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AS:14652-DB

2025:GAU-

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

Case No. : Crl.A./392/2024

ABDUL HAMID
S/O. LATE SABED ALI, VILL. SALMARA, P/S. KAMPUR, DIST. NAGAON,
ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR
REP. BY THE PP, ASSAM.

2:ANUWARA BEGUM
W/O. ABUL HUSSAIN
VILL. SALMARA
P/O. SALMARA
P/S. KAMPUR
DIST. NAGAON
ASSAM
PIN-782425

Advocate for the Petitioner : MS S S ZIA,

Advocate for the Respondent : PP, ASSAM,

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE MITALI THAKURIA

Advocate for the Appellant : Ms. S.S. Zia, Advocate

Advocate for the Respondents : Mr. R.R. Kaushik, Addl. PP

Date of Hearing : 16.10.2025

Date of Judgment : 31.10.2025

JUDGMENT & ORDER (CAV)

(M. Thakuria, J)

- 1.** Heard Ms. S.S. Zia, the learned counsel for the appellant. Also heard Mr. R.R. Kaushik, the learned Additional Public Prosecutor appearing on behalf of the State respondent.
- 2.** This is an appeal u/s 415 BNSS challenging the judgment & order dated 30.09.2024 passed by learned Special Judge, Nagaon, Assam in Special Case No. 54(N)/2021, whereby the appellant was convicted for the offence u/s 376(3) IPC read with Section 6 of the POCSO Act and thereby sentenced to undergo R.I. for 20 years and also sentenced to pay fine of Rs. 10,000/- with default stipulation.
- 3.** The brief facts leading to the present appeal is that on 28.05.2021 the respondent no. 2 lodged an FIR before Officer In-charge of Kampur police station, alleging *inter alia* that her father (the appellant) brought her minor daughter/victim to his house to do the household chores due to the illness of his wife, with an assurance that he would arrange the marriage of the victim. But, during the stay of the victim at the residence of the appellant, he enticed the victim to watch porn video in his mobile and also had sexual intercourse with her and in the consequence she became pregnant. On receipt of the FIR, a case was registered being numbered as Kampur P.S. Case No. 66/2021 u/s 376(3) IPC read with Section 6 of the POCSO Act.
- 4.** On completion of the investigation the I/O filed the charge-sheet against

the accused/appellant under the same section of law. Charges were framed accordingly u/s 376(3) IPC read with Section 6 of the POCSO Act. The charges were read over and explained to the accused/appellant, to which he pleaded not guilty and claimed to be tried.

5. During trial, the prosecution examined as many as 8 nos. of witnesses including the Medical Officer (M/O) and the Investigating Officer (I/O) and exhibited 13 nos. of documents which were marked as Ext.-1 to Ext.-13. In reply the defence also examined 3 witnesses, but did not exhibit any document and the Court also examined one Dharma Kanta Boruah as CW-1 and exhibited three documents as Court exhibits. The appellant also pleaded not guilty at the time of recording his statement u/s 313 Cr.PC. On completion of the trial and hearing the arguments forwarded by learned counsels for both sides, the learned Special Judge passed the impugned judgment & order dated 30.09.2024, convicting the accused/appellant u/s 376(3) IPC read with Section 6 of POCSO Act and sentenced him to undergo Rigorous Imprisonment for 20 years along with a fine of Rs. 10,000/-, with default stipulation.

6. On being highly aggrieved and dissatisfied by the judgment and order passed by the learned Special Judge (POCSO), Nagaon the present appeal has been preferred by the accused/appellant.

7. Ms. Zia, the learned counsel for the appellant submitted that the learned Special Judge did not consider the evidence-on-record and there is no proper appreciation of evidence-on-record and thus arrived at a perverse finding convicting the accused/appellant. She further submitted that the learned Special Judge has passed the order of conviction solely on the basis of the statement made by the victim (PW-1), by ignoring all other evidence which did not corroborate the prosecution story. The PW-1 deposed in her evidence that the

appellant had inappropriately touched her body and he did nothing more than that. But, on the other hand she again stated that she became pregnant which is self-contradictory and on the basis of such contradictory statement of the victim, the order of conviction has been passed by the learned Special Judge. She further submits that the learned Trial Court did not consider the evidence of the three Defence Witnesses (DWs) wherefrom, it is evident that the appellant was falsely implicated in this case, as the informant, being the daughter of the appellant, wanted to get transferred the landed property of the appellant in her name. However, as the appellant did not agree, he was falsely implicated in the present case. She further submitted that the medical evidence of PW-6 also did not support the case of the prosecution and apart from that, the learned Special Judge was totally misconceived with law by not taking into consideration the DNA test of the child who is alleged to have been born due to the sexual relationship between the appellant and the victim, inasmuch as, the DNA test revealed that the appellant was not the father of the child.

8. Ms. Zia, the learned counsel for the appellant further submitted that the learned Special Judge failed to appreciate the fact that the result of the DNA test was vital for determining the fact as to whether DNA of the child matched the appellant's DNA. As the DNA of the child did not match the appellant's DNA, the possibility of there being a sexual relationship between the victim and the appellant is doubtful and under such a situation, the conviction of the appellant was not sustainable in law.

9. Ms. Zia, the learned counsel for the appellant further submits that the learned Special Judge also failed to consider the fact that from the entire evidence, two views were possible, inasmuch as, the victim had become pregnant due to her having a sexual relationship with someone else. Thus,

when there is a possible view that the appellant did not rape the victim and as it is a settled principle of law that when two views are possible, the view which goes in favour of the accused should be accepted, there could not have been a finding of "guilty" towards the appellant. However, the learned Special Judge, by discarding the view in favour of the appellant, had convicted the accused/appellant, without appreciating the evidence-on-record in its true perspective. Accordingly, she submitted that the order of conviction passed against the accused/appellant was liable to be set aside and quashed.

10. The learned counsel for the appellant further submitted that the victim in her 164 Cr.PC statement had brought the allegation of penetrative sexual assault against the appellant and as per the same, he committed such acts with her on several occasions, by applying force and also threatened her not to disclose anything to her mother. She further stated that as a result of the forceful sexual intercourse by her grand-father/appellant, she became pregnant. But, conviction cannot be based solely on the basis of a 164 Cr.PC statement and it can be used only for contradiction and corroboration of the evidences of the PWs. In that context, she also relied on the decisions of the Hon'ble Apex Court in ***Ram Kishan Singh v. Harmit Kaur & Anr.***, reported in **(1972) 3 SCC 280**, ***R. Shaji v. State of Kerala***, reported in **(2013) 14 SCC 266** and ***Baid Nath Sah v. State of Bihar***, reported in **(2010) 6 SCC 736**.

11. Citing the above referred judgments, it is submitted by the counsel for the appellant that the statement made u/s 164 Cr.PC is not a substantive piece of evidence and it can only be used either to corroborate or contradict the statement of a prosecutrix or other PWs. She accordingly submits that as the prosecution had totally failed to establish a case against the accused/appellant and without considering all these aspects of the case, the order of conviction

was liable to be set aside and quashed.

12. Mr. Kaushik, the learned Additional Public Prosecutor submitted that the victim was consistent in her statement at every stage of the case. However, he submitted that while adducing her evidence in the Court, she did not describe as to how she was sexually assaulted by her grand-father/appellant, though she described the way she was sexually assaulted by the appellant, while giving her statement u/s 164 Cr.PC.

13. Mr. Kaushik further submitted that admittedly the DNA of the child of the prosecutrix did not match with the DNA profile of the appellant. But, on the basis of the DNA test, the entire case of the prosecution, especially the evidence of the prosecutrix cannot be discarded, who brought such a grave allegation against her own grandfather. More so, there is no reason as to why she would bring such a grave allegation against her own grandfather. Further, there was no evidence that she was tutored by her mother/informant while adducing her evidence or making her statement u/s 164 Cr.PC. Accordingly, it is submitted by Mr. Kaushik that the learned Special Judge committed no error or mistake while passing the judgment and the order of conviction against the accused/appellant and therefore there was no reason to interfere with the judgment & order passed by the learned Special Judge.

14. We have heard the submissions made by learned counsels for both sides and also perused the case record as well as the evidence and the judgment passed by the learned Special Judge. Before arriving at any decision, we are of the opinion that the evidence of the PWs are to be scrutinized.

15. PW-1 is the victim in this case. Her evidence was recorded in camera by the learned Special Judge after putting preliminary questions to her, to judge

her level of understanding. As per the victim/prosecutrix she used to stay in the house of the appellant to do household chores, as her grandmother was not well at that time. She stayed for about 8 months in the house of the accused/appellant. But, her grandfather/appellant used to call her to his room and committed bad act on her by touching her body inappropriately. He used to press her and touch her. She deposed that apart from this act, no other incident had taken place. But, she did not inform about this incident to her parents. However, when she got pregnant and on being asked by her mother, she informed them that the accused/appellant had committed bad act on her. Thereafter, she was medically examined and her statement was also recorded u/s 164 Cr.PC. PW-1 also exhibited her statement recorded u/s 164 Cr.PC as Ext.-1 and her signatures also. In her cross-examination she was asked various questions with regard to her brother-in-law, who had married her elder sister and who stayed in the same village. Her evidence revealed that the accused/appellant was the owner and possessor of agricultural land, having three daughters and her mother was the eldest amongst the three sisters. She denied the suggestion that her brother-in-law and uncle visited the house of the accused/appellant and her mother demanded land from her grandfather i.e. the accused. She denied the suggestion that as the appellant did not transfer land in her mother's name, she lodged a false case against him. Further, she denied the suggestion put to her that the accused/appellant was not the father of her child and that he had not committed any bad act with her.

16. PW-2 is the mother of the victim and informant of the case. PW-2 also narrated the same story, deposing that her daughter used to stay in the house of her father i.e. the appellant, as her mother was not well, only to help her grandparents in some household works. After 8 months of her stay in the house

of the accused/appellant, she saw some changes in the victim's body and it appeared that she was pregnant. On enquiry, the victim told her that the accused/appellant used to show her some porn pictures in his mobile phone and committed penetrative sexual assault on her, for which she became pregnant. Coming to know about the incident she initially informed her husband and thereafter her husband informed other people. Thereafter, she lodged the FIR when her daughter was six months pregnant. The victim then gave birth to a girl child. Her daughter was also medically examined and her statement was also recorded by the learned Magistrate.

In her cross-examination PW-2 denied the suggestion that the police did not seize the birth certificate of her daughter and that the date of birth of her daughter was not 19.04.2009. Further, she denied the suggestion that she demanded landed property from her father (the appellant) before going to Haaj and when her father/appellant refused to give the same, she lodged a false case against him. She further denied the suggestion that her daughter had a relationship with one Abu Taheb, who used to visit their house.

17. PW-3 is the father of the victim who narrated a similar story, corroborating the evidence of his wife/PW-2. He also deposed that his daughter informed his wife that the accused/appellant had sexually exploited her, by initially showing her some adult pictures in the mobile phone and thereafter having sexual intercourse with her forcibly. On an enquiry made by him, the appellant objected and stated that he was not involved in such deeds and thereafter they lodged the FIR. His cross examination revealed that the appellant had gone for Haaj about 4/5 years ago before the incident. He further stated that when his daughter was staying with the appellant, she visited their house two times, but did not say anything against the accused. He also denied the suggestion that his

daughter became pregnant due to a sexual assault on her by his eldest son-in-law or that a false case was lodged by his wife, as the appellant refused to transfer his landed property in the name of his wife/the informant.

18. PW-4 is an independent witness who deposed that he heard that during the stay of the victim in the house of the appellant, he had raped his own grand- daughter. Thereafter they called for a village *bichar* (meeting), wherein they found that the victim was a minor girl and she was pregnant at that time. They accordingly enquired into the matter with the accused/appellant, but he failed to appear in the *bichar*. Thereafter, they advised the informant to lodge a case. From his cross examination/evidence, it was revealed that he heard about the incident from the informant.

19. PW-5 is also an independent witness. He also heard about the incident that the accused-appellant had sexually assaulted his own grand-daughter, for which she became pregnant and coming to know about the incident the mother of the victim lodged an FIR. He deposed that he was a member of the Village Defense Party (VDP) but, he could not produce any document in that regard.

20. PW-6 is the doctor who examined the victim on 28.05.2021 and on her examination, she found no mark of violence on the body and private parts of the victim. The medical examination revealed a single live foetus and the age of the foetus was 30 weeks 3 days at the time of her examination. As per her opinion, there was no recent forceful sexual intercourse and as per radiological test, the age of the victim was 16 to 17 years at the time of her examination. PW-6 was re-examined by the prosecution, where the doctor described the history given by the victim girl at the time of her examination and as per the history given, the accused/appellant had sexual intercourse with the minor victim several times.

21. PW-7 is the Investigating Officer who investigated the case after receipt of the FIR at Kampur P.S, as he was entrusted with the investigation by the O.C of the said police station. He examined both the informant and the victim at the police station when they arrived at the police station for filing the FIR and on the same day he forwarded the victim for COVID test. Thereafter, he sent the victim for recording her statement u/s 164 Cr.PC. He also recorded the statement of the other witnesses and on the next day, he took the victim for her medical examination in the Civil Hospital, Nagaon. The appellant was also arrested on the same day and he was remanded to judicial custody. The vaccination certificate of the victim was also seized from the possession of the mother in the presence of witnesses. This PW-7 also exhibited Ext.-7 the FIR and Ext.-8 the format of the FIR, Ext.-9- the Seizure List, Ext.-10 the Sketch Map, Ext.-11 as the Arrest Memo, Ext.-12 the Forwarding Report, Ext.-13 is the prayer for recording of statement of the victim u/s 164 Cr.PC and Ext.-14 is a Medical Examination Report etc. From his cross-examination it is seen that Nuruddin, Mojibur Rahman, Hafijur Rahman and Abdul Hussain were neighbours of the appellant in the Sketch Map, but they were not examined as witnesses during the investigation. He also did not seize any birth certificate of the victim during the investigation. From his cross-examination it further reveals that the victim stated before him that the accused raped her, but she did not narrate anything about the touching of her body, as deposed before the Court.

22. PW-8 is another I/O who collected the Medical Report and the charge-sheet was filed by PW-8, on the basis of the investigation conducted by the PW-7.

23. The learned Special Judge/ Trial Court also examined one Dharma Kanta Boruah, Headmaster of Bunduraati L.P. School, who issued the school leaving

certificate to the victim on 25.10.2021 as CW-1. CW-1 deposed that the victim was admitted to school on 03.01.2015 and her date of birth as recorded by the school was 19.04.2009. He further deposed that on the basis of the school admission register, he recorded the date of birth of the victim in the school leaving certificate. He accordingly exhibited the school transfer certificate and the school admission register etc. to prove the age of the victim. In his cross examination he stated that the date of birth of the victim was entered by his predecessor and there was no mention of any source. As such, he did not know on what basis his predecessor had entered the date of birth of the victim in the school register. CW-1 could not produce the Attendance Register at the time of his examination in the learned Trial Court.

24. The accused/appellant also produced three defence witnesses in support of his case.

25. DW-1 is the nephew of the accused/appellant who stated that the informant used to stay in the land of the accused/appellant and the victim got pregnant while she was staying in the house of one Evadullah. The victim also did not disclose anything about her pregnancy and as per DW-1, the informant lodged the FIR on the refusal of the appellant to give land to the informant. He denied the suggestion that the victim never stayed in the house of Evadullah and also denied the suggestion that the accused/appellant brought the victim to his own house to look after her grand-mother, with an assurance that he would arrange the marriage of the victim.

26. DW-2 is another nephew of the accused/appellant who claimed he was present at the time of village *bichar*. He further deposed that the victim did not disclose anything about her pregnancy. A false case had been lodged by the informant as the appellant refused to give her land. As per DW-2, the case was

lodged while the victim was staying in the house of one Evadullah. In his cross-examination he stated that the said Evadullah is the brother-in-law of the victim and she was 16 years old at the time of the incident. He further stated that the victim stayed in the day time at the house of the accused/appellant and she used to return to the house of Evadullah at night. He also stated that the relationship between the informant and the accused/appellant was cordial before the filing of this case and the false case was lodged only due to the refusal of the appellant to give land to the informant. He also denied the suggestion that the accused/appellant had a sexual relationship with the victim while staying in his house.

27. DW-3 is the son-in-law of the appellant and as per DW-3, when the victim was asked about her pregnancy she did not utter a word and the father of the victim brought the allegation against the appellant falsely. He also deposed that the informant along with her husband used to stay in the property of the accused/appellant and when she asked for her share, the appellant refused to give her land, due to which a false case was lodged against him. He denied all the suggestions put to him, including the suggestion that the accused/appellant had brought the victim to his house to look after his ailing wife or that he showed obscene videos before sexually assaulting her.

28. From the testimonies of the PWs and DWs, it is seen that as per the prosecution case, the grandfather/accused-appellant had committed penetrative sexual assault on the victim and for which she got pregnant and also delivered a child. It is the stand of the prosecution that while the victim was staying in the house of the accused/appellant to do his household chores due to the illness of her grandmother, the accused/appellant used to commit bad act on her and for which she got pregnant. It is an admitted fact that there is no eye-witness to

the crime and the victim is the only witness who alleged that her grandfather i.e. the accused/appellant had sexual intercourse with her and she was also threatened not to disclose anything to her parents. The other witnesses are reportedly hearsay witnesses, who heard about the incident from the victim as well as the informant/PW-2 who lodged the FIR, only after she came to know about the incident from her daughter. After 8 months of the stay of the victim girl with her grandfather/appellant, the informant noticed some changes in the victim's body which showed her to be pregnant. When the informant enquired, she came to know that the appellant, who is her father, used to show the victim some adult porn pictures from his mobile and had sexual intercourse with the victim. Coming to know about the same she informed the matter to her husband and it was also informed to the society at large. However, the accused/appellant had denied having committed any sexual penetrative act on the victim and thereafter the case was lodged by the PW-2, the mother of the victim. After lodging of the FIR, the victim also gave birth to a girl child. It is also not disputed that the victim was a minor at the relevant time of the incident and her school certificate etc. were also produced by the prosecution during the trial.

29. The other PWs as stated above only came to know about the incident from the victim as well as the informant. So, the victim/prosecutrix is the vital witness for the entire prosecution case.

30. From the evidence of PW-1 as discussed above, it is seen that she brought the allegation against the accused/appellant that he used to touch her inappropriately while she was staying with the grandfather/accuse-appellant. She also specifically stated in her evidence that apart from this touching no other incident had taken place. She did not disclose these incidents to her

parents, but when she got pregnant, her mother made an enquiry. Only then did she disclose the fact that she got pregnant through her grandfather/appellant. The stand taken by the PW-1 that she was made pregnant by the appellant implies that she had been subjected to penetrative sexual assault by the appellant. In her statement made u/s 164 Cr.PC, she brought the allegation of penetrative sexual assault against the appellant and she also disclosed that she used to be sexually assaulted by her grandfather/appellant. In her evidence, PW-1 has not implicated anybody for having raped her or admitted having any sexual relationship with anybody else, except the appellant. The pregnancy has also been attributed only to the appellant. However, the said testimony of the victim has been proved to be false and a lie. It is settled law that conviction cannot be based solely on the basis of a statement made u/s 164 Cr.PC and it can only be used for contradiction and corroboration of the evidence of PWs. The learned counsel for the appellant also cited some judgments of the Hon'ble Apex Court in support of the above.

31. The Hon'ble Apex Court in case of **R. Shaji** (supra) reported in **(2013) 14 SCC 266** discussed the evidentiary value of a statement recorded u/s 164 Cr.PC in paragraphs 27 & 28 which reads as under:-

“ 27. So far as the statement of witnesses recorded under [Section 164](#) is concerned, the object is two fold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement, and secondly, to tide over immunity from prosecution by the witness under [Section 164](#). A proposition to the effect that if a statement of a witness is recorded under [Section 164](#), his evidence in Court should be discarded, is not at all warranted. (Vide: [Jogendra Nahak & Ors. v. State of Orissa & Ors.](#), AIR 1999 SC 2565; and [Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. & Ors.](#), AIR 2000 SC 2901).

28. [Section 157](#) of the Evidence Act makes it clear that a statement recorded under [Section 164](#) Cr.P.C., can be relied upon for the purpose of corroborating statements made by witnesses in the Committal Court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under [Section](#)

164 Cr.P.C., such statements cannot be treated as substantive evidence.”

32. The Hon’ble Apex Court in another case reported in **(2010) 6 SCC 736** also expressed the same view in paragraphs 6 & 7 which read as under:-

“6. We have heard the learned counsel for the parties and have gone through the record. We see from the judgments of the Courts below that the only material that has been used against the appellant is the statement under [Sec.164](#) of the Cr.P.C. This Court in [Ram Kishan Singh vs. Harmit Kaur and Another](#) ((1972) 3 SCC 280) has held that a statement of 164 [Cr.P.C.](#) is not substantive evidence and can be utilized only to corroborate or contradict the witness vis-a-vis. statement made in Court. In other words, it can be only utilized only as a previous statement and nothing more.

7. We see from the record that Suman Kumari was not produced as a witness as she had since been married in Nepal and her husband had refused to let her return to India for the evidence. In this light her statement under [Section 164](#) cannot be used against the appellant. Even otherwise, a look at her statement does not involve the appellant in any manner. The allegation against him is that after she had been kidnapped by the other accused she had been brought to their home, where the appellant was also present. In other words, when she had been brought to the appellant's home the kidnapping had already taken place. The appellant could therefore not be implicated in the offence under [Sec.363](#) or 366-A of the [IPC](#) de hors other evidence to show his involvement in the events preceding the kidnapping.”

33. Coming to the DNA profiling test done, it is seen that the DNA of the child of the prosecutrix did not match the DNA of the accused/appellant, which thus establishes the fact that the accused/appellant was not the father of the child of the prosecutrix. As submitted by Mr. Kaushik the learned Additional Public Prosecutor, the DNA test report may not be the sole basis to discard the prosecution case, wherein she has brought the allegation of sexual penetrative assault on the accused/appellant. The prosecutrix might have a relationship with any other person apart from the accused/appellant and for that reason the DNA test may be the negative one. However, the allegation of rape has been made by the victim only against the appellant. It is a settled position of law that a conviction can be based on the sole testimony of the prosecutrix, if it is

transparent, believable and inspires the confidence of the court. But, here in the instant case as discussed above, the evidence of the prosecutrix cannot be considered to be trustworthy and her evidence cannot be said to be sufficient to convict the accused/appellant. She brought the allegation of penetrative sexual assault against the accused/appellant while giving her statement u/s 164 Cr.PC. Though the statement of PW-1 under Section 164 Cr.P.C. corroborates her testimony that the appellant had made her pregnant, the DNA test clearly shows that the appellant was not the father of the child, which washes away the very edifice on which the victim's case was built. When PW-1 in her evidence has clearly laid the blame of rape on the appellant by taking a stand that the child was the appellant's child, the proof that the child was not the appellant's child clearly shows that the evidence of PW-1 is false and she is not a reliable witness.

34. In the case of **Rai Sandeep @ Deepu Vs. State (NCT of Delhi)**, reported in **(2012) 8 SCC 21**, the Supreme Court overturned the conviction of the appellant for gang rape due to significant inconsistencies in the prosecution case. The Supreme Court noted the inconsistencies in the victim's testimony and the lack of corroboration from other witnesses. The Supreme Court held that a "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The Court should be in a position to accept at its face value the evidence of a sterling witness without any hesitation. To test the quality of such a witness, what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end.

35. The the Supreme Court in the case of **Narender Kumar Vs. State (NCT**

of Delhi), reported in **(2012) 7 SCC 171**, held that once the statement of the prosecutrix inspires confidence and is accepted by the Court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required, unless there are compelling reasons which necessitate the Court for corroboration of her statement.

36. In the present case, the conviction of the appellant had been made on the sole evidence of the prosecutrix, which is to the effect that she had been made pregnant by the appellant. However, the very basis of the victim's allegation has been taken away by the DNA test report, which shows that the appellant was not the father of the victim's child. When the victim's evidence has been proved to be false, we are of the view that it would not be safe to rely upon the sole evidence of the victim that she was raped by the appellant, as she cannot be said to be a reliable witness and her evidence does not inspire our confidence. In fact, due to above reasons, the victim appears to have been tutored to make a false case.

37. The defence also adduced three witnesses in support of their case, wherein they have taken the plea that a false case has been lodged by the informant, as her aim was only to grab the land of the accused/appellant, who refused to give his land to the informant. Further, while cross-examining the PWs, the defence took the same plea and the plea of demand of land by the PW-1 could not be rebutted by the prosecution, while cross-examining the DWs.

38. As per Section 29 of the POCSO Act, the burden of rebutting the presumption is upon the accused. But, for the presumption to take effect, the prosecution has to prove the foundational facts of the offence against the accused and if the prosecution is not able to prove the foundational facts of the

offence, the presumption u/s 29 of the Act cannot be invoked against the accused.

39. This Court in the case of **Bhupen Kalita v. State of Assam**, reported in **2020 (3) GLT 403** had discussed the legal position concerning the provision of the POCSO Act and para 71 of the said judgment reads as under:-

“71. In the light of the discussions above, the following legal positions emerge in any proceeding under the POCSO Act.

(A) The prosecution has to prove the foundational facts of the offence charged against the accused, not based on proof beyond reasonable doubt, but on the basis of preponderance of probability.

(B) Accordingly, if the prosecution is not able to prove the foundational facts of the offence based on preponderance of probability, the presumption under Section 29 of the Act cannot be invoked against the accused.

(C) If the prosecution is successful in establishing the foundational facts and the presumption is raised against the accused, the accused can rebut the same either by discrediting the prosecution witnesses through cross-examination or by adducing his own evidence to demonstrate that the prosecution case is improbable based on the principle of preponderance of probability. However, if it relates to absence of culpable mental state, the accused has to prove the absence of such culpable mental state beyond reasonable doubt as provided under Section 30(2) of the Act.

(D) However, because of legal presumption against the accused, it may not suffice by merely trying to discredit the evidence of the prosecution through cross-examination, and the defence may be required to adduce evidence to dismantle the legal presumption against him and prove that he is not guilty. The accused would be expected to come forward with more positive evidence to establish his innocence to negate the presumption of guilt.”

40. Here in the instant case, the prosecution has failed to prove even the foundational facts of the case and at the same time it is also seen that DNA test profiling has also given a negative result, as the DNA of the child of the prosecutrix did not match with the DNA of the accused/appellant.

41. Due to the reasons stated above, we are of the opinion that the prosecution could not establish a case of aggravated penetrative sexual assault

against the accused/appellant, while PW-1 was staying with him in his house. Thus, we are of the opinion that the learned Special Judge has committed an error/ mistake in convicting the accused/appellant u/s 376(3) IPC read with Section 6 of POCSO Act and sentencing him accordingly. This Court also is of the opinion that interference is required with the judgment and order passed by the learned Special Judge. Accordingly, the impugned judgment of conviction and sentence passed against the accused/appellant dated 30.09.2024, by the learned Special Judge, Nagaon in Special Case No. 54(N)/2021 is hereby set aside and quashed. The appellant Abdul Hamid is acquitted from the charge/s leveled against him and it is directed that he shall be released from Jail forthwith, if not wanted in any other case.

42. With the above directions and observations, the criminal appeal stands disposed of.

43. Registry shall return the Trial Court records along with a copy of this Judgment.

JUDGE

JUDGE

Comparing Assistant