

GAHC010023342024



undefined

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

Case No. : Crl.A./158/2024

RAVI KUMAR BHOWEL
S/O - LATE PAUNI BHUSAN BHOWEL, R/O- PUB BHASKAR NAGAR, NEAR
BHASKAR VIDYAPEETH, P.S.- CHANDMARI, DIST- KAMRUP(M), ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY PUBLIC PROSECUTOR.

2:SUMAN BHOWAL
S/O - RAVI KUMAR BHOWEL
R/O- HOUSE NO.8
EAST BHASKAR NAGAR
NEAR BHASKAR VIDYAPEETH
P.S.- CHANDMARI
DIST- KAMRUP(M)
ASSAM
PIN-781003

Advocate for the Petitioner : MR. T DEURI, MR. A R HAZARIKA, MR S BORTHAKUR, MR N MILI, MR. R CHETRI

Advocate for the Respondent : PP, ASSAM, MR. A AHMED, AMICUS CURIAE, R2

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MR. JUSTICE ANJAN MONI KALITA

For the appellant : Mr. S. Borthakur, Advocate

For the respondents No.1 : Ms. A. Begum, Addl. P.P., Assam

For the respondents No.2 : Mr. A. Ahmed, Advocate
Date of hearing : 15.09.2025
Date of Judgment : 25.09.2025

JUDGMENT AND ORDER (CAV)

(M. Zothankhuma, J)

1. Heard Mr. S. Borthakur, learned counsel for the appellant. Also heard Ms. A. Begum, learned Addl. P.P., Assam, appearing for the State and Mr. A. Ahmed, learned Amicus Curiae appearing for the respondent no. 2.

2. The present appeal has been filed against the impugned judgment dated 22.11.2023, passed by the learned Addl. Sessions Judge-cum-Special Judge (POCSO), Kamrup(M), Guwahati, in Sessions Special Case No.46/2022, by which the appellant has been convicted under Section 376(2)(f) of the IPC and Section 6 of the POCSO Act. The appellant was thereafter sentenced to undergo Rigorous Imprisonment for 25 years and to pay fine of Rs.20,000/-, in default, to undergo Simple Imprisonment for 6 months, under Section 6 of the POCSO Act, in terms of Section 42 of the POCSO Act.

3. The prosecution case, in brief, is that the informant (PW-2), who is also the son of the accused appellant, submitted an FIR dated 04.05.2022, to the O/c of the All Woman Police Station, Panbazar, Guwahati, stating that his father, who had married another woman having 3 children, had raped one of them, who was 17 years old, for the last 4 years. However, the victim could not tell anyone and she had recently told him about the same, as it had become unbearable. In pursuance to the FIR, All Woman P.S. Case No.30/2022 under

Section 376(2)(f) of the IPC read with Section 6 of the POCSO Act was registered.

4. After investigation of the case was completed and the victim had been examined by a medical Doctor, a charge-sheet was submitted, wherein a prima facie case under Section 376(2)(f) of the IPC read with Section 6 of the POCSO Act had been found established against the appellant for raping his step daughter. Charge under Section 376(2)(f) of the IPC read with Section 6 of the POCSO Act was framed against the appellant, to which he pleaded not guilty and claimed to be tried.

5. The learned Trial Court thereafter examined 6 prosecution witnesses (PWs) and 2 defence witnesses (DWs), consisting of the appellant (DW-1) and his second wife (DW-2). After examination of the appellant under Section 313 Cr.P.C, the learned Trial Court came to a finding that the appellant had raped his minor step daughter, who was 17 years of age and as such, he was convicted Section 376(2)(f) of the IPC and Section 6 of the POCSO Act.

6. The appeal has been filed by the appellant, on the ground that the learned Trial Court has not considered the evidence of the defence witnesses and has instead brushed aside the evidence given by the defence witnesses.

7. The learned counsel for the appellant submits that in terms of the judgment of the Supreme Court in the case of ***Munshi Prasad & Ors. Vs. State of Bihar***, reported in ***(2002) 1 SCC 351***, the evidence of the defence witnesses are entitled to equal respect and treatment as that of the prosecution witnesses and that the evidence tendered by them cannot always be termed to

be a tainted one.

8. The learned counsel for the appellant further submits that in the examination of the appellant under Section 313 Cr.P.C., the explanation given by the appellant with regard to the year from which the victim started living with the appellant, clearly belied the evidence of the prosecution and PW-2, which was to the effect that rape had been committed by the appellant for the last 4 years, counting from the date the FIR had been filed. However, the learned Trial Court had not considered the defence taken by the appellant under Section 313 Cr.P.C., which resulted in the trial being vitiated, as the same had caused prejudice to the appellant. In this regard, he has relied upon the judgment of the Supreme Court in the case of ***Reena Hazarika Vs. State of Assam***, reported in ***(2019) 13 SCC 289***.

9. The learned counsel for the appellant further submits that even though conviction in a rape case can be based solely on the testimony of the prosecution witness, provided the testimony is truthful, the evidence adduced by the prosecution witnesses in the present case is full of loose ends, especially, when considered in the light of the evidence adduced by the defence witnesses, wherein an issue has risen relating to the attempt to grab the property of the appellant by his son. He submits that when the quality of the victim as a witness of sterling quality is in doubt, conviction cannot be made on the sole testimony of the victim. In this regard, he has relied upon the judgment of the Supreme Court in the case of ***Ramdas & Ors., Vs. State of Maharashtra***, reported in ***(2007) 2 SCC 170***.

10. The learned counsel for the appellant further submits that though minor

discrepancies in the evidence of the witnesses do not corrode the credibility of the prosecution case, material discrepancies do so. He submits that there being material discrepancies in the present case, wherein the second marriage of the appellant has been shown to be on 25.01.2021 and the appellant having started living with his second wife and family after the said marriage, the appellant could not have committed rape, 4 years prior to the date of filing of the FIR, which was on 04.05.2022.

11. The learned counsel for the appellant submits that there is delay in lodging the FIR. If rape had been committed a number of times by the appellant on the victim, the delay in filing the FIR, without there being any cogent reason for the same, leaves scope for embellishment of the case of the prosecution.

12. The learned counsel for the appellant further submits that the evidence of PWs- 1 & 2 goes to show that they have improved upon the statements made before the police and the same is proved by the cross-examination of the Investigating Officer during trial. The learned counsel for the appellant thus prays that the impugned judgment should be set aside and the appellant should be discharged from the case.

13. Ms. A. Begum, learned Addl. P.P., on the other hand, submits that there is no infirmity with the decision of the learned Trial Court. She submits that the testimony of the appellant as DW-1, to the effect that a false case had been filed against him by his son and step daughter to take over his property, was a false statement. She submits that the learned Trial Court has considered the said issue of delay in filing the FIR and held that the delay has been caused due to the fact that the mother of the victim had not supported the case of her

biological daughter, but had supported the case of her husband, the appellant.

14. The learned Addl. P.P submits that the cross-examination of PW-2, who is the informant, is to the effect that he along with his elder brother, Sanjay Bhowel and sister-in-law, Pooja Bhowel stayed together in one house. At the time of lodging the case, his sister Seema Rani Bhowel, his father, the victim girl, the second wife of the appellant and her two younger daughters stayed in a separate house. They had objections against their father marrying a second time during the time their mother was alive and they did not have any dispute regarding the property. She submits that as per the evidence of PW-3, the appellant's first wife died on 12.03.2021 and that PW-3 started residing with her father thereafter. She also submits that as per the marriage certificate of the appellant, the second marriage between the appellant and the second wife, Bobita Bhowel took place on 25.01.2021. Though the appellant's first wife had apparently died on 12.03.2021 and the marriage of the appellant with his second wife had taken place on 25.01.2021, the appellant appears to have been staying with the second wife and her two daughters, prior to the second marriage having taken place.

15. The learned Addl. P.P submits that the evidence of the Doctor is to the effect that there were old tears present in the hymen of the victim at 3 O' Clock and 7 O' Clock position and as the victim has blamed the appellant for raping her for around 4 years, there was no infirmity in the finding of the learned Trial Court that the appellant had committed rape on a minor girl below 18 years of age.

16. The learned Amicus Curiae for the respondent No.2 submits that the

evidence of the prosecution witnesses shows that the appellant had raped the victim. Further, the evidence of the victim is to the effect that while she was sleeping at night, her father and mother came to her room, whereupon her mother kept her mouth shut and told her that she would have to do/accept it during the time the appellant raped her. Further, she was confined inside the house and not allowed to go to school for a few days. He submits that the evidence adduced by the prosecution witnesses, especially PW-1 (victim) and PW-2 (informant), proves the fact that the appellant and the victim had been residing for quite some time together with the victim's mother and sisters. As the evidence of the victim was trustworthy, there was no reason to interfere with the impugned judgment passed by the learned Trial Court. He further submits that there was no evidence to show that there was any love/sexual relationship going on between the victim and the informant, even though DW-2 (second wife), had stated in her evidence that after the appellant had been sent to jail, the informant (PW-2) had come to her and stated that he loved the victim and wanted to marry her. He accordingly submits that the evidence of the victim not having been shaken or contradicted, the impugned judgment should not be interfered with.

17. We have heard the learned counsels for the parties.

18. The FIR submitted by the informant, who is the son of the appellant (PW-2), is to the effect that the victim (PW-1) had told him that she had been raped several times by the appellant, since the last 4 years. As the FIR had been filed on 04.05.2022, the incidents of rape should have started around 04.05.2018. The evidence of PW-2/ (informant) is that on the night of 03.05.2022, the victim came to his house in tears, wherein she informed the informant's sister,

informant's sister-in-law, elder brother of the informant and the informant that the appellant had been raping her for the last 4 years. Thus, on the next day, i.e. 04.05.2022, the FIR was filed by PW-2.

19. The victim (PW-1) in her evidence given on 29.09.2022 also stated that the incident of rape had been happening for 4 years and she had also given a particular month when the incident also occurred, i.e. in April, 2022. However, the victim, who was 17 years of age at the time of her testimony on 29.09.2022, has not made a mention of having gone to the house of the informant on 03.05.2022 and making a disclosure that she had been raped. It is not understood as to how such an important date could have been missed out by the victim (PW-1).

20. PW-1, in her evidence, has stated that when her mother (2nd wife) started living with the appellant, she was 12 years old. While she was sleeping one night, her step father and mother came to her room and shut her mouth. At that time, the appellant touched her inappropriately (bad touch). PW-1 stated that her mother shut her mouth and told her that she would have to accept what was being done to her by her step father. Thereafter, she was not allowed to go to school for a few days and she was locked in her room and not given food. As she had found it difficult to keep everything bottled up, she ran to the house of Sanjay Bhowal wherein, PW-2, PW-3 and PW-4 were present and she confided in them. PW-1 further stated that though PW-4 wanted to keep her for the night, the appellant and her mother took her back against her will. The following morning, PW-2 informed the Police Station and since then, she has been living with PW-2.

21. In her cross examination, PW-1 has stated that she had not specified in which part of her body, the appellant had touched her inappropriately. PW-1 clarified that it was a "bad touch". In her cross examination, PW-1 further stated that she has been given a tablet due to which she fell weak. PW-1 was thereafter taken to a hospital for treatment by the appellant, wherein she was examined by a Psychiatrist.

22. In her statement given under section 164 Cr.P.C., PW-1(victim) which was recorded on 05/05/2022, the victim had stated that her mother and the appellant entered into a marriage some 8 (eight) years back. Since then PW-1, her younger sister and her mother had been living in the house of the appellant with the appellant's family. The appellant had been forcibly having a physical relationship with her for some 4 (four) years and her mother had supported him in this regard. In her statement, PW-1 further stated that her mother and the appellant had threatened her that if she informed anybody, they would kill her.

23. It is surprising that the PW-1 has stated in her statement made under section 164 Cr.P.C. on 05/05/2022, that her mother had married the appellant some eight years ago. However, the evidence of the other witnesses would go to show that the appellant and victim's mother had married in the year 2021 only. This discrepancy amongst others arouses a suspicion as to whether the victim can be said to be a sterling witness.

24. The evidence of PW-3, who is the brother of PW-2, is to the effect that after the death of her mother on 12/03/2021, she was residing with her father. She noticed that the victim girl was suffering from some illness, but the victim did not initially tell her the reason. The victim was under depression and she was taken to hospital. On returning back from the hospital, the victim went to the house of her brother and sister-in-law. PW-3 also went there and the victim

girl told them that the appellant had been sexually assaulted her for the last four years. The informant then lodged an FIR. In her cross examination, PW-3 stated that their house is divided in two parts. In one part, PW-3 resided with her two brothers and the wife of her elder brother and her mother. In the other part, the appellant resided with the victim girl, her sister and the second wife. The two houses belonged to the appellant and there were houses between the two houses. The above discrepancy appears to have occurred during translation, as the fact appears to be that they were living in 2 houses.

25. The evidence of PW-4, who is the daughter-in-law of the appellant is to the effect that the victim came running to her house after discharge from the hospital. The victim then told the informant in her presence that she had been subjected to indecent touch for the last four years after being asked by the informant. The prosecution thereafter declared PW-4 as hostile.

26. The evidence of PW-5, who is the Investigating Officer, is to the effect that the FIR had been lodged by the informant and the same was registered as All Women PS case No. 30/2022 under section 376(2)(f) IPC read with section 6 of the POCSO Act on 04/05/2022. After investigating the case, examining the witnesses and collecting the medical report of the victim, PW-5 submitted a charge sheet, on finding a *prima facie* case under section 376(2)(f) IPC read with section 6 of the POCSO Act against the appellant.

27. In the cross examination, PW-5 has stated the following :-

“The victim girl (PW 1) in her statement U/s 161 Cr.P.C did not state before me that one night, while she was sleeping, her mother and father came to her room and pressed her mouth and the accused person committed rape upon her. Her mother had closed her mouth and told her that she had to do that. On the next day, she was kept behind in the house in closed door and she was not allowed to go to school and she

was also not given food for few days. She was kept locked inside the room.

The victim girl(PW 1) in her statement U/s 161 Cr.P.C did not state before me that then during night hours she ran to the house of Sanjay Bhowel, Suman Dada, Sima Baideo and Puja Bou also came there and she narrated the occurrence to them. Puja Bou wanted to keep her for the night but her father and mother forcefully took her away during night against her will.

The victim girl(PW 1) in her statement U/s 161 Cr.P.C did not state before me that on next day morning, Suman Dada had informed the matter to the police station and she was brought back.

PW 2 Sri Suman Bhowel did not state in his statement recorded U/s 161 Cr.P.C that after three days, he brought the victim girl and asked her to sleep with his sister Sima Rani Bhowel but Bobita Bhowel restricted her from sleeping and asked her to sleep in her own home. Thereafter, Bobita Bhowel scolded him and told that she had come to break down their family life. Then I told mother about consuming of tablet.

PW 2 Sri Suman Bhowel did not state in his statement recorded U/s 161 Cr.P.C that on 03.05.2022 during night hours, the victim girl came crying to their house.

PW2 Sri Suman Bhowel did not state in his statement recorded U/s 161 Cr.P.C that the victim girl told that for the first time, she was raped in front of her mother and he mother did not say anything. When victim girl tried to narrate about the occurrence, victim girl was kept locked inside her room by her mother.”

28. The evidence of PW-6, the Doctor is to the effect that she examined the victim on 05/05/2022 and found that there were tears in the Hymen at 3’O clock and 7’O clock.

29. The evidence of the appellant as DW-1 is to the effect that his wife died in the month of February, 2020. Since 2020, he had a severe heart disease, due to which he could not perform his daily activities as usual. Though he had 2(two) sons, a daughter and a daughter-in-law, they did not take care of him after the death of his wife. On coming into contact with his second wife, who promised to

take care of him, he married her on 25/01/2021. Since then, they have been living as husband and wife. The further evidence of the DW-1 is that on the date of his marriage, his children came to the house to throw him out of the house, as they were angry that he had married the second wife, who was a widow having two daughters. After marriage with his second wife, the daughters of his second wife started living with them and he took on all the responsibilities of a father. On the other hand, his sons tried to chase out his second wife and quarreled with him, for his properties. Later, PW-2 (informant) took advantage of the situation by making a relationship with the victim and filed a false case against him, to take over his property. DW-1 further stated that during his stay in jail, the informant wanted to live with the family of his second wife. However, when his second wife refused, the informant threatened his wife to leave the property. He further stated that the false case had been filed to grab his property.

30. The evidence of the second wife (DW-2) is to the effect that she was a widow having two daughters. She came into contact with the appellant, who was also a widower and who was suffering from various illnesses. She married the appellant on 25/01/2021 and since then, she and her two daughters came to live in the house of the appellant. The appellant took care of her two daughters as a father. However, the children from the first wife and the daughter-in-law were not happy with the marriage of DW-1 with the DW-2. On the first day of their marriage, PWs-2, 3 & 4 quarreled with the appellant and asked him to throw the second wife and her daughters out of the house. They also threatened the appellant to put the property in their names. DW-2 stated that the children of the appellant and his daughter-in-law frequently quarreled with the appellant and never took care of him. However, as time passed, PW-2

kept good relations with the victim and after making a conspiracy, they filed a false case against the appellant, who had a bye-pass heart surgery on 10/02/2022 and sent him to jail.

31. DW-2, in her testimony further stated that during the time the appellant was sent to jail, PW-2 came to her saying that he was in love with the victim and asked that he be allowed to marry the victim and live in the same house together. DW-1 refused saying that they were brother and sister. PW-2 then become angry and threatened to put DW-2 (second wife) in jail like the appellant. As PW-2 continued to threaten DW-2, DW-2 went to the Chandmari Police Station and thereafter to the All Women Police Station, Panbazar, Guwahati and took shelter there. Seeing her condition, the all Women Police Station personnel called PW-2 over phone and told him that if he did not stop threatening DW-2, he would be booked according to law. Then PW-2 had stopped threatening DW-2. DW-2 further stated that her husband had been put in jail due to a conspiracy hatched by PW-2 with her innocent daughter (victim), to get the property of her husband.

32. In his examination under section 313 Cr.P.C., the appellant stated that he had not committed rape for the last four years, as stated by the victim, as he had started living with them only after 25/01/2021. In his examination under section 313 Cr.P.C., the appellant replied to question no. 9, which is "what do you have to say about this case?" as follows :-

"Answer:- I married for 2nd time in 2021, January. My earlier wife died on 2020, February month. I was not well, I had to undergo heart surgery. I was bed ridden. I wanted someone to look after me, so I married for 2nd time in January, 2021 as my condition deteriorated. I also got infected by Covid during that period. Doctor suggested for surgery, I took Rs. 50,000/- from Manager. I had undergone surgery in last week of

February 2022. Suman Bhowel attended in Bangalore during my operation.

On date of discharge, I came to know that Suman had arrived. After discharge, I was brought to guest house. After three days I was checked up by doctor in month of March, 2023 and we returned back to Guwahati. I was in bed rest, I had to do excursive. In month of March, 2022, I saw Suman and victim girl one day in compromising position. I told the matter to her mother Bobita Bhowel. Her mother enquired the matter from her, assaulted her. I asked my son Suman to go away from my house and he started residing in another house which belong to me only. He used to visit our house now and then. Then marriage of younger brother of Bobita Bhowel was fixed in Month of May, 2022, but victim girl did not accompany her mother to Bihar though her mother insisted. On the day Bobita Bhowel went for marriage(29th of April, 2022). Victim girl called Suman, he came and raised hue and cry. I was sleeping in bed as I was not well. I, Suman, victim girl, Pooja and Seema went to GMCH consulted doctor but during treatment itself took her back home without permission. On next day, again he was taken to doctor, again brought back home. I took her to Eastern Nursing Home again and doctor said she had psycho problem and asked us not to pressurize to study. After 3 days she was discharged.

Suman threatened me that he would see me. He called Bobita Bhowel. Bobita Bhowel returned back on 4th may, 2022. He asked Bobita to leave the home and go away with her children. Again on 4th May, 2022 evening I went to GMCH, consulted one psycho doctor. Victim girl talked to Suman over phone. Doctor advised as before.

We brought her back home. Pooja (my daughter in law) kept asking me as to where I was. to station. On same day, I was brought since 2015, Suman, Suman's mother, my daughter (Seema) fought with me for police property and drove me out of house on 17th September, 2015. They took rent from house(Rs. 30,000) from shop(Rs. 25,000-Rs. 30,000). I resided in another house. I used to cook alone, run my shop. Suman brought his girl friend to my house, had fight with his mother, his mother fell ill, his mother expired in 2020. Business of Suman declined. Bobita Bhowel gave him 1,

80,000/- from her own to him. Suman had misused the money that he received after selling the plot of land at Bonda, Narengi. He even after had quarreled with me for property and had filed this false case against me using the victim girl. I am physically weak and unable to do any work since my heart blockage since January 2020. I was bed ridden since January 2021. I have not committed any such offence as alleged by the victim girl and I am an innocent person."

33. The fact that the children of the appellant had objected to the marriage of the appellant with DW-2 is reflected in the admission made by PW-2 in his cross examination, where he had stated that they had objections against their father marrying for the second time. The evidence of PW-4, who is the daughter in law of the appellant is to the effect that after the second marriage of the appellant, he started residing separately from them, which was 5-6 houses away. What can be gathered from the above, is the fact that the appellant had re-married on 25/01/2021 and that he had started living with his second wife and her two daughters only after the marriage i.e. 25/01/2021. However, the FIR and the evidence of the prosecution witnesses is to the effect that the appellant had been raping the victim for the last four years. When the FIR had been filed on 04/05/2022 i.e. around 1(one) year and 4(four) months after the marriage of the appellant with the second wife (DW-2), it was not possible for the appellant to have been raping the victim for the last four years, as they had not lived together prior to 25/01/2021.

34. The victim (PW-1) in her statement recorded under section 164 Cr.P.C. on 05/05/2022 had stated that her mother had entered into a second marriage with the appellant some 8(eight) years ago and that since then, she, her younger sister and mother had been living in the house of the appellant. Further, her step father has been forcibly establishing physical relationship with her for some

4(four) years and her mother had supported him in this regard. She further stated that her step father (appellant) raped her several times in front of her mother. Also, her mother and the appellant threatened her that if she informed anyone about it, they would kill her.

35. In terms of the statement made by the victim under section 164 Cr.P.C., the marriage between her mother and the appellant had occurred about 8 years ago and that they have been living in the house for the appellant for around 8 years. This clearly contradicts the evidence of PW-3, who stated that after the death of her mother on 12/02/2021, she started residing with her father. Further, as per the evidence of PW-4, the appellant started residing separately from his first family after the second marriage, which apparently took place on 25/01/2021. In the present case, the mother has been clearly named by the victim as an abettor of the crime of rape committed upon her. However, it is surprising that the victim's mother has not been made an accused by the Police, nor has the victim or the informant taken any steps, for having DW-2 arrayed as an accused in the case.

36. PW-2 in his evidence has stated that in his cross examination that he resided with his two brothers, sister-in-law and mother in one part of the house and in the other part, the appellant with his second wife and two sisters. PW-2 in his evidence has stated that at the time his father married for the second time, his mother was still alive. PW-3 in her evidence has stated that her mother died on 12/02/2021, which is however, countered by the evidence of DW-1, who stated that his wife had died on February, 2020. Thus, there appears to be no certainty as to when the first wife had died. Further, the evidence of PW-2 in his cross examination taken on 12/10/2022, is to the effect that his brother, sister-in-law and himself were living together in one house at the time of filing the

FIR. PW-3, his father and the second wife and the two daughters were staying in a separate house for the last five years since i.e. since the time of marriage of his father with the second wife, Bobita Bhowal.

37. The evidence of DW-1 is to the effect that he had married for the second time on 25/01/2021 before a Marriage Officer, Kamrup (M), Assam, which was proved by way of a Marriage Certificate and not denied by anyone.

38. The contradiction in the date of marriage of the appellant with the second wife need not detain us for long, in view of the fact that there could be a situation where the appellant and the second wife lived together for some time as husband and wife and had made the same official and valid subsequently.

39. Whatever be the stand of the parties, what is clear is that the learned trial Court has not considered the evidence of the defence witnesses DW-1 and DW-2. No consideration and finding has also been made with regard to the explanation given by the appellant to question no.9, in his examination under section 313 Cr.P.C. In para 48 of the impugned judgement dated 22/11/2023 passed by the learned trial Court, the learned trial Court has stated that though the appellant in his statement recorded under section 313 Cr.P.C. had submitted that he was innocent and had also adduced evidence of two defence witnesses including himself, the prosecution case remains unshaken. It also held that the evidence of the appellant as DW-1 could not be considered, as the prosecution had already proved the prosecution case by way of evidence supported by medical evidence. The evidence of DW-2, who was the mother of the victim was also found to be unreliable as she had been financially supported by the appellant and was residing with him. The learned trial Court further stated that the victim also deposed that she was never supported by her mother. The above observations made by the learned Trial Court is neither here or there. There is

no real consideration of the explanation and testimonies of DW-1 and DW-2 by the learned Trial Court. There is no finding based on reasons, as to why the explanation under Section 313 Cr.P.C and the testimony of DW-1 and DW-2 is not acceptable.

40. In the case of ***Reena Hazarika Vs. State of Assam [(2019) 13 SCC 289]***, the Supreme Court has held that the Court was duty bound under section 313(4) Cr.P.C. to consider the defence taken by an accused under section 313 (1)(b) Cr.P.C., after the prosecution evidence is closed. It further held that if there has been no consideration at all of the defence taken under section 313 Cr.P.C., in the given facts of the case, the conviction may will stand vitiated. It also held that a solemn duty is cast on the Court, in the dispensation of justice, to adequately consider the defence of the accused taken under section 313 Cr.P.C, and to either accept or reject the same for reasons specified in writing. The Supreme Court further held that the complete non-consideration of the defence can cause prejudice and that unlike the prosecution, the accused is not required to establish the defence beyond all reasonable doubt. The accused has only to raise doubt in preponderance of probability as observed in the case of ***Hate Singh Bhagat Singh Vs. State of Madhya Bharat [AIR 1953 SC 468]***.

41. In the case of ***Ramadas and others Vs. State of Maharashtra [(2007) 2 SCC 170]***, the Supreme Court has held that conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the Court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity. It also held that in the case of sexual offences, the initial hesitation of the victim to report the matter to the Police which may affect her family life

and family's reputation would be another consideration, which should weigh in the mind of the Court. There may be cases where the victim may chose to suffer ignominy rather than to disclose the true facts which may cast a stigma on her rest of life. There are cases where the initial hesitation of the prosecutrix to disclose the true fact may provide a good explanation in delay in lodging the FIR. In the ultimate analysis, what is the delay in lodging an FIR 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. The Supreme Court thus held that mere delay in lodging of the FIR 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 on fact.

42. In the case of ***Munshi Prasad and others Vs, State of Bihar [(2002) 1 SCC 351]***, the Supreme Court has held that evidence tendered by a defence witness cannot always be termed to be a tainted one by the reason of the factum of the witnesses being examined by the defence. The defence witnesses are entitled to equal respect and treatment as that of the prosecution. The issue of credibility and trustworthiness was also to be attributed to the defence witnesses on a par with that of the prosecution. A lapse on the part of the defence witness cannot be differentiated and be treated differently than that of the prosecutors'.

43. In the present case, the marriage certificate showing that the marriage between the appellant and the second wife had taken place on 25/01/2021 has not been contested by any one. Though there can be two views available that the appellant and the second wife started living together prior to the death of the first wife or after the death of the first wife, the view that is favourable to

the accused would have to be adopted by this Court, keeping in view the settled law that when two views are possible, the one favouring the accused should be adopted.

44. When the evidence of the victim can be made the whole basis of convicting the appellant for rape, the same would amount to the learned trial Court being convinced about the truthfulness of the evidence of the victim. In that case, action should have been taken against the mother of the victim also, who had allegedly acted as an abettor to the rape committed by her second husband, the appellant. However, nothing in that direction has been undertaken.

45. Though the Supreme Court in the case of ***Munshi Prasad (supra)*** has held that the evidence tendered by the defence witnesses cannot always termed to be tainted one, the learned trial Court has without considering the evidence of DW-2, held in para 48 of the impugned judgement that the evidence of DW-2 is unreliable considering that she was being financially supported by the appellant, was residing with him and as the victim had deposed that DW-2 had never supported her. The said observation of the learned Trial Court basically states that the testimony of DW-2 is tainted evidence, without considering the material discrepancies in the evidence of the victim, which go to the root of the issue. The fact that there was no marriage of 8 years at the time of recording the evidence of the victim and the fact that the evidence of the I.O. (PW-5) showed that the victim had bettered her story during her testimony, beyond what had been disclosed under Section 161 Cr.P.C, raises the issue of the credibility of the evidence.

46. The above clearly shows that the learned trial Court had considered the evidence of DW-2 as tainted. The learned trial Court should have considered the evidence of DW-2 and /or have considered making the victim's mother an

accused, for abetting the crime of rape, if the learned trial Court was convinced with the veracity of the evidence of the victim. However, the same has not been done by the learned trial Court.

47. PW-5, in his cross-examination, had stated that the victim in her statement under Section 161 Cr.P.C. did not speak of her mother and father coming to her room and the appellant raping her. She also did not say anything about the victim being kept in a locked room, without being allowed to go to school and not being given food. However, we find that the same is a part of the testimony of the victim. We find it hard to believe that the victim would be treated in the manner stated above and the delay in lodging the FIR, besides the absence of specifics, despite the victim being 17 at the time of filing the FIR, does not convince us that the case of the victim is not without embellishments. In the case of ***Sunil Kumar Sambhudayal Gupta (Dr.) & Ors. Vs. State of Maharashtra***, reported in ***(2010) 13 SCC 657***, the Supreme Court has held that if a witness in his statement under Section 161 Cr.P.C. has not disclosed certain facts, but meets the prosecution case for first time before the court, such version lacks credence and is liable to be discarded.

48. A reading of the explanation to Section 161 Cr.P.C., which is equivalent to Section 181 BNSS, shows that when a witness does not say anything with respect to a certain fact during the recording of his statement under Section 161 Cr.P.C., but says it for the first time during evidence, the same may amount to an omission and contradiction and cannot be considered by a Court, if it goes to the root cause of the case. In the present case, the victim has stated in her statement under section 161 Cr.P.C. that for the last 4 years, the appellant had been touching her in a bad way and that her mother knew everything about it.

In the first instance, her mother had stopped the appellant. She was also given medicines which made her weak and she was also shown videos. However, in the testimony of the victim, she has stated that she had been raped for the last four years. As there is a change in the accusation made by the victim, from bad touch in her section 161 Cr.P.C. statement to rape in her testimony, we are of the view that there being material discrepancies and contradictions, we do not find the victim to be a sterling witness, as we are not convinced with the truthfulness of the victim's testimony and the same does not inspire the confidence of this Court.

49. In the case of ***Santosh Prasad @ Santosh Kumar Vs. The State of Bihar***, reported in ***(2020) 3 SCC 443***, the Supreme Court has held that conviction in a rape case can be based on the solitary evidence of the prosecutrix, provided the same inspires confidence of the Court and appears to be absolutely trustworthy, unblemished and is of sterling quality.

50. In the case of ***Rai Sandeep @ Deepu & Another Vs. State of NCT of Delhi***, reported in ***(2012) 8 SCC 21***, the Supreme Court had an occasion to consider who can be said to be a sterling witness and it has observed in para 22 as follows:-

“In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be

natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

51. On considering all the above, we are unable to agree with the findings of the learned Trial Court that a case of rape had been made out against the appellant, inasmuch as, we are of the view that it has not been proved beyond reasonable doubt that rape had been committed by the appellant for the last 4 years, keeping in view the major discrepancies and contradictions in the evidence of the prosecution witnesses. Accordingly, we set aside the impugned judgment dated 22.11.2023, passed by the learned Addl. Sessions Judge-cum-Special Judge (POCSO), Kamrup(M), Guwahati, in Sessions Special Case No.46/2022. The appellant is accordingly acquitted from the charge under Section 376(2)(f) of the IPC and Section 6 of the POCSO Act.

52. The appeal is accordingly allowed and disposed of.

53. Send back the TCR.

JUDGE

JUDGE

Comparing Assistant