

GAHC010063062023



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

Case No. : Crl.A./110/2023

FAKRUL ISLAM
S/O LATE SIDDEQUE ALI,
VILL.- KALKALIBASTI,
P.S.- PATHERKANDI,
DIST.- KARIMGANJ, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR.
TO BE REP. BY THE P.P., ASSAM.

2:NESARUN KHATUN
W/O MAHABBAT ALI
VILL.- KALKALIBASTI
P.S.- PATHERKANDI
P.O.- CHANDKHIRA
DIST.- KARIMGANJ
ASSAM
PIN- 788725

:::BEFORE:::

HON'BLE MR. JUSTICE SANJEEV KUMAR SHARMA

Advocate for the appellant : Mr. N. Haque.

Advocate for the respondents : Mr. D.K.Bhattacharyya, Amicus Curiae for R-2.
Mr. P.S. Lahkar, Addl. PP.

Date on which judgment is reserved : **12.02.2026.**

Date of pronouncement of judgment : **27.03.2026**

Whether the pronouncement is of the : No.
operative part of the judgment ?

Whether the full judgment has been : Yes
pronounced?

JUDGMENT & ORDER (CAV)

Heard Mr. N. Haque, learned counsel for the appellant. Also heard Mr. D.K.Bhattacharyya, learned Amicus Curiae for the informant/respondent No. 2 and Mr. P.S. Lahkar, learned Addl. Public Prosecutor for the State.

2. This appeal is directed against a Judgment dated 08.02.2023 passed by the learned Sessions Judge, Karimganj in Special Sessions Case No. 05/2020 convicting the accused/appellant under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and sentencing him to suffer Rigorous Imprisonment for 10 years and also fine of Rs. 20,000/- and in default of payment of fine, further Simple Imprisonment for 6 months.

3. The prosecution case as per the FIR inter alia is that on 26.02.2018 while the informant went to her parental home by leaving her minor daughter aged about 16 years in the nearby house, the accused by taking advantage of absence of anyone at home, committed rape on her daughter. On the subsequent day while she came to know about the said incident, after returning to home she waited for a village bichar (meeting) but as no bichar was held, she lodged the FIR.

4. On receipt of the said FIR, the same was registered as Patherkandi P.S.

case No. 81/2018 under Section 448/376 IPC r/w Section 6 of the POCSO Act. Thereafter, Investigating Officer took up the investigation of the case and after completion of the investigation submitted charge sheet against the accused under Sections 448/376 IPC r/w Section 6 of POCSO Act. On appearance of accused before this Court, charge under Section 448/376 IPC r/w Section 6 of the Protection of Children from Sexual Offences Act, 2012 got framed against him, to which he pleaded not guilty and claimed to be tried.

5. The prosecution to prove its case examined as many as seven witnesses including Medical Officer and Investigating Officer. After the completion of evidence of prosecution, the accused was examined under Section 313 Cr.PC, wherein he denied all the incriminating materials against him. Defence declined to adduce evidence.

6. At this stage, it would be apposite to discuss the evidence on record.

7. As per the evidence being adduced by the informant, PW-1, being the mother of the victim girl, about 3 years back, went to her parental home to perform last rites of her mother by leaving her minor daughter with her mother in law at her home and on the subsequent day while she returned to her home, she heard from her daughter and the village people that the accused, who is her brother in law slept with her at night and did sexual intercourse with her. After the incident, her daughter informed about the same to the village people in her absence and after she returned home, her daughter and other village people informed her about the incident. After knowing about the incident, she approached the village people for bichar(meeting) but as the village people

failed to hold any bichar(meeting), she lodged the FIR against the accused after about one (1) week. After lodging the FIR, the President of their village asked the accused to settle the matter by giving Rs. 10,000/- to her through the middlemen but the accused did not settle the matter.

In her cross examination, she deposed that the following people namely, Nepur Begum, Sama Begum, Sarifa Begum, Neharunnessa, Asma Begum informed her about the incident. She denied that her daughter gave statement under Section 164 Cr.PC as per the instruction of their village President. At the time of the incident, the accused was a married person, being her brother in law, having one (1) month old child. During the childhood, her daughter had some mental illness but she got cured after medication. She denied that her daughter still has any mental illness. She denied that her husband and the accused being step brothers had any sort of dispute or that she implicated the accused falsely to squeeze money from him. During the incident her husband was in Agartala. She denied that her daughter made statement under Section 164 Cr.PC as per her instruction.

8. PW-2 (victim) deposed that her mother one day went to attend the last rites of her maternal grandmother by leaving her with her paternal aunt namely, Sajeda Begum, wife of her uncle (accused). While she was with her aunt, she made her to sleep in a separate room. At night, while she asked her aunt to accompany her to attend nature's call, she asked her to take her uncle (accused) along with her to attend the nature's call. After attending the nature's call, she went to sleep and while she was sleeping, her uncle came and gagged her mouth and forcefully undressed her and committed rape on her. During the

relevant time she was menstruating. On the subsequent day, her mother came and she narrated the incident to her mother. After knowing about the incident, she informed about the same to the village President, who advised her to lodge FIR. She proved her statement before the Magistrate as Ext.1.

In her cross examination, she deposed that she knows Nepur Begum, Sama Begum, Sarifa Begum, Neharunnessa and Asma Begum, all of whom are her paternal aunts. She also knows Ala Uddin whose house is situated near to her house. At the time of the incident, her paternal grandmother Amina Bibi was alive. Her father has four brothers namely, Fakrul Islam (accused), Rahamat Ali, Fakar and Sifat Ali, all her uncle stay in their respective houses adjacent to their house. She denied the suggestion of not making the statement to the police regarding being made to sleep in a separate room by her aunt or being accompanied by the accused while going to attend natures' call or regarding the commission of rape on her by the accused. After the incident and prior to the lodgment of the FIR, there was a talk of settlement and for payment of money but the accused failed to pay any amount.

9. PW-3, Majida Khatun deposed that she does not know anything about the incident. Her house is situated far away from the house of the informant. She was called by the informant to her home after the incident, where she saw police, who only asked her name but did not record her statement.

In view of her having resiled from her previous statement under Section 161 Cr.PC, she was allowed to be cross examined by the prosecution. In her cross examination by the prosecution, she denied to have made statement to

the police that her house is about 100 meters away from the house of the informant or on 27.02.2018 the victim told her on the way that her paternal uncle (accused) committed sexual assault on her. She denied that victim told anything about the incident.

In her cross examination by the defence, she deposed that while she went to the house of the informant, on being called by her after the incident she found Nepur Begum, Sama Begum, Sarifa Begum, Neharunnessa and Asma Begum there.

10. PW-4, Sarifa Begum deposed that during the incident she was at her parental home at Kolkolibasti. After the incident, the informant called her to her home and after going there, she found police over there. She does not know anything about the incident as the informant did not tell about the same.

She too was allowed to be cross examined by the prosecution wherein she denied to have stated to the police that on 27.02.2018 in the morning, victim came to her home and told her and her mother that on the previous night at about 12 midnight, her paternal uncle Fakrul Islam committed rape on her or then they told to her to inform about the same to her mother or on the subsequent day, she queried the accused about the incident, and asked him as to why he has done such act.

In her cross examination by the defence, she deposed that while police came to the home of the informant, she called her to her home and while she went to the home of the informant, there were several people over there. She

found Majida Khatun, Sama Begum, Sarifa Begum, Neharunnessa and Asma Begum at the home of the informant while she went there but they did not tell her anything about the incident. Victim is not mentally sound and she speaks meaningless things and has no conformity in her actions. Sometimes she even tries to assault her mother. Accused Fakrul Islam and father of the victim girl are step brothers. They have separate homestead. Both of them have dispute between them quite often regarding landed property. Regarding the said dispute, few days prior to the incident, village elders held talk regarding amicable settlement between them.

11. PW-5 being the father of the victim deposed that about 3 years back, while he was in Agartala in connection with his work and his wife went to her parental home at village Tillabari, Karimganj, his daughter called him over phone in the morning and informed him that the accused Fakrul Islam sexually assaulted her and after knowing about the same, he asked her to inform about the same to her mother i.e. his wife, as it was not possible for him to come back immediately by leaving his work.

Accordingly, his wife after knowing about the sexual assault on their daughter by the accused lodged FIR against him. During the incident, his daughter was about 14-15 years old. His daughter read up to class VI.

In his cross examination, he deposed that after about 4-5 days after knowing about the incident, he came to his home. Before his arrival, his wife already lodged FIR against the accused. He knows their GP President namely, Bappa. He had conversation with the said GP President. Before the lodgment of

the FIR, his wife asked President Bappa to get Rs. 50,000/- from the accused and when the said amount was not given, thereafter Rs. 10,000/- was asked and when the accused failed to pay any amount, President Bappa instructed for institution of FIR. Police did not record his statement. He denied to have stated to the police that after 2 days of the incident, he came to his home and after discussing with the village people, got the FIR instituted or that his daughter, since her childhood is having some mental issues. He denied the suggestion regarding the falsity of his evidence in respect of the age of his daughter stating it to be 14 years. He denied that he got his wife to institute a false FIR against the accused due to land dispute with the accused or with the intention to grab the landed property.

12. PW-6, Nagendra Singha in his evidence deposed that the earlier Investigating Officer after being entrusted with the investigation, visited the place of occurrence, examined the complainant and other witnesses, sent the victim for medical examination and arrested the accused and during the investigation he expired and thereafter, he was entrusted with the investigation. On perusal of the case diary, he found that the investigation was already completed by the previous Investigating Officer, as such, on finding sufficient materials against the accused, he after consulting the concerned Officer in Charge, submitted charge sheet against the accused under Section 448/376 IPC r/w Section 6 of POCSO Act. He proved Ext.P-3/PW-6 as the charge sheet and Ext.P-3(1)/PW-6 being his signature. Ext.P-4/PW-6 as the FIR and Ext.P-5/PW-6 being the printed form of the FIR. He confirmed that PW-3, Majida Khatun stated during the investigation, "that her house is about 100 meters away from the house of the informant, on 27.02.2018, XXX (victim) told him on the way

that her paternal uncle Fakrul Islam committed sexual intercourse with her on the previous night but though being the neighbour he did not ask her about the incident." It was further confirmed that PW-4 Sarifa Begum stated during the investigation that, "on 27.02.2018 in the morning, XXX (victim) came to her home and told her and her mother that on the previous night at about 12 midnight, her paternal uncle Fakrul Islam committed rape on her, then they told to her to inform about the same to her mother. On the subsequent day, she queried the accused about the incident and asked him as to why he has done such act."

In his cross examination, he deposed that in the FIR, the name of the person identifying or taking the thumb impression of the informant is not mentioned. In the printed form of the FIR(Ext.P-5), the name of the informant is mentioned as Neharun Nessa and in the FIR/ejahar (Ext.P-4) the name of the informant is mentioned as Nesarunnessa. In the sketch map, the date of preparation of the same is not mentioned. Statements of all the witnesses are recorded by the previous I.O. on the same day i.e. on 05.03.2018. The date of incident as per the FIR is on 26.02.2018 and the FIR was lodged on 05.03.2018. The concerned village President was not examined during the investigation. The date of collection of the medical report is not mentioned in the case diary. PW-1, Nesarun Khatun during the investigation did not state that her daughter told to her that the accused slept with her. PW-1 did not state that village President Bappa was approached for bichar though the fact of approaching for bichar was stated by her. PW-1 did not state that village President Bappa asked the accused to settle the matter by giving Rs. 10,000/- to PW-1 (Nesarun Khatun) but the accused failed to give the said amount. PW-2 XXX (victim) during the

investigation though specifically did not state to him that while she was with her aunt Sajida Begum, she was made to sleep in a separate room and at night, when she asked her aunt to accompany her to attend nature's call, she asked her to take her uncle (accused) along with her to attend the same or after attending the nature's call she went to sleep but she stated that the accused gagged her mouth, undressed her and committed rape on her. It is not mentioned specifically in the case diary at whose house PW-3 Majida Khatun and PW-4 Sarifa Begum were examined but it shows that they were examined at Kolkalibasti near the house of the accused. PW-5 Mohabat Ali stated during the investigation that after 2 days of the incident, he came to his house and after discussing with the village people, got the FIR instituted. PW-5 Mohabat Ali stated during the investigation that his daughter during her childhood had some mental issues but he stated that presently she is fit. It is not a fact that during investigation PW-3 and PW-4 did not make the statement as claimed by the prosecution. PW-3 stated during the investigation that XXX (victim) is Aad Pagal in Bengali, which is meant for the word absent minded, in English. It is not a fact that without perusing the materials properly he submitted charge sheet.

13. PW-7, Dr. Najma Begum in her evidence deposed that on 06.03.2018 on police requisition of Patherkandi PS Case No. 81/2018 under Section 448/376 IPC r/w Section 6 of POCSO Act, 2012, she examined one Moimun Begum, aged 14 years, daughter of Mohabat Ali and Nesarun Khatun of village Kalkalibasti, P.S Patherkandi, District Karimganj, in connection with MLC No. 1210/12392/18. She was escorted by WPC 369 L. Halam of Patherkandi P.S. Her identification mark is a black mole on the forehead. The victim was examined on obtaining

the consent of the victim and her mother and the thumb impression of the victim was taken.

As per statement of the victim, on 26.02.2018, her mother went to her mother's home for some ceremony. She was kept in her paternal uncle's house nearby. Her father was working as labourer at Agartala. At night, when she was sleeping in her room, her uncle entered into the room, tied her mouth with a cloth, removed all her clothing and raped her three times. When he left, he threatened her not to tell anybody about the incident but she told her mother and aunt. Her father was informed and her mother complained the matter to the local Panchayat but they did not respond. On the prior day of the medical examination, Panchayat President and one member accompanied them and lodged a complaint at Patherkandi P.S.

As per the medical opinion, there was no sign of recent sexual intercourse or of injury on her body or private parts, and the age of the victim girl was determined to be above 16 years and below 18 years.

In her cross examination, she deposed that the date of issuance of the medical report is not mentioned in the same and it is not a fact that the victim girl has not narrated any history to her as being deposed by her in her examination in chief. She denied that the victim girl was mentally unsound. The hymen can get torn due to swimming, jumping or cycling, stated by PW-7.

14. Before proceeding to discuss the evidence, the first contention raised by the appellant is to be addressed. The same is with regard to the age of the

victim, as she was treated as a minor by the learned Trial Court. It is pointed out by learned counsel for the appellant that the age has been determined purely on the basis of medical evidence to be below 18 years, as per the deposition of PW-7, the Doctor who examined the victim. As per the X-ray report of the wrist joint, elbow joint, knee joint, and iliac crest, the age of the victim is above 16 and below 18 years. No other documentary evidence is available in this regard. Learned counsel for the appellant has submitted that the medical evidence, as stated above, which is based on the expert report, does not conclusively establish the victim to be below 18 years of age.

15. It is a settled position of law that a margin of two years on either side is to be considered when age is estimated on the basis of medical evidence, i.e, X-ray report, commonly known as an ossification test.

16. It is well settled that an ossification test, though is a guiding factor for determining the age, the same is not conclusive or incontrovertible and leaves a margin of error and the benefit of doubt with regard to the age of the victim always goes in favor of the accused.

17. In this regard, learned counsel for the appellant has relied upon the decision of a Co-ordinate Bench of this High Court in the case of ***Sri Utpal Debnath Vs. The State of Assam & Others***, reported in ***2023 (0) Supreme (Gau) 259***, (Criminal Appeal No. 276 of 2019), decided on 04.05.2023, wherein it has been observed as follows:

"26. As regards the evidence of PW-9 i.e. Dr. Atreyee Goswami, who examined the victim girl, is concerned, it appears that she exhibited only

medical examination report as Ext. 4 and on perusal of medical examination report, it appears that the Column No. 3 which mentions about the age of the patient, has been kept unfilled and nothing has been mentioned therein. It also appears that doctor has opined that the age of the victim is below 18 years (16 to 17 years) as per the report of radiologist, though no separate report of radiologist has been exhibited in this case. Even if, we consider the opinion of PW-9 as regards the age of the victim, which was based on radiological examination of the victim, it is an accepted fact that the age determined on the basis of radiological examination may not be an accurate determination of the age and sufficient margin of error on either way has to be allowed. The Hon'ble Supreme Court of India, in several of its decisions, has laid down that in case of ascertainment of age by radiological examination, a margin of error of two years on either side has to be reckoned with.

27. In the instant case, as no certificate of age has been exhibited, during trial, by any of the prosecution witnesses, the doctor's opinion is the only evidence, available in, the present case which may be relied upon. In such a case a margin of error has also to be reckoned with. It is also a settled principle now that in case of determination of age on the basis of the opinion of the radiologist, the benefit of the margin of error should always go to the accused. In the instant case, the doctor has opined that the age of the victim was below 18 years (16 to 17 years) and if we add 2 (two) years of margin of error to 16 (sixteen) to 17 (seventeen) years, it will come 18 (eighteen) to 19 (nineteen) years, in which case, the victim may not be regarded as a minor as under section 2(1)(d) of the POCSO Act, 2012 a child is defined as any person below the age of 18 years. Same is also the case in case of offence under Section 363 of the Indian Penal Code. In view of above circumstances, this Court is constrained to hold that the prosecution side has failed to prove that the age of the victim was less than 18 years when the alleged offence was committed and the benefit of the same would go to the accused (present appellant)."

18. Further, in the cited case of ***Alamelu & Another Vs. State Represented by Inspector of Police*** reported in ***(2011) 2 SCC 385***, the Hon'ble Apex Court held as follows:

"46. In addition, the High Court failed to consider the expert evidence given by PW13 Dr. Manimegalaikumar, who had medically examined the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. This margin of error in age has been judicially recognised by this Court in Jaya Mala v. Govt. of J&K. In the aforesaid judgment, it is observed as follows:

"9.... However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side."

47. We are of the opinion, in the facts of this case, the age of the girl could not have been fixed on the basis of the transfer certificate. There was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate. The expert evidence does not rule out the possibility of the girl being a major. In our opinion, the prosecution has failed to prove that the girl was a minor, at the relevant date."

19. In the instant case, although the medical evidence points to a range of 16 to 18 years as the age of the victim, even discounting the fact that the radiologist who conducted the X-ray examination has not been examined, it can be safely held that by applying the margin of two years, it is quite possible that the age of the victim could extend to below 20 years, thereby placing her in the category of a major.

20. Hence, I am of the considered opinion that Section 6 of the POCSO Act would not be attracted in the facts of the present case and the evidence has to be considered in the light of Sections 375/376 IPC.

21. Learned counsel for the appellant, with reference to the evidence on record submitted that as per the version of the prosecution, the incident took place on 26.02.2018, and the FIR was filed one week later, on 05.03.2018 and the explanation for the delay offered was that the informant had sought justice from the neighbors, particularly, the President of the Panchayat, namely, Bappa. But there is not a single prosecution witness who has been examined to establish the fact that she had, in fact, sought the help of the co-villagers for settlement of the issue.

22. It is further contended that PW-2 (Victim) in her cross-examination stated that her aunt made her to sleep in a separate room. After attending the nature's call she went to sleep and while she was sleeping the accused came and gagged her mouth and forcefully undressed her and committed rape. But in her statement under Section 164 Cr.PC, the PW-2 stated that after urinating, when she wanted to enter the room, the accused resisted her and gagged her with a gamocha and removed all clothes from her body and raped her. From the aforesaid statements of the PW-2, it is clear that the victim made contradictory statements in her evidence before the Court and her statement under Section 164 Cr.PC.

23. It is therefore contended that from the above, it is crystal clear that the victim cannot be regarded as a sterling witness whose testimony can be

accepted without any corroboration. Further, the independent witnesses namely, PW-3 and PW-4 to whom the prosecution sought to corroborate the version of the PW-2/victim did not support the prosecution case and in fact the DW-4 had stated that the victim was not mentally sound and she speaks meaningless things with no conformity with her actions and sometimes she even tried to assault her mother. The I.O during his examination also stated that the PW-3 in her statement before the I.O stated that the victim is "Aaad Pagal" which in English means "absent minded". But the said fact was not taken into consideration by the learned Trial Court. It is further submitted that it has also emerged from the evidence of the said witnesses that there exists certain disputes between the father of the victim and the accused, who are stepbrothers, with regard to landed property, which provides a motive for lodging a false ejahar. It is further submitted that the story narrated in the FIR is inherently improbable, because the aunt of the victim was also in the same house and the sketch map reveals that the grandmother of the victim and two other persons, Fakruddin and Rahmat Ali, were living in the adjacent rooms, but none of them were examined by the I.O.

24. Per contra, the learned Additional Public Prosecutor as well as the learned Amicus Curiae would submit that the versions of PW-3 and PW-4 cannot be believed as they have been declared hostile, and the I.O has proved that they had deposed about the victim reporting to them about the occurrence in their statements before the I.O earlier. Moreover, the victim has remained consistent in her statements before the I.O, the Magistrate, as well as before the Court and hence, she must be treated as a trustworthy witness.

25. It is also submitted that there is no motive for false implication that could be established by the defense. It is clear from the evidence of PW-1/informant, that she had asked for a bichar, but having failed in that regard, she was compelled to lodge the FIR and thereby, some delay has been occasioned.

26. I have given my anxious considerations to the rival submissions and the evidence on record.

27. It is to be noticed that the informant, PW-1/ mother of the victim was confronted by the defense with an omission to the effect that she had not stated before the police that her daughter informed her that the accused slept with her, which omission was confirmed by the I.O. This, in my considered view, is a very material contradiction because the very foundation of the prosecution case, i.e., commission of sexual intercourse, forcible or otherwise, by the accused with the victim, has not been stated by the victim to the informant/mother as per version of the police. Furthermore, it was also put to her that she never stated before the police that she had approached the village people for holding a meeting or bichar or that she also approached the village President, Bappa, for the said purpose and also about the fact of the said village President asking the accused to settle the matter by giving ₹10,000 to her, but the accused failed to give the amount. All of the above omissions were proved through the I.O.

28. As rightly contended by the learned defense counsel, the prosecution has failed to bring out or produce any witness other than the members of the immediate informant's family, i.e., the victim and her parents, who could depose

to the aforesaid facts regarding the informant seeking a bichar. Not even the village President was examined by the I.O, who was the best person to have confirmed the aforesaid contention of the PW-1, PW-2 and PW-5. Therefore, there is no sufficient explanation for the delay of seven days in lodging the FIR, leaving room for concoction. It is, of course, trite that in cases of this nature, delay in lodging the FIR is to be viewed differently, but that is on account of the fact that the honor of the family is involved and it requires time for the family members to deliberate and decide to approach the police. But in the instant case, the matter was apparently reported on the next day to all and sundry in the village and therefore, the said question of family honor does not arise at all.

29. Coming to the evidence of PW-2, she deposed that when she had asked her aunt to accompany her to attend nature's call, she asked her to take her uncle/accused with her to attend nature's call and after attending nature's call, she went to sleep. It was put to her by the defense that she had omitted to state so before the I.O, which was confirmed by the I.O. What she stated before the I.O was the remaining part, i.e., while she was sleeping, her uncle came and gagged her mouth and forcefully undressed her, and committed rape upon her.

30. In contradistinction to this, what the victim had stated before the Magistrate in her statement under Section 164 Cr.PC is that after answering nature's call, when she wanted to enter the house, the accused resisted her. Thereafter, her uncle gagged her mouth with a gumcha and took off all her clothes and thereafter, her uncle pushed her on her chest and threw her on the bed, and thereafter committed "baje kaaj". Therefore, there appears to be a material contradiction in her version before the Magistrate and that before the

Court, wherein her version was that she was already asleep when the accused came and, by gagging her mouth, committed rape upon her three times after forcefully undressing her. Neither in her evidence before the Court nor in her statement before the Magistrate is there any whisper regarding any resistance offered by her or whether she attempted to shout by un-gagging her mouth, inasmuch as, apparently, both her hands were free. There is no description of the kind of clothes she was wearing, which were allegedly taken off forcefully by the accused. All of this apparently happened when other family members were present in the adjoining rooms, as per the sketch map, none of whom were examined by the I.O. In fact, as per the version of the victim herself, the wife of the accused, who was in an adjoining room, was awake at that time, as the victim had asked her to accompany her to answer nature's call. Although the learned Trial court had opined that the victim would have been too shocked to resist, in the absence of any evidence, it is not permissible for the Court to resort to conjectures and surmises.

31. From the above, there appears to be a ring of improbability and implausibility to the whole incident as described by the victim. In any case, due to the aforesaid inconsistencies in her statement, in my considered opinion, she cannot be considered a sterling witness whose uncorroborated testimony, can be relied upon to return a verdict of conviction. It is to be recalled at this point that her mother herself did not state before the police that her daughter informed her that the accused slept with her. Interestingly enough, even in her examination in chief, PW-1 did not allude to any forcible sexual intercourse but stated that she heard from her daughter and the village people that the accused slept with her at night and had sexual intercourse with her. Therefore, it cannot

be said that the evidence of PW-1 corroborates the evidence of the victim as far as forcible sexual intercourse is concerned. What is also to be noted is that the victim had deposed that her mother had taken her mobile phone with her when she went to her parent's place, but although the victim claims to have reported the incident to the villagers, as per the evidence of PW-1 and as it appears from the cross-examination of PW-3 and PW-4, i.e., from the alleged statements made by the said PWs before the police, no one informed the mother of the victim over phone.

32. PW-6, the I.O, has confirmed that PW-3, who was declared hostile and was allowed to be cross-examined by the prosecution had stated that on 27.02.2018, the victim told her on the way that her paternal uncle committed sexual intercourse with her on the previous night. Therefore, as per the prosecution's version itself, regarding the statement of PW-3, the element of force is absent.

33. In view of the aforesaid discussion, it would not be safe to sustain the verdict of conviction and the sentence imposed by the learned Trial Court.

34. Accordingly, the appeal stands allowed and the impugned Judgment and Sentence dated 08.02.2023 is set aside. The accused/appellant be set at liberty forthwith.

35. In appreciation of the assistance provided by Mr. D.K. Bhattacharyya, learned Amicus Curiae for the respondent No.2, his fees should be paid by the High Court Legal Services Committee as per norms.

36. The appeal stands disposed of.

37. Send back the TCR.

JUDGE

Comparing Assistant