GAHC020000382023 2026:GAU-NL:542

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

Case No. : CRL.A(J)/1/2023

SHRI. M.TANGSOI
SON OF LATE MONGTHAM,
RESIDENT OF OLD MEDICAL SECTOR - A,
DISTRICT - TUENSANG, NAGALAND

VERSUS

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

2:MS. TABITHA

REPRESENTED BY HER MOTHER SMTI. ASANG

WIFE OF SHAMO
R/O OLD MEDICAL - A
DISTRICT - TUENSANG
NAGALAN

Advocate for the Petitioner : LIMAWAPANG, PFOSEKHO PFOTTE

Advocate for the Respondent : P.P, NAGALAND,

BEFORE
HON'BLE MR. JUSTICE N. UNNI KRISHNAN NAIR
HON'BLE MRS. JUSTICE YARENJUNGLA LONGKUMER

Advocate for the Petitioner : Mr. Limawapang, LAC

Advocate for the Respondent No.1 : Mr. V. Zhimomi, P.P

JUDGMENT & ORDER (ORAL)

07.10.2026

(Y.Longkumer,J)

The present appeal is preferred against the judgment dated 22/11/2022 and the sentencing order dated 23/11/2022 passed by the learned Principal Sessions Judge-cum-Special Judge, POCSO, Tuensang, Nagaland in G.R Case No. 37/2017 corresponding to Tuensang Women P.S Case No. 4/2019.

2. Heard the learned Legal Aid Counsel, Mr. Limawapang, for the appellant. Also heard Mr. V. Zhimomi, learned Public Prosecutor for the State respondent.

3. The facts leading to the filing of the instant appeal is that on 10/07/2019, a suo motu FIR was received at the Tuensang P.S stating that at around 1800 hours, a rape accused was apprehended at SC Colony, Tuensang. Thereafter, the appellant was arrested and the Tuensang P.S Case No. 4/2019 under Section 376 AB IPC read with Section 4 of the POCSO Act, 2012 was registered against him. Upon completion of the investigation, the I.O filed the charge sheet No. 3/2019 dated 18/07/2019 against the appellant under Section 376 AB/323/342 IPC read with Section 4 of the POCSO Act.

4. The learned Special Judge, POCSO, Tuensang, after hearing the prosecution and the defense counsel on the consideration of charge framed charge on 27/09/2019 against the appellant under Section 376 (2) (f)/342 IPC and Section 6 of the POCSO Act. The appellant pleaded not guilty, and the case proceeded for trial.

5. Thereafter, evidence was adduced by the prosecution by examining eight witnesses, and the defense examined one witness. The accused/appellant was examined under Section 313 CrPC, and after hearing the parties, the learned Trial Court by judgment dated 22/11/2022 convicted the appellant under Section 6 of the POCSO Act with Section 376AB of the IPC. Thereafter, by order dated 23/11/2022, the appellant was sentenced to undergo rigorous imprisonment for a period of 20 years and to pay a fine of Rs. 10,000/-, with a default clause to undergo further simple imprisonment for a period of 6 months. The period of detention already undergone during the investigation and the trial, which was 3 months 7 days, was directed to be set off against the period of sentence. Being aggrieved the appellant has filed the instant appeal.

6. The learned Legal Aid counsel appearing for the appellant submits that there is contradiction and inconsistencies in the testimony of the prosecution witnesses. However, the learned court below has not appreciated the evidence from the proper perspective and came to the conclusion that the prosecution has proved beyond all reasonable doubt that the accused had committed aggravated penetrative sexual assault upon the victim punishable under Section 6 of the POCSO Act.

7. It is contended that the confession made by the accused/appellant before the parents of the victim or the Police cannot be admissible in evidence as it was extracted through force and coercion, which is corroborated by the injuries sustained by the appellant and proved by the medical reports and by the deposition of PW-1. Therefore, the conviction arrived at by the court below based on the extra-judicial confession of the appellant is bad in law.

8. Another submission of the appellant is that the medical report dated 10/07/2019 as well as the testimony of the Medical Officer/PW-2, clearly proved that there was no bleeding or semen on the body of the victim. The PW-2 deposed that the tear of hymen in the victim is not a conclusive proof of sexual intercourse. However, the learned court below, by ignoring this material evidence, came to a conclusion that the accused had committed aggravated penetrative sexual assault upon the victim without any substantial evidence to prove the charges.

9. It is the submission of the learned legal aid counsel that in order to establish the alleged offense of aggravated penetrative sexual assault upon the victim who was only 7 years old while the accused was a grown man, the presence of blood or semen on the private parts of the victim is a necessity. Moreover, if the hymen is torn as alleged, there should have been bleeding in the private parts of the victim as she was examined by the Doctor on the same day of the incident. In fact, the learned court below has discarded the FSL report dated 28/08/2019 without any valid reason solely on the ground that the PW-5 in his cross-examination had deposed that the seized articles were not shown to him. The FSL report plays a vital role in a criminal trial, but the learned Trial

Court simply observed that the investigating officer was not diligent in ascertaining the facts before seizing the articles for the purpose of conducting the scientific test and thereupon discarded the FSL report dated 28/08/2019 whereas the FSL report shows that there was no blood or semen in the underwear of the victim.

10. It is further submitted by the learned counsel for the appellant that Section 35 of the POCSO Act prescribes that the evidence of the victim should be recorded within a period of 30 days after the Special Court takes cognizance of the offense. However, in the instant case, the charge was framed against the accused on 27/09/2019, whereas the statement of the victim was recorded by the trial Court only on 26/05/2022. The evidence adduced by the victim after a gap of nearly 3 years cannot be accepted in the eye of law as there is a strong possibility of tutoring. However, the learned Trial Court passed the impugned judgment dated 22/11/2022 based solely on the evidence of the victim and the PW-6 which was recorded in violation of the mandatory provision of law. Moreover, the evidence of the victim/PW-8 and PW-6 does not in any way prove that there was aggravated penetrative sexual assault.

11. The learned counsel for the appellant also submits that the appellant had examined the nephew of the accused as DW1. The DW 1 had deposed that he was also present inside the shop at the time of the incident. In his cross-examination, the DW 1 deposed that the accused sleeps in the bedroom cum store room which is adjacent to the shop and the partition is partially made with glass. He stated that the victim and the accused were inside the bedroom cum store for about 1 to 2 minutes and he was present in the shop. When the victim and the accused came out

he did not see the victim crying. He also stated that when he looked inside the room through the glass where the victim and the accused was inside he saw the accused cutting the jaggery and the victim was standing beside him and he did not hear any sound or commotion from inside the bedroom when the victim and accused were inside the room. Inspite of the clear and unambiguous deposition of DW1, the learned trial Court totally disregarded the evidence of DW1.

12. In view of the above stated grounds, the learned counsel for the appellant submits that the prosecution has not been able to prove the case against the appellant beyond reasonable doubt and therefore the impugned judgment dated 22/11/2022 and the sentence order dated 23/11/2022 are perverse and illegal and deserves to be set aside. The learned counsel also submitted that the learned Trial Court could not have convicted the appellant for a period of 20 years under Section 6 of the POCSO Act inasmuch as the alleged incident took place on 10.7.2019 whereas the amendment of the POCSO Act came into force only on 16.8.2019 and before the amendment, Section 6 prescribed punishment of rigorous imprisonment of not less than 10 years extendable to life imprisonment for penetrative aggravated sexual assault. Therefore, since the alleged offence was committed before 16.08.2019, the enhanced punishment could not have been retrospectively applied.

13. Per contra, the learned P.P. Mr. V. Zhimomi appearing for the State respondents submits that the testimony of PW 2/Medical Officer and the medical report which shows that was tearing of the hymen clearly proves the commission of penetrative assault. He submits that the victim being only 7 years old at the time of the incident, it was extremely rare for

such a young child to have a torn hymen. The learned P.P. also submits that the deposition of PW 6 and PW 8 has proved that the accused after sending the other two girls away to the kitchen to prepare black tea forcefully pulled the victim inside the room, pulled down her half-pant and committed rape on the victim. It was only when PW 6 came back from the kitchen and saw the victim and the accused from the partially open door, that the accused released the victim from his clutches. The testimony of the eye witness PW 6 has proved beyond any doubt that the accused had committed penetrative sexual assault.

14. The learned P.P. further submits that the evidence of PW 6 and PW 8 alone are sufficient to prove the case beyond reasonable doubt against the appellant as their testimony is credible and unblemished and can be relied upon. The learned P.P. further submits that the finding of the learned trial Court is without any perversity and deserves to be upheld.

15. We have given due consideration to the submissions made by the learned counsel for the parties and perused the trial Court records specifically the deposition of the witness.

16. In the instant case, it is significant to note that the alleged incident occurred on 10/07/2019, however, it was only on 11/10/2021, upon assuming charge of the Court that the Presiding officer found that the name of the victim was not included in the list of prosecution witness. Therefore, her name was subsequently added and after several summons, her presence was secured and her deposition could be recorded by the Court only on 26/05/2022, thereby a period of nearly 3 years have lapsed since the occurrence of the incident.

17. The PW 1 is the complainant and he deposed that upon receiving the information on 10.07.2019 regarding the incident, they apprehended the accused person who had already been apprehended by the public and lodged the suo moto FIR. In his cross-examination he deposed that when he reached the place of occurrence, the condition of the accused was deplorable and he could hardly walk on his own. After completing the formalities, the accused was taken to hospital.

18. PW 2 is the medical Officer who examined the victim. He deposed that he was the Medical Officer who examined the victim. He stated that the victim was a minor and was brought by her mother and relatives. He examined the victim as per the protocol and found that there was a tear in the upper part of the hymen but there were no scratch marks and no visible semen on the body. He deposed that it is very uncommon for a 6 years old girl to have torn hymen and it could happen due to penetration or strenuous activities. On being cross examined, PW 2 stated that tear of hymen is not a conclusive proof of sexual intercourse and there is possibility of torn hymen in a minor girl through other physical activities. He reiterated in his cross-examination that during the course of medical examination, he did not come across any blood or semen on the body of the victim or the accused person. He also stated that he had examined the victim on the same day of the incident and it is not possible that the evidence would disappear within some few hours and that when the hymen is torn for the first time there is every possibility of bleeding and there is also every possibility to have scratch marks on the body of the minor in the event of forceful sexual activity.

19. PW 3 is the arrest witness who stated that the accused person was arrested on 10/07/2019 and in his cross-examination he deposed that the physical condition of the accused person was not good at the time of arrest and therefore, he was admitted to hospital for treatment.

20. PW 4 is the mother of the victim. She deposed that after hearing the information about the incident she along with her sister and children went to the residence of the accused and asked him as to whether the information received was correct. At first the accused denied everything. However, subsequently when she insisted further, he replied that he has merely used his finger.

21. PW 6 is the eye witness in the instant case. She deposed that she is about 11 years old and on 10/07/2019 she along with her sister and the victim went to the shop of the accused. When they reached the shop, the accused called them inside the shop and told them he will treat them with jaggery and black tea. When they went inside the shop, the accused told her and her sister to go to the kitchen to prepare black tea. When they asked him to let the victim also go to the kitchen, he said that only she and her sister should go to the kitchen. When she and her sister went to the kitchen, the son of the accused whose name is Hanong told her to go up to the shop and when she went to the shop, the accused was not inside the shop but in a room and she saw the accused beating the victim on the buttock and gagging the victim telling her not to shout. She also saw the victim in a lying down position on a bed type like platform and the accused was on top of her with his pants zipper open. She also saw the victim was sobbing and told her it is hurting and after seeing her, the accused left the victim and warned her and the victim not to tell to their

parents about what happened. In her cross-examination, PW 6 deposed that she could not say whether the victim was crying because she was beaten by the accused or because of some reasons and when she returned to the shop from the kitchen she saw the accused standing and the victim was lying down.

22. PW 7 is the I.O. He deposed that after he took up the case for investigation, the accused as well as the victim were taken for medical examination and he had recorded the statement of the minor victim. He also recorded the statement of the minor eyewitness and the statement of the victim's mother. He also examined the accused during the investigation and the accused stated before him that he merely played with his fingers. However, on further interrogation, the accused admitted that he had sexual intercourse with the victim. He further recorded the confessional statement of the accused under Section 164 of the CrPC. During the investigation, the victim stated before him that her half-pant was removed and the accused committed rape on her. Her statement was also corroborated by the statement of the eyewitness/PW6. After completion of the investigation, he filed the charge sheet against the accused for offense under Section 376 AB IPC read with Section 6 of the POCSO Act.

23. The victim was examined as PW-8 on 26/5/2022. She deposed that on the day of the incident, she went to the shop along with PW6 and another girl to buy mama. She stated that the owner of the shop is the accused and when they reached the shop, the accused asked her to come inside the room. When she refused to go inside the room the accused forcibly pulled her and took her inside the room. During that time, the

other girl and PW-6 were told by the accused to go inside the kitchen to prepare black tea. She also wanted to go to the kitchen along with the other girls, but she was not allowed by the accused and she was forced to stay. Both the other two girls went inside the kitchen, and she was left alone with the accused. She deposed that the accused took her inside the room, and he forcibly opened her pants and shirt. The room was partially locked, so PW-6 came and witnessed the incident. The room where the incident took place is adjacent to the shop. When she tried to scream, the accused muffled her with his hand. And when PW-6 came, the accused released her from his clutches. There was a bed in the room, and the accused had laid her down on the bed. When she was set free by the accused, she ran back home and narrated the incident to her aunty, who is her mother's elder sister and her aunty informed her mother. She identified the accused, who was shown to her through video conference during her deposition. In her cross-examination, the victim / PW-8 deposed that the accused lifted her legs and committed rape, and that the accused also touched her on her body and private parts. She deposed that there were no other customers in the shop, and she could not scream, though she tried many times, as the accused muffled her with his hand. She deposed that the accused committed the act after forcibly taking her inside the room and after the incident, she had pain, so she was given medicine.

24. DW-1 is the nephew of the Accused. He deposed that on the date of the alleged incident, three girls came to the shop when he was also in the shop. At that time, the accused asked the girls whether they wanted to have jaggery, and they happily agreed. So, the Accused sent

his younger brother to the kitchen to prepare red tea. And since there were six of them, the accused sent the other two girls to assist Hanong. Thereafter, the accused went to the room to bring the jaggery and at that time, the victim followed the accused to the room. When the accused was coming out with the jaggery from the room, his younger brother Hanong and the two girls also came to the shop with the red tea. Thereafter, the accused came out with the jaggery, and the eldest among the girls took the entire jaggery and ran away. In his cross-examination, he stated that the accused sleeps in the bedroom-cum-store which is next to the shop, and the partition is made partially with glass. He also stated that the kitchen was located below the shop in a separate house, and that the victim and the accused were inside the bedroom-cum-store for about 1 to 2 minutes, and he was in the shop. When the victim and the accused came out from the room, he did not notice the victim crying. He also deposed that he was arranging the goods in the shop when the alleged incident took place, and when he looked inside the room through the glass, he saw the accused cutting the jaggery and the victim was standing beside him. In the re-examination, the DW-1 stated that he was in the shop when the alleged incident took place, but he did not hear any sound or commotion from inside the bedroom-cum-store when the victim and the accused were inside the room.

25. From the materials available on record we have observed that the prosecution case, in substance, is that the victim, a child aged about 7 years at the time of the occurrence, was taken by the appellant into a room where the appellant allegedly removed her clothes and committed rape upon her. The prosecution case is further supported by the evidence

of PW-6, another child witness who stated that she saw the victim lying on the bed with the appellant on top of her and his pant zipper open. According to PW-6 upon seeing her, the accused/appellant immediately released the victim. The Public Prosecutor has also stated that the medical evidence showed that the hymen of the victim was torn and this evidence corroborates with the oral evidence of PW-6 and PW-8.

26. The victim was about 7 years at the time of the alleged occurrence and about 10 years when her evidence was recorded which means that the victim was examined after nearly 3 years from the date of the incident. It is also a matter of concern that before recording her evidence and also before recording the evidence of PW-6 who was about 11 yrs, the learned Trial Court did not conduct any preliminary examination to ascertain their competency to understand the questions and to give rational answers. This omission greatly affects the credibility of the child witnesses PW-6 and the victim/PW-8 and leads to doubt in the mind of the court. Section 118 of the Indian Evidence Act requires the Court to ascertain whether a witness is capable of understanding the questions put to him or her and of giving rational answers. The Supreme Court in the case of ***Pradeep vs. State of Haryana,*** reported in **(*2023) 19 SCC 221,*** held as under:

"10. We have carefully considered the submissions. The fate of the case depends on the testimony of the minor witness Ajay (PW1). Under Section 118 of the Evidence Act, 1872 (for short, "the Evidence Act"), a child witness is competent to depose unless the Court considers that he is prevented from understanding the questions put to him, or from giving rational answers by the reason of his tender age. As regards the administration of oath to a child witness, Section 4 of the Oaths Act, 1969 (for short "Oaths Act") is relevant. Section 4 reads thus:

"4. Oaths or affirmations to be made by witnesses, interpreters and jurors.—(1) Oaths or affirmations shall be made by the following persons, namely:—

(a) all witnesses, that is to say, all persons who may lawfully be

examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;

(b) interpreters of questions put to, and evidence given by, witnesses; and

(c) jurors:

Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

11. Under the proviso to sub-Section (1) of Section 4, it is laid down that in case of a child witness under 12 years of age, unless satisfaction as required by the said proviso is recorded, an oath cannot be administered to the child witness. In this case, in the deposition of PW1 Ajay, it is mentioned that his age was 12 years at the time of the recording of evidence. Therefore, the proviso to Section 4 of the Oaths Act will not apply in this case. However, in view of the requirement of Section 118 of the Evidence Act, the learned Trial Judge was under a duty to record his opinion that the child is able to understand the questions put to him and that he is able to give rational answers to the questions put to him. The Trial Judge must also record his opinion that the child witness understands the duty of speaking the truth and

state why he is of the opinion that the child understands the duty of speaking the truth.

12. *It is a well settled principle that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The Court must make careful scrutiny of the evidence of a child witness. The Court must apply its mind to the question whether there is a possibility of the child witness being tutored. Therefore, scrutiny of the evidence of a child witness is required to be made by the Court with care and caution.*

13. Before recording evidence of a minor, it is the duty of a Judicial Officer to ask preliminary questions to him with a view to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. Therefore, the role of the Judge who records the evidence is very crucial. He has to make a proper preliminary examination of the minor by putting appropriate questions to ascertain whether the minor is capable of understanding the questions put to him and is able to give rational answers. ***It is advisable to record the preliminary questions and answers so that the Appellate Court can go into the correctness of the opinion of the Trial Court."***

27. The Hon'ble Apex Court in the above judgment has clearly emphasized the necessity of a preliminary assessment in the case of a child witness. We have seen from the records that no such preliminary assessment has been done in the case of PW6 and PW8. At the same time, the absence of such preliminary examination does not by itself render the testimony of the child inadmissible. The Appellate Court is bound to examine the substantial evidence and the manner in which the

child responded to questions in examination and cross-examination to determine whether the child was in fact capable of understanding the questions and giving rational answers.

28. In the present case, the evidence of the victim/PW8 has been examined in its entirety, particularly with regard to the manner in which she has described the occurrence and the nature of the act attributed to the appellant. The victim stated that the appellant took her inside the room, forcibly opened her pants and shirt, and raped her. She further stated that the room was partially locked and that the other child witness/PW6 came there, whereupon the appellant released her. It is significant however, that the victim's substantive evidence does not contain a clear factual description of the act of penetration. The word "rape" has been used by her, but the evidence does not satisfactorily establish that the child understood the precise meaning of the expression or that by using the expression she was describing a specific act constituting penetration as defined in Section 3 of the POCSO Act. This aspect is most significant because the victim was only 7 years old at the time of the occurrence, no preliminary competency examination was conducted before her evidence was recorded, and the medical evidence does not independently establish penetration.

29. The PW-6 stated that she saw the victim lying on the bed and the appellant on top of her with his pant zipper open. She further stated that when the appellant saw her, he immediately released the victim. The evidence of PW-6 lends substantial support to the prosecution case that the appellant had subjected the victim to sexual physical conduct. However, the witness did not state that she actually saw penetration. Her

evidence, therefore, establishes the surrounding circumstances and physical conduct of the appellant, but does not by itself establish the essential fact of penetration.

30. As far as the medical evidence is concerned, it has been proved that the medical examination of the victim was conducted on the same day of the incident. The Medical officer found that the hymen was torn. At the same time, there was no bleeding and no semen was detected in the private parts of the victim. It is true that the absence of semen or bleeding cannot by itself rule out penetration. Equally, the finding of a torn hymen by itself cannot establish that penetration had occurred during the incident in question. The Medical Officer/PW2 in his cross-examination had stated that there is a possibility to tear the hymen in a minor girl through some other physical activities. He deposed that when the hymen is broken for the first time, there is every possibility of bleeding, and that there is every possibility to have scratch marks on the body of the minor in the event of forceful sexual activity. The medical evidence must, therefore, be assessed together with the oral evidence. A medical examination report and the evidence of the doctor only serve as corroborative or expert evidence but not as direct proof of the crime itself. Neither oral evidence nor medical evidence outweighs each other. But the court must weigh both the credibility, consistency and demeanor of the victim’s oral testimony alongside any medical, forensic or circumstantial evidence on a case by case basis.

31. In the instant case we are of the view that the medical evidence does not furnish independent corroboration of penetration. More importantly, PW-6 did not see penetration, and the victim's evidence,

when examined in its factual content rather than merely by reference to the expression "rape", does not prove the precise act of penetration beyond reasonable doubt.

32. Section 3 of the POCSO Act defines penetrative sexual assault and requires proof of one of the acts of penetration specified therein. The fact that the appellant was found on top of the victim with his trouser zipper open and that he had forcibly removed her clothes undoubtedly constitutes highly incriminating evidence of sexual conduct. However, this Court must distinguish between proof of sexual assault and proof of the particular additional ingredient of penetration.

33. Upon a cumulative assessment of the evidence, we are of the view that the prosecution has established beyond reasonable doubt that the appellant subjected the victim to sexual physical contact with sexual intent. However, the prosecution has not established the fact of penetration with the degree of certainty required for sustaining the conviction for aggravated penetrative sexual assault, punishable under Section 6 of the POCSO Act. The benefit of doubt arising specifically in relation to penetration must, therefore, go to the appellant.

34. Section 7 of the POCSO Act provides that a person commits sexual assault when with sexual intent, he touches the vagina, penis, anus, or breast of a child, or makes the child touch such person or any other person or does any other act with sexual intent which involves physical contact without penetration.

35. The evidence on record, particularly the testimony of the victim (PW-8) and PW-6, establishes that the appellant had physical contact with the victim with sexual intent. The evidence, therefore,

satisfies the ingredients of Section 7 of the POCSO Act, notwithstanding that penetration has not been proved beyond reasonable doubt. With regard to the charge under Section 376AB IPC, we have already come to a finding that penetration has not been proved beyond reasonable doubt in the instant case. And therefore, the appellant is discharged from the liabilities of the charge under Section 376AB IPC.

36. As a result, the conviction under Section 6 of the POCSO Act relating to aggravated penetrative sexual assault, cannot be sustained. However, the proved facts constitute the offence punishable under Section 8 of the POCSO Act.

37. In this regard, Section 222 of the CrPC permits conviction for a minor offence, notwithstanding that the accused was charged with a major offence, where the ingredients of the minor offence are proved. In the present case, the factual allegations constituting the offence of sexual assault were contained in the prosecution case, and the appellant had full opportunity to cross-examine the witnesses on those allegations. No prejudice will be caused to the appellant by recording a conviction for the lesser offence. Section 8 of the POCSO Act provides for punishment for sexual assault with imprisonment of either description for a term which shall not be less than three years, but which may extend to five years, and also with fine.

38. Having regard to the above findings, the conviction of the appellant is hereby altered to the lesser offence, and the appellant is sentenced to undergo rigorous imprisonment for five years. The fine of Rs. 10,000 imposed by the learned Trial Court is not interfered with.

Further, the default clause of simple imprisonment for six months is also not interfered with.

39. The appeal is partly allowed. The conviction of the appellant under Section 6 of the POCSO Act and Section 376 AB IPC is set aside. The appellant is instead convicted for the offense under Section 7 punishable under Section 8 of the POCSO Act.

40. The appellant has already undergone approximately 7(seven) years of imprisonment. The period of detention undergone by him shall be set off against the sentence under Section 428 of the CrPC. Since the period already undergone exceeds the substantive sentence now imposed, the appellant shall be released forthwith, if his custody is not required in connection with any other case. The judgment of conviction and order of sentence passed by the learned Special Judge, POCSO, stands modified to the above extent.

41. The appeal is disposed.

42. The Registry shall send back the trial court records.

JUDGE **JUDGE**

Comparing Assistant