P.W.11] registered the information vide General Diary Entry no. 94 [Ext.-1-1] at 04-10 p.m. on 06.07.2020 and thereafter, proceeded to the place where the accused was tied up. It is true that when being informed, the I.O. [P.W.11] had noted the information in the General Diary but the same cannot be treated to be a First



Information Report [FIR]. In the telephonic information registered as General Diary Entry no. 94 [Ext.-1-1], the thrust was on the clear and present danger from assault on the accused, then going on, by the people of the locality tying him up with an electric post on the allegation that the accused had sexually assaulted his minor daughter and the allegation is not directly on the sexual assault on the minor daughter. When an information of such nature regarding assault on a person is received by an Officer In-Charge of a Police Station, the first and foremost duty of the Officer In-Charge is to proceed for the place of incident by himself or to depute a police officer, as per the procedure prescribed in the Code, and to reach the place of such incident at the earliest possible time to avert any possible mishap as it is the duty of the State to protect the life of an injured. It is not necessary for an Officer In-Charge to take such steps like proceeding to the place of incident only on the basis of a First Information Report. An information received in regard to the commission of a cognizable offence is not required to be preceded by a First Information Report [FIR].

43. The First Information Report [Ext.-2] was received from the informant [P.W.8] in the Police Station at 05-10 p.m. on 06.07.2020 and it was on receipt of the same, Bogijan Police Station Case no. 31/2020 was registered. In the afore-mentioned fact situation, the telephonic information received by the I.O. at a prior point of time, 04-10 p.m. was not in the nature of an FIR so as to attract the provisions of Section 162, CrPC. In this connection, the following observations made in *Sidhartha Vashisth alias Manu Sharma vs. State [NCT of Delhi], [2010] 6 SCC 1*, can be referred to :-

113. The information about the commission of a cognizable offence given 'in person at the police station' and the information about a cognizable offence given 'on telephone' have forever been treated by this Court on different pedestals. The rationale for the said differential treatment to the two situations is, that the information given by any individual on telephone to the police is not for the purpose of lodging a first information report, but rather to request the police to reach the place of occurrence; whereas the information about the commission of an offence given in person by a witness or anybody else to the police is for the purpose



of lodging a first information report. Identifying the said objective difference between the two situations, this Court has categorically held in a plethora of judgments that a cryptic telephonic message of a cognizable offence cannot be treated as a first information report under the Code.

114. It has also been held in a number of judgments by this Court that merely because the information given on phone was prior in time would not mean that the same would be treated as the first information report, as understood under the Code.

44. The testimonies of the victim [P.W.7] and the informant-mother [P.W.8] on the above sequence of events lend credence to the prosecution case. The prosecution witness, P.W.5 who is the aunt of the victim [P.W.7]; the sister-in-law of the accused; and the informant [P.W.8] and the wife of the younger brother [P.W.1] of the accused; turning hostile is of no benefit to the accused as it has not dented the prosecution in any manner.
45. It has been urged on behalf of the accused that as the relationship between the informant-mother [P.W.8] and the accused was not cordial and was strained, the case had been foisted on the accused falsely. Such plea seemed to have been raised by the defence by putting suggestions to the informant-mother [P.W.8] to the effect that she filed the case falsely as she intended to marry the person with whom she was maintaining a relationship at the relevant point of time and which relationship was a matter of discord between them. To substantiate such plea, attention has also been drawn to the testimony of P.W.1, who stated that he suspected that the informant [P.W.8] might have lodged a false case as the relationship between the informant [P.W.8] and the accused was not good and after the incident, the informant [P.W.8] had left with another person.
- 45.1. From the evidence/materials on record, it has emerged that the informant [P.W.8], that is, the wife of the accused was driven out of her matrimonial home after subjecting her to physical assaults. The victim [P.W.7] had stated that three months



earlier to the incident, the accused drove her mother [P.W.8] out of the house. In her testimony, the informant [P.W.8] deposed to the effect that she reported the matter to the younger brother of the accused, that is, P.W.1 and P.W.1 had threatened her and her children with death in view of the case filed by her. The informant [P.W.8] denied suggestions that she had deposed falsely against the accused; that she had quarrel with the accused as she was then having an affair with her present husband; and that she filed the case falsely as she intended to marry her present husband. The informant [P.W.8] had stated that at the time of giving testimony before the court, she was living with her present husband.

- 45.2. Other than raising such a plea in the form of suggestions, the defence did not bring any other evidence/materials on record to substantiate such plea. Thus, the plea that the informant [P.W.8] being not favourably disposed towards her husband, that is, the accused at the relevant point of time, had falsely brought the allegation of sexual assault on her daughter by the accused remained in the realm of allegation only and nothing more. It is not difficult to comprehend that if the husband of a woman commits sexual assault on his own minor daughter, one possible step on the part of such a woman being the mother of the child, to take is to leave from the society of her husband. In presence of overwhelming evidence/materials brought on record by the prosecution pointing towards the commission of aggravated penetrative sexual assault, as discussed above, such a plea after consideration, is only to be discarded.
46. In view of the provision contained in Section 5[n] of the POCSO Act, the penetrative sexual assault of the nature involved in the present case becomes aggravated penetrative sexual assault, which is punishable under Section 6 of the POCSO Act. As per sub-section [1] of Section 6, whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment with 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 a person, and shall also be liable to fine, or with death. Sub-section [2] thereof has provided that the fine imposed under sub-section [1] shall be just and reasonable. From a reading of the language contained in Section 6, it is clear that there is no discretion left to the court in the absence of any enabling statutory provision, to impose a lesser sentence than a period of twenty years. Such sentence has been mandated in view of the gruesome



and abhorrent nature of the offence, which can only be committed by a morally depraved person.

48. The learned trial court after convicting the accused-appellant for the offence under Section 6 of the POCSO Act, has sentenced the accused-appellant to undergo imprisonment for a period of twenty years, which period is the minimum, and to pay a fine of Rs. 5,000/-, which is just and reasonable. As we have found no reason, not to speak of any good and sufficient reason, to interfere with the Judgment and Order dated 01.02.2022 of conviction and sentence passed by the learned Special Court, the instant criminal appeal being bereft of any merits, fails. Accordingly, affirming the Judgment and Order dated 01.02.2022 and maintaining the order of conviction and sentence, the criminal appeal is dismissed.
49. This Court records its appreciation for the assistance rendered by the learned Legal Aid Counsel. The learned Legal Aid Counsel is to be paid remuneration as per the rules in force.
50. The records of the learned trial court be send back forthwith.

JUDGE

JUDGE

Comparing Assistant