

GAHC040012482021

2026:GAU-AP:850



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

Case No. : CrI.A./13/2021

Topha Wangsu
S/o Late Athuak Wangsu,
Village Longkhaw,
P.O and P.S Longding, District Longding, Arunachal Pradesh

VERSUS

THE STATE OF AP and Anr.
Represented by Public Prosecutor/Special Public Prosecutor, at Gauhati High Court
Itanagar

2:Phohe Wangsa
Age: 0
Occupation :
D/o Late Akha Wangsa

R/o Bonia Village
Police Station Pongchau
District Longding
Arunachal Pradesh

-BEFORE-
HON'BLE MR. JUSTICE N. UNNI KRISHNAN NAIR
HON'BLE MR. JUSTICE PRANJAL DAS

Advocated for petitioner:

Mr. M Biswas,
Mr. K K Goswami,
Mr. M K Sharma,
Mr. Tabit Tapak,
Mr. Y Pangu

Advocate for Respondent:

Ms. L. Hage, Addl. P.P.
Ms. G. Jini, Legal Aid Counsel for the respondent no.2.

Date on which judgment is reserved : 06.08.2026

Date of pronouncement of judgment : 27.08.2026

Whether the pronouncement is of

the operative part of the judgment? : No

Whether the full judgment has been Pronounced? : Yes

JUDGMENT & ORDER (CAV)

(Pranjal Das, J.)

1. Heard Mr. T. Tapak, learned counsel for the appellant. Also heard Ms. L. Hage, learned Addl. P.P. appearing for the State respondents and Ms. G. Jini, learned Legal Aid counsel for the respondent no.2.

Introductory Facts

2. The instant criminal appeal has been filed by the appellant, **Topha Wangsu**, against the Judgment and Order dated 15.03.2021, passed by the learned Special Judge (POCSO), Tirap, Changlang and Longding at Khonsa, Arunachal Pradesh in Khonsa Special Judge, (POCSO) Case No. 25/2020, arising

out of Longding P.S. Case No.59/2019 - whereby the convict appellant as accused was convicted under Section 4 of the POCSO Act 2012 and sentenced to undergo rigorous imprisonment for 20 years and pay a fine of Rs. 20,000 (in default, undergo simple imprisonment for 2 months).

3. The prosecution case in brief before the learned trial Court was that on 28.11.2019, the victim girl herself lodged a complaint before the Longding police station with the allegation that in June 2019 in her house in Longding at around 4.00 p.m., the accused Topha Wangsu of Longkhaw village came to her house and forcefully had sex with her against her wish, whereupon, she conceived and suddenly delivered a child during her exam in Don Bosco School, Longding. She further stated that she did not know that she had conceived but in November only, she came to know that she was pregnant. On the basis of the complaint, Longding P.S. case No. 59/2019 was registered under Section 376 (i) IPC read with Section 4 of the POCSO Act and investigation started.

4. After completion of investigation, the Investigating Officer submitted a charge-sheet being C.S No. 4 of 2020 dated 11.02.2020 under Section 376 (i) IPC read with Section 6 of the POCSO Act. Subsequently, after completion of usual formalities, the learned trial Court vide order dated 11.03.2020 framed charges against the accused under Section 376 (2)(n) IPC read with Section 6 of the POCSO Act.

5. During the trial, the prosecution adduced the testimony of only 4(four) witnesses including the informant-cum-victim and the Investigating Officer. After the completion of prosecution evidence, the accused was examined under Section 313 Cr.P.C. The defence did not adduce any evidence.

6. Upon completion of the trial, the appellant as accused was convicted and

sentenced as already narrated above. Hence, this appeal.

Evidence

7. The alleged victim girl adduced evidence during the trial as PW-1, in which, she stated that she was residing with her uncle and aunt for purpose of studies. She stated that on 15.06.2019, her uncle and aunt had gone to the village for attending a marriage ceremony and she was present in their house along with her younger brother. Testifying further, PW-1 stated that on the particular day 17th or 18th June 2019, she along with her younger small brother was studying outside the residence on the veranda and at 4.00 p.m. the accused came to their residence and enquired about her uncle and aunt, whereupon she told him about their going to village for attending marriage ceremony. She told him that her father might come in the evening. The accused was sitting at their veranda and told that he would not stay for long. At about 5.00-6.00 p.m. the electricity came and he asked for charging his mobile, whereupon she told him that there is no charger at the residence as uncle and aunt had taken the charger with them. Thereupon, the accused told that he has charger with him and he went into the house and put his mobile on charge. PW-1 stated that she along with her brother did not enter the residence and asked him to come out of it and told him to go away as her father might be reaching. Thereupon, the accused told her that he will not stay for long and asked her and her brother to come inside the residence, whereupon they entered and gave a chair to the accused for sitting and that during that time PW-1 and her brother were on the sofa. She further testified that when he came near them and set down on the sofa watching his mobile though she had told him to go away.

8. She stated that after some time, her brother fell asleep on the sofa and during that time the accused started to touch her body, whereupon she restrained him and asked him to go but he did not stop. Testifying further, he stated that he forcefully took her to the nearby room and held her tightly and forcefully pulled down her pant. *The trial Court has mentioned regarding demeanour of the witness that during this time the witness broke down in tears.*

9. Testifying further, PW-1 stated that she could not protect herself as she did not have enough strength and the accused forcefully committed sexual intercourse upon her. She did not disclose the incident to her uncle and aunt and parents due to fear and even to her friends out of embarrassment. She stated that she did not know that she was pregnant as during the month of July/August, she had menstrual period and hence she did not perceive that she was pregnant, but in October, she came to know that she was pregnant. On 25th November of that year she was having her examination and on 26th though she was suffering from stomach ache she went to the school for appearing in the examination. She further testified that during examination, as she was having severe stomach pain she told her teacher to take her to the office room of the father. She was allowed to take rest and also her guardian was called by the school authority. Subsequently, she went to the school toilet for attending nature's call and during that time there was severe bleeding and she felt something came out of her stomach along with blood. From the school she went to the residence. On 27th November 2019, some women came to their residence and enquired about the incident and after they went away the accused came to their residence and took her to hospital. The police personnel apprehended the accused and took them to the police station. She stated about being produced before Magistrate for giving her statement and also taken to the hospital for

check-up. She proved the FIR as Exhibit-1 and her signature there on Exhibit-1 (a). She proved her statement before magistrate under section 164 Cr.P.C as Exhibit-2 and her signatures thereon as Exhibit-2 (a) (b) and (c).

10. In cross-examination PW-1 stated that, she used to see the accused and he used to talk with her but did not come to their residence earlier. She stated that her younger brother who was with her is the son of her uncle and aunt and at that time he was about seven years of age. She stated that she cannot say exactly what time he fell asleep. She stated that during the incident, she did not shout for help and due to fear she did not discuss the matter before uncle and aunt. She stated that after the incident she did not lodge a FIR against the accused. She stated that after the incident the accused did not commit anything wrong with her.

11. In her statement before Magistrate recorded under Section 164 Cr.P.C on 20.11.2019, she was subjected to some preliminary questioning whereupon the learned Magistrate proceeded to examine her statement. In her statement she stated that she was a student of Class-IX living with her uncle and aunt. She stated that she met the accused in April 2019 and one day he asked for her mobile phone which she gave to her. She stated that during June of that year, when her uncle and auntie went to attend a marriage ceremony, she was alone in the house with her brother on 16th June alone with her brother and one day after the school she along with her cousin brother was studying outside the house and at around 4 P.M, the accused came to their house and inquired about her uncle and aunt. She told them that they had gone to village. The accused requested to charge his phone, but, she refused but he forced her to charge his mobile and she requested him to go out of the house. Stating further, the victim girl stated that, she and her brother were sitting on the sofa and watching a

movie on mobile phone but around 4.30 P.M her cousin brother fell asleep on the sofa and thereafter, the accused forcefully took her to another room and forcefully raped her (had sexual intercourse with her). That, on the same night he raped her thrice. She stated that she cried a lot but no one came to her rescue as the neighbours also went to the marriage ceremony. She stated that the accused left at 11.00 P.M whereupon, she took bath and went to sleep. She stated that one morning she was having stomach pain and felt like a stone in her stomach whereupon she doubted about pregnancy. She stated that on 20th of the month, she took one pregnancy kit which gave positive result whereupon after three days, i.e., on 23.11. 2019, she brought some medicines from chemist shop for abortion. She stated about the doses mentioned on the medicine strip and she took the medicines accordingly. She stated that on 26th November 2019, while sitting for biology exam she felt a slight pain in her stomach and went for urine and came back and resumed writing her examination. Again after 20 minutes she felt severe stomach pain and informed her teacher about it whereupon she took her to the headmaster's office room and made her rest on a sofa. After 10 minutes she went to the toilet and there while sitting for urine something came out of her vagina and she poured water to clean the blood on the floor near that and went out of the toilet. Upon coming out she saw her uncle and thereafter, went home with him after the exam was over. On the next day, i.e., on 27.11. 2019 in the evening police came to their house along with some women and enquired about one aborted foetus in the school toilet room and thereafter she confessed everything. She stated that, when she was raped she was very scared to tell about the incident to her parents and also felt shy to tell to her friends that she was raped.

12. PW-2 is **Tailai Wangpan**, the uncle of the prosecutrix, who stated about

the prosecutrix residing with him and his wife and that during June he along with his wife went to the village for a marriage ceremony, where they stayed for a week. He further testified that during that time the girl and his son were residing at his residence. He stated that he did not know about the case but came to know about the incident in November 2019, when some women came to their residence and disclosed that the prosecutrix had the miscarriage of her pregnancy in the school toilet. In cross-examination PW-2 stated that his son who was with the prosecutrix during their absence was about 5/6 years of age. He stated that the victim was residing in their house for about 3/4 years. He stated that the accused is a native of their village, did not used to come to their residence and that at that time he used to have a mobile.

13. PW-3 is **Chusa Wangpan**, the wife of PW-2 and she stated that she does not know anything about the case but was told by the father of the school that her niece, the prosecutrix had delivered an immature foetus in the school. In cross-examination she stated that the victim girl used to reside in their house for about 3/4 years and that the accused is from their village but he did not used to come to their house. She stated that she had not seen the victim girl possessing mobile while residing in their house.

14. PW-4 **Jawpha Wangsa** is the Investigating Officer of the case. He stated in his deposition that on 28.11-2019 he was posted at Longding Police Station as sub-inspector of police and at 9.30 am the victim girl filed a written FIR alleging that in June 2019, the accused had forcefully committed sexual intercourse with her due to which, she conceived and delivered a premature foetus at school. He registered the FIR into Longding Police Station Case No. 59/2019 under Section 376 IPC read with Section 4 of the investigation himself. He has stated about the routine steps of investigation. He also stated that the

victim disclosed to him that when her guardian was out of the residence the accused committed penetrative sexual assault upon her and she disclosed her age to be 15 years. PW-4 stated that he seized the birth certificate of the victim where her date of birth is mentioned as 08.06.2004 and as per the said certificate she was of 15 years of age. He stated about forwarding the victim for medical examination and Dr. *Tangseng Techhi* examined the victim and submitted a report reflecting the finding that it was a recent delivery. He also stated about forwarding the victim for recording her statement for learning JMFC. He stated that the accused personally confessed before him that he was in love with the victim girl and he had committed sexual intercourse with the victim.

15. Upon completion of investigation he submitted charge-sheet against the accused under section 376(2)(i) IPC read with Section 6 of the POCSO Act. He proved the FIR as Exhibit-1 and his signature of the O.C Longding as Exhibit-1(b). He proved the medical report as Exhibit-5 and the Seizure memo of the Birth certificate as Exhibit-6 and his signature thereon as Exhibit-6 (a). He proved the birth certificate of the victim as Exhibit-7 and the forwarding of the victim for recording statement before magistrate as Exhibit-8 and his signature thereon as Exhibit-8 (a). He proved the charge-sheet as Exhibit-11 and his signature thereon as Exhibit-11(a). He also stated about forwarding the accused for recording his confessional statement which he exhibited as Exhibit-9 and his signature thereon as Exhibit-9 (a). The confessional statement was exhibited by him as Exhibit-10.

16. In cross-examination, PW-4 stated that as per the record the incident took place on 14.06.2019 but no FIR was filed immediately, but, in November, when the victim delivered a premature foetus in school during examination case was registered vide Longding P.S. Case No. 57/2019 and on 28.11.2019 the present

FIR was filed by the victim and as per her statement the miscarried foetus was of the accused. It is stated that in the present case the foetus and blood samples of the accused and victim are collected and sent for FSL but they have not received the FSL report.

Submissions

17. Mr. T. Tapak, the learned counsel for the convict appellant, submits that the act of sexual intercourse between the accused and the victim girl, if at all, was consensual in nature. It is submitted that there are discrepancies in the dates in the prosecution case, throwing doubts over its veracity. It is submitted that there was considerable delay in lodging of the FIR, which has not been properly explained. It is submitted that at the relevant time, the victim girl was not a minor and therefore, as the sexual act, if any, was consensual, no offenses are made out against the convict appellant. In support of his contentions, the learned counsel for the convict appellant cites the following decisions:-

(i) *Anand Sidasow Vs. State of Arunachal Pradesh & Anr. 2026 (3) GLT 910.*

18. On the other hand, Ms. L. Hage, the learned Addl. P.P., supports the impugned judgment and contends that the testimony of the prosecutorix is consistent through her deposition and statement before learned JMFC. It is submitted that the convict appellant committed penetrative sexual assault upon a minor, leading to her pregnancy. It is submitted that the testimony of the I.O as PW-4 lends corroboration to the testimony of the victim, thereby, fortifying the prosecution case. In support of her contentions, the learned Addl. P.P. cites the following decisions:-

(i) *Ganesan Vs. State represented by Its Inspector of Police (2020) 10 SCC 573.*

19. The learned counsel for the informant submits that the victim's statement

and deposition are consistent and in this context, the learned counsel refers to the provisions of Section 114 A of the Indian Evidence Act about certain presumptions in prosecutions such as these, in which, when the prosecutrix states that there was no consent for the sexual intercourse. The learned counsel for the informant cites the following decision:-

(i) *Jagjeet Singh and Ors. Vs. Ashish Mishra @ Monu and Another (2022) 0 AIR (SC) 1918.*

Discussion

20. We have perused the appeal memo, the impugned judgment and order, the exhibited documents, the evidence on record before the learned trial Court. We have considered the submissions of the learned counsels on both the sides. We have perused the decisions cited at the Bar.

21. In the FIR lodged by the victim girl, exhibited as Exhibit-1 and her signature as Exhibit-1(a), she has stated about being subjected to sex forcefully by the appellant. In her statement recorded before learned JMFC also, which has been exhibited during the trial, she stated that she was subjected to rape by the appellant, clarifying that the appellant had sexual intercourse with her. She has reiterated in a later part of that statement that she was raped by the appellant.

22. During her deposition as PW-1 during the trial, she has again stated that the appellant forcefully committed sexual intercourse with her and that she could not protect herself as she did not have enough strength. Not much cross-examination is found to be done with regard to this aspect of the testimony and

therefore, the testimony of the victim girl about being subjected to forced sexual intercourse by the appellant has remained unshaken in her cross-examination. The learned trial Court has also recorded the demeanour of the witness during her examination-in-chief, stating that during this time, the *witness broke down in tears*.

23. Thus, from the narration in the FIR, her statement before learned Magistrate and her deposition during trial, further fortified by her demeanour recorded by the learned trial Court during examination, it is found that the victim girl has consistently stated about being subjected to forced sexual intercourse by the convict appellant. It is well settled that conviction in a sexual offence case of this nature can be recorded on the sole testimony of the victim, provided she is found to be trustworthy and reliable.

24. During the trial, only 4(four) witnesses were examined, as already mentioned above being the prosecutrix, two other witnesses and the Investigating Officer. Surprisingly, neither the parents of the girl nor the uncle with whom she was staying at the time of the incident for her studies were examined by the prosecution, as they ought to have been in the normal course. The prosecution also failed to examine the doctor who had examined the victim girl after the purported miscarriage in her school during examination, though the medical examination report (Exhibit-5) has been exhibited during the trial through the Investigating Officer testifying as PW-4. In the said medical report, the general appearance of the girl at the time of examination was stated to be pale, exhausted and ill-looking. With regard to the column pertaining to any vaginal discharge, it is mentioned that there was presence of blood. With regard to genital examination, it was stated that – *Labia- Tender and swollen, Uterus- hard & contracted on examination, Cervix- soft & dilated C edges torn and*

lacerated. The Doctor gave the opinion at serial no.9 and stated that the examination showed signs and findings suggestive of recent delivery.

25. In the history column also, it has been mentioned about aborted foetus found in the school on 27.11.2019 at 3.00 p.m. Therefore, I am of the considered opinion that though the medical examination report has not been adduced in evidence the way it should have been but nevertheless, the medical examination report also indicates that the girl was subjected to sexual intercourse.

26. One infirmity which I have noticed in the statement of the girl recorded before Magistrate and also in her deposition is that - while the accused is stated to have committed the sexual offence upon her, in the room, her minor cousin brother stated to be aged around 7 years was supposedly in the other room where earlier all three of them were together – and in this context, both in her statement as well as in her deposition, she has not stated anything about the said cousin brother, though a minor, reacting to the situation in any manner. In fact, in her statement before JMFC, she stated that she cried a lot when the appellant committed the offence but none came to her rescue and neighbours had also gone to attend the marriage ceremony. However, in her deposition as PW-1, she stated that at the time of the incident she did not shout for help. Apart from this contradiction between her statement and her testimony, it also casts some doubt on her statement that though she shouted but none came to her rescue, although it was revealed from the other materials that her minor brother was in the other room.

27. This contradiction would not in my view demolish the testimony of the prosecutrix, in view of her testimony being cogent and consistent in other parts. However, it would make her less than a sterling witness and some corroboration

would be wise to arrive at any finding.

28. Another important aspect assumes importance inasmuch as both in his statement under Section 313 Cr.P.C as well as his confessional statement exhibited during the trial, the appellant has admitted of committing sexual intercourse upon the victim girl but stated that they were in a relationship and it was consensual. In my considered view, the aforementioned infirmity in the testimony of the prosecutrix can be seen in the context of this aspect emerging from the side of the appellant as mentioned above. Therefore, it can be said that there are certain circumstances which might be indicative of the act of the accused-appellant upon the victim girl being consensual, even though, the victim girl has been consistent in her statements about being subjected to forceful sexual intercourse. In this situation, therefore, the question as to whether the victim girl was a minor assumes significance as if she was indeed a minor as projected by the prosecution and accepted by the learned trial Court, any consensual sexual intercourse would still be a sexual offence and her consent would be immaterial.

29. It is revealed from the materials that during investigation, the I.O. has seized the birth certificate of the girl which has been exhibited during the trial by the I.O. as PW-4. In his testimony, though PW-4, the I.O, though has stated about seizure of the birth certificate, has not stated as to from where or from whom it was seized. The parents of the girl or her uncle with whom she was staying have not adduced evidence as already stated.

30. I have carefully perused the birth certificate (Exhibit-7). It mentions the date of birth of the girl as 08.06.2004 and it is also stated therein that the contents of the certificate were taken from the original record of birth in the register for the local area of that district. However, the registration of the birth

certificate was in 2010 and date of issue was 11.06.2010. The prosecution has not proved the birth certificate by calling any official from the registrar of births and deaths or any pertinent office. Moreover, the birth certificate has also been issued more than a year after the birth. In this context, the decision in *Anand Sidasow (supra)* relied upon by the appellant side, is relevant and can be referred to. In the said case, the birth certificate was adduced in evidence by the prosecution and the pertinent official was also examined. However, the Court held that the prosecution has not been able to prove the contents of the certificate as the certificate was issued based on an affidavit submitted by the mother of the girl after 11 years and that it also did not fulfil the provisions of Section 13(3) of the Registration of Births and Deaths Act, 1969, which mandates that any birth or death which has not been registered within one year of its occurrence shall be registered only by an order of a Magistrate of First Class or a presidency Magistrate after verifying the correctness of the Birth or Death and on payment of the prescribed fee. The paragraph nos.43 to 46 of *Anand Sidasow (supra)* can be gainfully reproduced herein below:-

43. The birth certificate issued by the jurisdictional Registrar of Birth and Death is a part of a public record. Section 35 of the Evidence Act, 1872, deals with relevancy of entry in a public record and the same reads as follows:

“35. Relevancy of entry in public record or an electronic record] made in performance of duty. An entry in any public or other official book, register or record or an electronic record), stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record) is kept, is itself a relevant fact.”

44. A perusal of the provisions of Section 35 of the Indian Evidence Act, 1872, it

would be apparent that an entry made in any public or other official book/register of record is required to be proved by a public servant who had made the entry in discharge of his official duty or by any other person in performance of duty, especially enjoined by the law. In the instant case the birth certificate, which was exhibited as Exhibit-4, was proved by the Registrar of Birth and Death, Nafra. As the Exhibit-4 was so exhibited without any objection, in so far as admissibility of Exhibit-4 is concerned, the same must be answered in favour of the prosecution. However, the same would not automatically absolve the prosecution from the requirement in law to establish the truthfulness of the contents of Exhibit-P4. Exhibit-P4, the birth certificate of the victim girl was so issued basing on the registration of the birth of the victim girl, in pursuance to an application submitted in the matter, by the mother of the victim girl on 13.04.2017. The birth of the victim girl is found to have been registered, basing upon the affidavit submitted in the matter by her mother. It is also found that the birth of the victim girl came to be registered after lapse of around 11 years w.e.f. her projected date of birth. Accordingly, it is also be examined as to whether the condition required to be fulfilled for delayed registration of birth was complied with in the matter.

45. The provisions of Section 13 of the Registration of Births and Deaths Act, 1969, dealing with procedure to be followed for delayed registration of birth and death, being relevant, is extracted here-in-below:

“13. Delayed registration of births and deaths.—

(1) Any birth or death of which information is given to the Registrar after the expiry of the period specified therefore, but within thirty days of its occurrence, shall be registered on payment of such late fee as may be prescribed.

(2) Any birth or death of which delayed information is given to the Registrar after thirty days but within one year of its occurrence shall be registered only with the written permission of the prescribed authority and on payment of the prescribed fee and the production of an affidavit made before a notary public or any other officer authorised in this behalf by the State Government.

(3) Any birth or death which has not been registered within one year of its

occurrence, shall be registered only on an order made by a magistrate of the first class or a Presidency Magistrate after varifying the correctness of the birth or death and on payment of the prescribed fee.

(4) The provisions of this section shall be without prejudice to any action that may be taken against a person for failure on his part to register any birth or death within the time specified therefore and any such birth or death may be registered during the pendency of any such action. 7”

46. A perusal of the provisions of Section 13 of the Registration of Births and Deaths Act, 1969, mandates that any birth or death of which information is given to the Registrar after the expiry of the period specified thereof, but within 30 days of its occurrence, shall be registered on payment of such late fee as may be prescribed. It further mandates that any birth or death of which delayed information is given to the Registrar after thirty days but within one year of its occurrence shall be registered only with the written permission of the competent authority, on payment of prescribed fee and the production of an affidavit made before a Notary Public or any other officer authorised in this behalf by the State Government. Provisions of sub-section (3) of Section 13 of the Act of 1969 mandates that, any birth or death which has not been registered within one year of its occurrence shall be registered only by an order of Magistrate of 1st Class or a Presidency Magistrate after verifying the correctness of the Birth or Death and on payment of the prescribed fee.”

(emphasis added)

31. In the instant case, the birth certificate has been proved by the I.O. and it is not clear from the evidence as to from whom it was seized. No official from the concerned department was also examined. Lastly, this certificate was also obtained several years after the birth and there is no material to indicate compliance with Section 13(3) of the Registration of Births and Deaths Act, 1969 as discussed above. Therefore, though the date of birth indicated in the birth certificate would make the girl less than 16 years at the time of the

incident but in view of the aforesaid factors, one cannot go straight away by the age indicated in the said birth certificate.

32. In the circumstances, perhaps benefit of doubt can be given to the appellant on the question of the victim girl being below 16 years. Now, the question is, even if that aspect is interpreted in a beneficial manner in favour of the accused, whether there are materials to indicate that the victim was a minor at the time of the incident. In this context, we go back to the FIR (Exhibit-1) and her signature Exhibit-1 (a) in which mentioning her date of birth as 08.06.2004, the victim girl as informant has indicated her age to be 15 years. In her statement before learned Magistrate (Exhibit-2) also, her age has been mentioned as 15 years by the learned Magistrate stating that it is revealed from the police papers. In her statement before the learned Magistrate, the victim girl has stated herself to be a student of 9th standard studying in that particular school. In the medical examination report, her age is mentioned as 15 years as stated by the victim.

33. Upon perusing her deposition as PW-1, we find that the victim girl has not mentioned about her age therein. From the materials and evidence it has also emerged that at the time of her purported miscarriage, she was studying in the school and it happened during her examination. The I.O. PW-4 has also stated that the victim disclosed her age as 15 years. Of course, he has also stated about the birth certificate which has already been discussed earlier. Thus, in our considered opinion, there are sufficient materials and evidence to indicate that at the time of the incident, the victim girl was a school student and a minor aged below 18 years, even though we have given benefit of doubt on the aspect of her being below 16 years.

34. In view of the aforesaid finding that at the time of the incident, the victim girl was a minor, her consent if any is immaterial. Even though the prosecutrix falls slightly short of being a sterling witness which does not at all require any corroboration but, we are of the considered opinion that her testimony and statements together indicate a consistent story about being subjected to sexual intercourse by the appellant. Corroboration regarding the same also comes from the medical evidence, the confession of the appellant and his statement during examination under 313 Cr.P.C. As already stated, the medical evidence indicates miscarriage and the findings of genital examination have already been indicated above.

35. During his examination under Section 313 Cr.P.C, the appellant admitted that he committed sexual intercourse upon the victim girl, but further stated that it was consensual in the context of their relationship. It is well settled that a conviction cannot be based solely on the statement of an accused during examination under 313 Cr.P.C, but such a statement can be used along with other parts of the prosecution evidence.

36. A confession of the appellant was also recorded during the investigation and the I.O. as PW-4 exhibited the forwarding for recording the confessional statement (Exhibit-9) and the confessional statement (Exhibit-10).

37. We have carefully perused the confessional statement. The recording Magistrate has not been examined by the prosecution as ought to have been. However, most of the safeguards necessary at the time of recording such a confession have been indicated in the confessional statement, including the certificate by the recording Magistrate at the footnote. In the confessional statement also, the appellant has admitted that he has indulged in sexual intercourse with the victim girl in the house of her uncle in the context of their

relationship.

38. As the learned Magistrate recording the confession has not been examined and subjected to cross-examination, therefore, we would have been hesitant to use the confession as substantive evidence, basing conviction solely there upon. However, in the instant case, the aforementioned confession is only being used as corroborative evidence to support the testimony and statements of the victim girl.

39. In totality, based on the statements and testimony of the victim girl; the medical evidence; the confession of the appellant and the statement of the appellant under Section 313 Cr.P.C, we come to the considered finding that at the time of the incident, the appellant was responsible for committing sexual intercourse upon the victim girl who was a minor and a school student. There are materials to indicate the pregnancy of the victim girl and in normal course, such an act upon a minor victim leading to her pregnancy would bring the act within the ambit of aggravated penetrative sexual assault under the POCSO Act.

40. However, as the learned trial Court has convicted the appellant under Section 4 of the POCSO Act, though for the aggravated limb, we cannot turn the clock back to take the offence under aggravated penetrative sexual assault. It is well settled that an appellant cannot be worse off by preferring an appeal against his conviction and sentence.

41. The minimum sentence of 20 years has been imposed on the appellant, in view of his conviction under Section 4 of the POCSO Act pertaining to the offence upon a girl aged below 16 years. Since we have given benefit of doubt to the appellant with regard to the girl being below 16 years, even though we are convinced about her minority, therefore, the guilt of the appellant would

come within the ambit of the first limb of section 4 of the POCSO Act.

42. In the entirety of the facts and circumstances, the conviction of the appellant is altered to the first limb of Section 4 of the POCSO Act i.e., [Section 4(1)] and the appellant is hereby convicted under Section 4(1) of the POCSO Act for committing penetrative sexual assault upon a minor girl. The offence under the first limb of section 4 i.e.,[Section 4(1)] of the POCSO Act is punishable with imprisonment of either description for a term not less than 10 years, but which may extend to imprisonment for life and also be liable to fine.

43. In view of the circumstances indicating that the act of the appellant might have been consensual as well, even though the victim was a minor, we are of the considered opinion that a sentence of rigorous imprisonment of 10 years, which is also the statutory minimum, would meet the ends of justice.

44. Accordingly, for his conviction under Section 4 (1) of the POCSO Act (1st limb), the appellant is sentenced to undergo rigorous imprisonment (RI) for 10 (ten) years. The sentence of fine of Rs.20,000/- in default, S.I. for 2(two) months is left untouched. Consequently, the criminal appeal stands **dismissed**, subject to the aforesaid modification in the conviction and the sentence.

45. Return the original TCR to the learned trial Court.

JUDGE

JUDGE

B. Dey.

Comparing Assistant