

GAHC010216972024



2026:GAU-AS:5294

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

**Case No. : Crl.A./362/2024**

RITU BORDOLOI  
S/O KAMESWAR BORDOLOI, R/O KHOLAGAON, SUB-DIST- MAYONG,  
DIST- MORIGAON, ASSAM, PIN-782411

VERSUS

THE STATE OF ASSAM AND ANR  
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2: PURAN BORDOLOI  
S/O LT. ALAKSING BORDOLOI  
R/O GAMARIGURI  
HARIYABORI  
MORIGAON  
P.S.-MORIGAON  
ASSAM-78210

**Advocate for the Petitioner** : MR. B KONWAR, MS D DUTTA

**Advocate for the Respondent** : PP, ASSAM, MR B PRASAD, AMICUS CURIAE (R-2)

**BEFORE**  
**HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI**  
**HONOURABLE MR. JUSTICE PRANJAL DAS**

*Advocate for the appellant*

*: Shri B. Konwar, Ld Adv*

*Advocate for the State respondent*

*: Ms. B. Bhuyan, Sr. Adv &*

*Addl. PP* :  
*Ms. R. Saloi, Ld Adv*

*Advocate for the respondent No. 2* : *Shri B. Prasad, Amicus Curiae*

*Date on which judgment is reserved* : **25.03.2026**

*Date of pronouncement of judgment* : **08.04.2026**

*Whether the pronouncement is of the operative part of the judgment ?* : **N/A**

*Whether the full judgment has been pronounced?*

### **JUDGMENT & ORDER (CAV)**

*(Pranjal Das, J)*

Heard Shri *B. Konwar*, learned counsel for the appellant. Also heard Ms. B. Bhuyan, learned Senior Advocate and Additional Public Prosecutor, Assam assisted by *Ms. R. Saloi*, and Shri B. Prasad, learned Amicus Curiae for the respondent no. 2.

**2.** The instant criminal appeal has been filed under section 415 (2) of the BNSS, 2023 by the convict appellant, **Ritu Bordoloi @ Rituparna Bordoloi**, against the Judgment and Order dated 22.08.2024 passed by the learned Additional Sessions Judge cum Special Judge, POCSO, Morigaon in POCSO Case No. 285/2023.

**3.** By the impugned judgment, the appellant has been convicted under Section 366 IPC read with Section 6 of the POCSO Act. For his conviction under Section 6 of the POCSO Act, he has been sentenced to

undergo rigorous imprisonment for 20 years and imposed with a fine of Rs. 20,000/- (Rupees twenty thousand) in default to undergo R.I. for three months. For his conviction under Section 366 IPC, he has been sentenced to undergo R.I. for five years and a fine of Rs. 10,000/- (Rupees Ten Thousand) in default to undergo R.I. for one month. Both the sentences have been directed to run concurrently. He was also given the benefit of set off.

**4.** The prosecution case before the learned Trial Court was that an FIR dated 25.07.2023 was lodged by the father of the victim girl before the Morigaon police station with the allegations that on 24.07.2023, the convict appellant took his 15 year old daughter Miss 'X' to Guwahati on the pretext of selection for a volleyball game, but his daughter did not return back. It is further alleged that the accused is a married person and his wife had come and informed that her husband has taken away the victim. On the basis of the FIR, Morigaon PS Case No. 286/ 2023 was registered under section 365 IPC. Subsequently, the girl came back to her parental place. The investigation continued in the case and upon completion of investigation, charge sheet was submitted against the convict appellant under section 365/ 376 (3) IPC read with section 6 of the POCSO Act, 2012. Subsequently, charges were also framed against him under section 366/376(3) IPC read with Section 6 of the POCSO Act - the charges were read over and explained to the convict appellant as accused, to which he denied, whereupon the trial started.

**5.** During the trial, the prosecution examined 6 (six) witnesses including the I.O. and M.O. The victim was also examined. It may be mentioned herein that during the investigation, the statements of the victim were

recorded by police as well as before the learned JMFC, Morigaon. The defense adduced the evidence of 2 (two) witnesses. After completion of the trial, the convict appellant, as accused, was convicted and sentenced as narrated above. Aggrieved by the same, he has filed the instant appeal.

**6.** The original TCR was called for and received.

**7.** The learned counsel for the appellant submits that in the statement of the prosecutrix recorded under Section 164 CrPC, she has referred to the alleged offence as only bad act. It is submitted that there is no consistency between the different statements of the prosecutrix, and that those are consistently inconsistent. It is submitted that the prosecutrix has narrated three different versions or stories regarding the incident. That, there are also contradictions in her statement recorded by police vis-a-vis her statement under Section 164 CrPC. It is submitted on behalf of the appellant that the testimony of the victim is not of sterling quality and should not be relied upon for conviction. It is submitted that the age of minority of the victim has also not been cogently proved by the prosecution during the trial. It is submitted by the learned counsel for the appellant that as the birth certificate was held to be not proved by this Court in this appeal, an ossification test was directed vide order dated 15.12.2025 and the Ossification report returned the finding that her present age is 18-20 years. That, therefore, the upper end of the bracket along with the margin of error of 2 years should be taken as the age of the victim and going by that, she would be a major on the date of the incident.

**8.** The learned Additional PP for the prosecution submits that the

prosecution evidence during the trial has successfully proved that the girl was a minor and that the offence was committed. It is submitted that even going by the Ossification report, the girl still happens to be a minor. It is submitted by the prosecution that in view of the statutory presumptions under the POCSO Act, the accused had to rebut the presumptions, and that he has not been able to do so.

**9.** Shri. Prasad, the learned Legal Aid Counsel for the informant, submits that it was not disputed during the trial that the victim was a student of 9<sup>th</sup> standard. It is submitted that there are minor discrepancies in the birth certificate and that on the basis of the same, it cannot be said that the certificate is fake. The learned counsel submits that the prosecution case has been successfully proved during the trial and that there is no infirmity in the impugned judgment and order.

**10.** In support of his contentions, *Mr. B. Konwar*, the learned counsel for the appellant cites the following decisions:-

*(i) Jaya Mala Vs. Home Secretary, Govt. of J&K and Ors reported in 1982 Supreme(SC) 132;*

*(ii) Rajak Mohammad Vs. The State Of Himachal Pradesh reported in 2018 Supreme (SC) 1124;*

*(iii) Court on its own motion Vs. State of NCT of Delhi reported in 2024 Supreme (Online) (DEL)515;*

*(iv) Ajijul Islam Vs. State of Assam 2025 reported in Supreme(Gau) 1975;*

*(v) Shiva Chautal Vs. The State of Assam reported in 2023 Supreme (Gau) 864);*

(vi) *Alamelu vs State represented by Inspector of Police reported in 2011 Supreme(SC) 74;*

(vii) *Birka Shiva vs The State of Telangana reported in 2025 Supreme (SC) 1081;*

(viii) *Narendra Kumar Vs. State (NCT Delhi) reported in 2012 Supreme (SC) 406;*

(ix) *Kali Ram Vs State of H.P. reported in 1973 Supreme(SC) 299;*

(x) *Nirmal Premkumar & Anr Vs. State Rep. by Inspector of Police reported in 2024 Supreme (SC) 218;*

(xi) *Mukarrab & Ors Vs. State of Uttar Pradesh reported in (2017) 2 SCC 210.*

**11.** Similarly, in support of her contentions, *Ms. B. Bhuyan*, the learned Additional P.P. submits the following decisions:-

(i) *Manoj Vs. State of Haryana & Ors in Criminal Appeal No. 207 of 2022;*

(ii) *Vishnu alias Undrya Vs. State of Maharashtra (2006) 1 SCC 283.*

### **Discussion and Decision**

**12.** In any prosecution for sexual offenses, the testimony of the victim is extremely important and crucial. It is well settled that a conviction in such cases can be based on the sole testimony of the victim, provided the same is found to be trustworthy. It is also well settled that a victim in such cases is not considered to be equivalent to an accomplice and rather, her position is similar to an injured eyewitness.

**13.** Before proceeding further, the testimony of the victim adduced during the trial may be looked at and also her statement recorded before the Magistrate during the investigation. During the investigation,

the testimony of the victim girl was recorded before learned JMFC at Morigaon on 01.08.2023. In her statement, she indicated her age as 14 years and stated that she plays volleyball and she has been learning volleyball from the appellant for two months and that he is her volleyball teacher.

**14.** She further stated that on 24.07.2023, the appellant took her to Guwahati saying that there will be a volleyball selection match and her family was informed before she was taken along. She stated that he took her on a bike during the daytime and she wanted to return home at night. She further stated that he kept her at his female friend's house who had a husband and a little son. She further stated that she was forced to sleep with Ritu Bordoloi, the appellant at night and physical relationship was established with her. Though she had refused, but he did not listen. She further stated that she was taken from Guwahati to Lanka and they stayed there in a rented house for two days. They also stayed at Raha for a couple of days and stayed for one day at the house of the appellant's friend at Sonoka.

**15.** Upon learning that a case has been filed, the appellant himself appeared at the police station and the victim girl was also taken to the police station. During the trial, the victim girl adduced evidence as P.W.-1, during which she stated that the case was lodged by her father and at the time of the deposition, she was aged 15 years. She stated that she knew the accused who was her volleyball coach, and that she was studying at that time in Class 9. The incident took place in July 2023.

**16.** She stated that she started her volleyball practice under the appellant since one month before the incident. She stated that the

accused took her to Guwahati on his bike saying that there was a volleyball game, and he also took permission of her parents before taking her to Guwahati and accordingly, she went with the accused by his bike to Guwahati. She stated that after she was taken to Guwahati, she came to know that there was no game of volleyball. They had started for Guwahati at 9 am and reached there around noon. She further stated that on that day after darkness, the accused took her to Lanka by train. She stated that at Guwahati, he took her to various places by bike and they also had tea at restaurant.

**17.** At Lanka, the accused took her to a rented room and in the rented room, one person was present and that they stayed in Lanka for three days. PW-1 testified that the accused committed bad act with her by inserting his penis inside her vagina on all the three days and thereafter, the accused brought her to the police station at Morigaon. She further testified that during their stay at Lanka, she and the accused took their food in a nearby hotel and they used to go there three times in a day.

**18.** She stated about her statement being recorded before Magistrate which she proved as Exhibit P-1, and her signatures thereon as Exhibit P-1(1) and P-1(2). She stated that she told about the incident to her parents. In *cross-examination*, she clarified and admitted that the accused had taken her with him with the permission of her parents. She further stated that at Guwahati, she was taken to various places where she met various persons during their stay at Lanka and also while going by train, she met many persons but she did not disclose about the incident to any such persons. She stated that she did not shout when

being taken by the bike and by train. She denied the suggestion that the accused did not take her to Lanka and did not commit bad act with her.

**19.** She stated that the accused used to take other girls also for playing. She denied that she had falsely stated that, at Lanka, the accused took her to a rented room where one person was present and that they stayed at Lanka for three days during which the accused committed bad act with her by inserting his penis inside her vagina on all the three days. She denied the suggestion that she was aged more than 18 years.

**20.** In her testimony, the Investigating Officer, W.S.I. Tarali Bora, who testified as PW-5 during the trial, stated that on 01.08.2023 at around 11 am, the accused surrendered before the Morigaon police station along with the victim and that subsequently, she forwarded the victim to the hospital for medical examination.

**21.** In this regard, the doctor who examined the victim testified during the trial as PW-6, being Dr. Jutika Baidya, PW-6 testified that on 01.08.2023 while she was working as Medical and Health Officer No.1 at Morigaon Civil Hospital, she examined the victim X in connection with Morigaon PS case No. 286 of 2023. She testified that consent was given by the father of the victim. Upon examination, she found her genital organs, including vulva to be normal. However, her hymen was found to be ruptured. She stated that her gait, cooperation and behaviour was normal and good. Vaginal smear test did not reveal any spermatozoa. Urine test was negative.

**22.** Regarding opinion, PW-6 stated that on the basis of physical, Radiological and Laboratory investigations done, she opined that there was no evidence of recent sexual intercourse. No evidence of external injury or violence mark was seen on her body or private parts and that her age was more than 16 years and less than 18 years. PW-6 exhibited the Medical Report as Exhibit- P11 and her signature thereon as Exhibit P11(1). In cross-examination, she stated that she conducted the medical examination after following the proper procedure. She also admitted that hymen, which is the membranous organ in the opening of the vagina can get torn in any kind of stress, including physical activities like cycling and playing volleyball. She stated that there was no bodily injury found on the victim.

**23.** Thus, from the medical evidence, it emerges that the victim was examined on 01.08.2023, soon after the incident. And, apart from ruptured hymen, the medical evidence does not help in determining as to whether there was rape or sexual assault upon the victim. As stated in the testimony of PW-6, M.O. herself stated that hymen can be torn due to physical activities such as sports etc. That with regard to the ruptured hymen, merely because it was found to be ruptured at the time of the medical examination, it cannot be said solely on the basis of that, as to whether such rupture was due to any sexual intercourse committed by the appellant.

**24.** The medical evidence does not indicate any injuries or tenderness or lacerations, which can be indicative of any rape or sexual assault upon the victim. However, the medical report and the medical evidence of PW-6 states that the age of the victim is more than 16

years and below 18 years. And going by that range, as per the medical evidence, the victim was a minor, aged below 18 years at the time of the incident.

**25.** Now, as the medical evidence is not very helpful or conclusive in determining the question of rape or sexual assault upon the victim, the testimony of the victim becomes even more important. As already discussed, in trials pertaining to sexual offences, the testimony of the victim plays a pivoted role because such offences by their very nature would not be having eyewitnesses usually. Therefore, in a situation where the medical evidence is not very helpful in determining the cardinal question of whether the appellant committed sexual assault or rape upon the victim, the testimony of the victim acquires even more importance. And, it would be practically the testimony of the victim which would be crucial or determinative of answering the aforesaid cardinal question.

**26.** In support of its contentions for reliability of the statement of the prosecutrix, the prosecution has referred to the decision of ***Vishnu alias Undrya*** (supra) and referred to para 25 which may be reproduced herein below:

*”25. The statement of the prosecutrix, in our view, is quite natural, inspires confidence and merits acceptance. In the traditional non-permissive bounds of society of India, no girl or woman of self-respect and dignity would depose falsely, implicating somebody of ravishing her chastity by sacrificing and jeopardising her future prospect of getting married with a suitable match. Not only would she be sacrificing her future prospect of getting married and having family life, but also would invite the wrath of being ostracised and cast out from the society she belongs to and also from her family circle. From the statement of the prosecutrix, it is revealed that the accused induced her to a hotel by creating an impression that his wife*

*was admitted in the hospital and that he would see her first and then drop the prosecutrix at her residence whereas, in fact, she was not admitted in the hospital. On the pretext of going to Nanawati Hospital, he took her to a hotel, took her inside a room, closed the door of the room, threatened to finish her if she shouted and then forcibly ravished her sexually. In our view, a clear case of rape, as defined under Section 375 clause thirdly IPC has been established against the accused. It is now a well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence."*

**27.** It is well settled as mentioned earlier that, in a prosecution for sexual offences, conviction can be based on the sole testimony of the victim. However, to do so, such testimony has to be trustworthy. Generally speaking also, in a criminal trial, conviction can be based upon the testimony of solitary witness, provided it is trustworthy and inspires the confidence of the Court. Section 134 of the Evidence Act does not require any specific number of witnesses to prove a fact. It is a well-known principle of evidence jurisprudence that evidence is weighed and not counted, and it is the quality of the evidence which matters more than the quantity. However, if a conviction is sought to be based on the sole testimony of the prosecutrix or primarily on the testimony of the prosecutrix, such evidence of the victim or prosecutrix has to be wholly reliable and free from doubts or infirmities. In a way, in such a situation, the victim, as a witness has to meet the standard of a sterling witness.

**28.** A sterling witness has been held to be one whose testimony is consistent, does not suffer from infirmities, cogent and has a strong ring of truth about it, and does not suffer from any contradictions. Such a testimony should be convincing and be one which fully or substantially satisfies the judicial conscience of the Court to fully rely upon it. In this

regard, reference may be made to the decision of ***Rai Sandeep Vs. State of NCT Delhi*** reported in ***(2012) 8 SCC 21*** The relevant para 15 is gainfully reproduced herein below :-

*“15. In our considered opinion, the ‘sterling witness’ should be of a very high quality and caliber 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 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 everyone 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 similar such tests to be applied, it can 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.”*

**29.** Coming back to the instant case herein, apart from the prosecutrix, the other witnesses are not eyewitnesses. Nevertheless, the

father of the victim who was the informant of the case, adduced evidence as PW-2, during which he testified that he knew the accused as a volleyball coach and that the victim is his daughter who is aged 16 years and studying in Class 9. He stated that the accused had come to his house and told him as to whether he will send his daughter with him for volleyball coaching to Guwahati and that there will be a selection for girls team at the stadium in Guwahati. He stated that before the said proposal, the accused had taken volleyball coaching of his daughter for about three months along with other girls.

**30.** He stated that upon being asked by him about coaching at Guwahati, the accused answered in the affirmative and told that other girls will also go with his daughter in a rented vehicle. Accordingly, the PW-2 allowed his daughter to go with him and on the day of the incident, the appellant came to their house in the morning and took his daughter by a Pulsar bike and they were supposed to return by the evening, but they did not return. He further testified that on the next day also when they did not return, he came to the Morigaon police station and lodged the ejahar, and after three days, police recovered his daughter at Lanka and upon being informed by police, he went to Morigaon PS and found his daughter there. He stated that on being asked, his daughter told him that she stayed with the appellant at Guwahati for one day and thereafter went to Lanka by train and stayed there for three days and that his daughter told him that the accused committed rape upon her during their stay together at Lanka for three days in a rented room.

**31.** In cross-examination, he stated that the accused had taken

his daughter alone to Guwahati by falsely telling him that he will take other girls also. PW-2 denied that his daughter was aged more than 18 years at the time of the incident. He denied that the accused did not induce his daughter to go with him to Guwahati and denied that the accused did not commit any bad act with her at Lanka.

**32.** The mother of the prosecutrix adduced evidence as PW-3 and she stated that the victim is her daughter and she is aged 15 years. She also stated about the accused being a volleyball coach of her daughter and that on the day of the incident, her daughter went with the accused to play at Guwahati, but as there was a delay of two days in returning home of her daughter, the case was lodged. She stated that after her daughter came home, she told her that she stayed in the house of relative of the accused at Guwahati with one girl there and that she did not tell anything else. In cross-examination, she stated that on the day of the incident, her daughter went by asking her. She also stated in cross-examination that after recovery, her daughter told her that she was kept in the house of relative of the accused at Guwahati. She stated that her daughter stayed in the house at Guwahati out of her will and stayed there as she thought that her brother will scold her.

**33.** It is interesting to note that in the testimony of the mother of the prosecutrix as PW-3, no incident of sexual assault or rape emerges. By the standards of normal behavior, especially in our society, usually a girl would be more comfortable to tell about such matters to her mother rather than her father. Herein though her father has testified about being told about the sexual act of the accused on his daughter; her mother has not stated anything on those lines. Moreover, the

testimony of PW-3, mother of the prosecutrix, in her cross-examination dilutes the testimony of her husband PW-2 inasmuch as she stated that the victim girl stayed in Guwahati in the house out of her own will.

**34.** PW-4 is the brother of the prosecutrix and he has stated about the victim girl being aged 14 years at the time of the incident. He has also stated on similar lines about his sister taking volleyball coaching from the appellant and going to Guwahati, saying that there was a volleyball trial. As there was delay in her returning, his father lodged the case. On the day of the incident, he is stated to have telephoned her and she told that there was no play and then he asked her to come back. However, she did not return home and as there was a delay in such returning, the case was lodged. PW-4 stated after returning, his sister told him that she stayed at Sonoka and did not tell anything else. He also stated in cross-examination that he scolded his sister over the phone for not returning. Therefore, we find that from the testimony of PW-4 also, narration regarding the incident of rape or sexual assault does not emerge.

**35.** Now going back to the testimony of PW-5, the IO, we find that she has stated about the steps of investigation and upon completion of investigation, submitting charge sheet against the accused under section 365/376 (3) IPC, read with Section 6 of the POCSO Act. She proved as Exhibit P-3, the extract copy of G.D.E. No. 787, dated 25.07.2023. She also proved as Exhibit-P4, the ejahar and as Exhibit-P4(1), the signature of then O.C. Jyoti Prasad Handique and her signature as Exhibit-P4(2). She proved the printed form of the FIR as

Exhibit-P5, and signature of Inspector Jyoti Prasad Handique as Exhibit-P5(1). She proved the sketch map as Exhibit-P6 and her signature thereon as Exhibit-P6(1).

**36.** She proved the arrest memo of the accused as Exhibit-P9 and her signature thereon as Exhibit-P9(1). She proved the charge sheet as Exhibit-P10 and her signature thereon as Exhibit-P10(1). In cross-examination, she stated about following proper procedure of investigation. She stated that the victim told her that she was in Guwahati with the accused. The statement under Section 161 Cr.PC was recorded by her twice, once before her statement under Section 164 CrPC was recorded and once more after recording of the statement before the Magistrate. Upon being asked as to where they went, the girl did not cooperate as stated by PW-5, the I.O.

**37.** On behalf of the defense, two witnesses adduced evidence. DW-1 adduced evidence with regard to birth certificate of the victim. The learned Trial court found the birth certificate to be admissible and relied upon the same to arrive at the finding that the victim was a minor at the time of the incident. However, this Court by order dated 15.12.2025 found a fatal infirmity in the birth certificate in as much as the year of registration was found to be 2011 and the date of issue was indicated as of 2009. Therefore, an Ossification Test was directed and after the said test was conducted, the Ossification report returned a finding that at the time of examination of the girl, she was above 18 years and less than 20 years.

**38.** DW-2 is one Niroda Saikia who testified that she knew the appellant through her son. She testified that one day in the evening the

appellant came to their house at Sonoka under the jurisdiction of Mayong police station, saying that he had come from Guwahati and stayed in their house along with one girl. DW-2 stated that on being asked as to why the girl had come with the accused, the girl did not reply anything and only gave a smile. It is stated that the said incident took place on 24<sup>th</sup> July. It is stated that they stayed in their house for one night and the girl slept with her daughter. In the morning they went away. In cross-examination, DW-2 has expressed ignorance about other things regarding the girl and the accused.

**39.** Upon carefully perusing the prosecution evidence, especially the testimony of the girl, including her statement recorded before Magistrate, the following points may be noticed –

- (i) In her statement before learned JMFC, Morigaon during investigation, she has stated about the appellant establishing physical relationship with her, despite her refusal and that was at Guwahati. Though she stated about staying in a rented place at Lanka for two days, she has not mentioned about any sexual assault or rape by the appellant at Lanka in such statement before the Magistrate.
- (ii) In her testimony during the trial as PW-1, she has not stated about physical relationship at Guwahati and rather stated that on the same day in the night, they moved from Guwahati to Lanka. She stated that when they stayed for three days in the rented place at Lanka, on each day, the appellant committed bad act with her by inserting his penis

inside her vagina. However, in the same breath, she states that during their stay in Lanka both of them took food in nearby hotel and used to go there three times in a day.

**40.** This part of the testimony is surprising and dilutes her testimony about sexual assault or rape in the earlier part of her deposition. Further, though her father as PW-2 has stated about being reported by her about rape or sexual assault, but her mother importantly has not stated anything on those lines. Her brother also testified about not being reported about the incident by her sister.

**41.** On the testimony of PW-6, the M.O., we find that regarding the case history noted from the victim, it was stated about love affair with the appellant few months back and that she ran away with him on 24.07.2023 and stayed together and they had physical relationship there and that he is a married person. There was no history of assault. This aspect of the testimony of PW-6 also dilutes that part of the testimony of PW-1, the victim, about being subjected to rape or sexual assault. DW-2 in whose house at Sonoka under the jurisdiction of Mayong police station, the appellant and the victim are stated to have stayed for a night, has testified about the victim replying with just a smile when DW-2 asked her as to why she had come with the appellant. From her cross-examination also it emerges that when the accused took her to various places at Guwahati and during their stay at Lanka and also while going by train - though she met many persons, but she did not disclose to any of the persons about the incident. In any case it has emerged from the testimony of PW-2, the father of the victim and informant that the accused had taken the girl with the permission of her father.

**42.** In his examination under Section 313 CrPC, to the general question, being Q.No. 83 with regard to the incident - the appellant has stated that when they were returning from Guwahati, she refused to go and told that her brother would assault her if she goes home and that being compelled, he took her to Sonoka. He stated that she had refused to come home and but she maintained contact with her brother over phone. He further stated that one day on the pretext of going to shopping mall, he brought her to the police station.

**43.** Upon perusing the entire evidence on record, including the testimony of the victim, we find that the prosecution evidence suffers from infirmities as enumerated above. More importantly and especially, the testimony of the victim suffers from some inconsistencies and infirmities. The most important infirmity that we find in the testimony is that when they were at Lanka though the appellant is stated to have committed rape upon her on all the three days - every day, they went out to the restaurant to have food and they did so three times a day. This is contrary to normal human conduct and also renders the implicating part of her testimony not fully trustworthy.

**44.** Thus, on the basis of the evidence on record, we come to the considered opinion that the testimony of the victim prosecutrix in the instant case fails to pass the test of a sterling witness. Despite some other infirmities also in the prosecution case as discussed above - since the prosecution case primarily relies on the oral testimony of the victim, due to the incomplete nature of the medical evidence - therefore, due to the infirmities in such testimony of the prosecutrix and it not being of a sterling quality, it would not be safe to base a conviction thereupon

solely and primarily. With regard to the offence of kidnapping the girl, it has emerged from the testimony of the father of the victim that the appellant took permission in her home before taking her and therefore the element of kidnapping would not come.

**45.** The learned counsel for the appellant has contended in the context of the finding of the Ossification report that the margin of error of two years should be applied to the age bracket of 18 to 20 years indicated as the present age of the victim girl, and further contended that since it is the question of the age of the girl therefore, such margin of error should be applied to the upper end of the age bracket i.e., 20 years. In support of the said contention, the learned counsel has referred to the decision of **Jaya Mala** (supra), **Rajak Mohammad** (supra), **Mukarrab** (supra). However, we do not deem it necessary to discuss the said decisions in detail as the age of the victim girl has become secondary due to the fatal infirmities found in the testimony of the victim girl.

**46.** In support of his contentions that the testimony of the victim girl should not be relied upon, the learned counsel for the appellant has also referred to the decision of **Nirmal Premkumar** (supra) where the Hon'ble Apex Court, after referring to the decision in **Rai Sandeep** (supra) has discussed the attributes of the sterling witness. The relevant para 15 of **Nirmal Premkumar** (supra) may be reproduced herein below:

*“15. What flows from the aforesaid decisions is that in cases where witnesses are neither wholly reliable nor wholly unreliable, the Court should strive to find out the true genesis of the incident. The Court can rely on the victim as a "sterling witness" without further corroboration, but the quality*

*and credibility must be exceptionally high. The statement of the prosecutrix ought to be consistent from the beginning to the end (minor inconsistencies excepted), from the initial statement to the oral testimony, without creating any doubt qua the prosecution's case. While a victim's testimony is usually enough for sexual offence cases, an unreliable or insufficient account from the prosecutrix, marked by identified flaws and gaps, could make it difficult for a conviction to be recorded."*

**47.** The prosecution has referred to the decision of **Manoj** (supra) in support of its contention that the result of Ossification Test or such medical examination should not be accepted mechanically and that the finding in the instant case still does not prove that the victim is a major.

**48.** However, as already mentioned above, this aspect need not be discussed in detail as the issue of age has been found to have become secondary in our discussion due to the fatal infirmities in the testimony of the victim on which the conviction by the learned Trial court had largely proceeded on.

**49.** Further, since the aspect of sexual intercourse or rape has not been convincingly proved due to the infirmities in the testimony of the prosecutrix - therefore, the aspect of illicit intercourse as a necessary ingredient of Section 366 IPC would also not stand. Thus, we come to the considered finding that the conviction of the appellant cannot be sustained under the penal provisions of IPC and POCSO Act under which he has been convicted nor can he be convicted for any other cognate minor offences.

**50.** Consequently, this criminal appeal **succeeds** and the impugned Judgment and Order dated 22.08.2024 passed by the learned Additional Sessions Judge cum Special Judge, POCSO, Morigaon in POCSO Case No. 285/2023 **is set aside**.

**51.** The appellant shall be set at liberty forthwith, if not wanted in any other case.

**52.** The criminal appeal stands disposed of. Send back the TCR.

**JUDGE**

**JUDGE**

**Comparing Assistant**