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

Case No. : Crl.A./224/2025

DIPAN GHOSH ALIAS DIPON GHOSH
S/O - LT PUTUL GHOSH
R/O - KANAIBAZAR
P.S. - PATHARKANDI
DIST - SRIBHUMI

VERSUS

THE STATE OF ASSAM
REPRESENTED BY PP, ASSAM

Advocate for the appellant : Mr. A. Ahmed, Adv.

Advocate for the respondents : Mr. R.R. Kaushik, Addl. P.P., Assam,
Mr. J. Islam, Adv (R-2)

:::BEFORE:::
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MR. JUSTICE SANJEEV KUMAR SHARMA

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Date of hearing and judgement : 05/11/2026

JUDGMENT & ORDER (ORAL)

(M. Zothankhuma, J)

1. Heard Mr. A. Ahmed, learned counsel for the appellant. Also heard Mr. R.R. Kaushik, learned APP for the State and Mr. J. Islam, learned counsel for the respondent no. 2.

2. This appeal has been filed against the impugned judgment dated 26-03-2025 passed by the learned Additional Sessions Judge (FTC), Karimganj in Sessions Case No. 32/2016, arising out of Patharkandi PS Case No. 180/2013, by which the appellant has been convicted under Section 376 IPC read with Section 6 of the POCSO Act. Accordingly, he was sentenced to undergo rigorous imprisonment for 10 years with a fine of ₹10,000/-, in default, simple imprisonment for one year under Section 376 IPC. He was also sentenced to undergo rigorous imprisonment for 20 years with a fine of ₹20,000/-, in default, simple imprisonment for two years under Section 6 of the POCSO Act.

3. The brief facts of the case is that a complaint was submitted by the informant (PW-4) to the Court of the Chief Judicial Magistrate, Karimganj on 12-09-2013 stating that her 16 year old daughter (victim) had been frequently visiting the house of the appellant. On telling the accused No. 3 about the same, the accused no. 3 told PW-4 that she would look after her daughter (victim). PW-4 then states in the FIR that on 22-02-2013, the appellant raped her daughter by confining her in his house. When her daughter raised a protest, accused Nos. 2 and 3 made a promise that they would get her daughter married to the appellant. Thereafter, with the help of accused No. 2 and 3, the appellant and her victim daughter developed a love affair and established physical relations against the will of the daughter and raped her on 12-04-2013 and 14-05-2013. On her daughter informing PW-4 that she was pregnant, advice was given to her daughter to terminate the pregnancy. However, as a promise had been made to marry her

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daughter, PW-4 spoke to the appellant and the other accused persons about the said promise. However, the appellant refused to marry her victim daughter. On 01-09-2013, her victim daughter went to the house of the appellant and asked him to marry her, but he scolded her and the other accused persons told her victim daughter that the appellant would not marry her. In view of the above, the FIR had been filed to take action against the appellant.

4. The Investigating Officer (PW-11) started the investigation and on finding a *prima facie* case under Sections 342/376/417 IPC established against the appellant only, charge sheet was filed.

5. The learned Trial Court thereafter framed charge on 16-02-2016 under Section 376 IPC, to which the appellant pleaded not guilty and claimed to be tried. Subsequently, on 25-02-2021, another charge was framed against the appellant under Section 6 of the POCSO Act, on the allegation that he had committed the offence within the meaning of Section 3(a)/5(j)(ii)/5(l) of the POCSO Act.

6. The learned Trial Court thereafter examined 11 Prosecution Witnesses and after examining the appellant under Section 313 Cr.PC, came to a finding that the appellant had committed the offence punishable under Section 376 IPC read with Section 6 of the POCSO Act and convicted him accordingly.

7. The learned counsel for the appellant submits that there is nothing to prove that the victim was below 18 years of age at the time she first had sexual intercourse with the appellant, on account of the fact that the victim (PW-3) in her cross-examination had stated that at the time of the first incident, she was 19 years old. He further submits that the Birth Certificate of the victim, which had allegedly been seized by the Police showing the victim's date of birth as 02-10-1995, had never been exhibited before the learned Trial Court. Further, the evidence of the Doctor (PW-6) was to the effect that in terms of the X-ray report in respect of the victim's knee joint and right iliac crest, the age of the victim was around 17 to 18 years. The X-ray report as given by the Radiologist was reflected in the medical report, which was exhibited as Ext. 4. The learned counsel for the appellant thus submits that the evidence recorded by the learned Trial Court thus proved that the victim was around 18 years, if not more, at the time of

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the first incident of sexual intercourse that occurred between the appellant and the victim, for which the provisions of the IPC and the POCSO Act, 2012 were not attracted.

8. The learned counsel or the appellant submits that the evidence of the Prosecution Witnesses and the victim herself shows that the sexual liasion between the victim and the appellant had primarily occurred in the house of the victim, where the appellant used to go. On the other hand, the 164 Cr.PC statement made by the victim was to the effect that the sexual acts between the two used to occur in the appellant's house. Thus, there is a glaring discrepancy in the testimony of the victim vis-à-vis her Section 164 Cr.PC statement.

9. The issue as to whether there was forcible rape of the victim by the appellant cannot be proved by way of the testimony of the victim, as the same is at complete variance with the statement provided in the victim's statement made under Section 164 Cr.PC. However, the fact remains that they were in a love relationship, which did not fructify into a marriage. The learned counsel for the appellant submits that on account of there being a consensual sexual relationship between the parties and the victim being above 18 years of age at the time of the incident, the question of rape of the victim in terms of the Indian Penal Code or the offence of penetrative sexual assault in terms of the POCSO Act, 2012, does not arise.

10. Mr. R.R. Kaushik, learned APP for the state and Mr. J. Islam, learned counsel for the respond no. 2, submit that the first incident of sexual intercourse between the parties was forceful rape, though the subsequent sexual acts between the parties was consensual in nature, on account of the promise made by the appellant to marry the victim.

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

12. The testimony of the victim is to the effect that on the first incident of sexual intercourse between the parties, the same had been done forcefully by the appellant, without the consent of the victim. The same had also been apparently done in the house of the victim. However, on various occasions thereafter, sexual intercourse between the appellant and the victim had happened in the house of the victim. This is also stated in the cross-examination of the victim (PW-3) wherein she stated "All the incidents of sexual intercourse by the accused

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with me had taken place in my residence. The accused is to commit sexual intercourse with me when my family members did not used to be in the residence. Sometimes, he would come during day and sometimes at night." The victim also stated in her testimony that the appellant had sexual intercourse with her around 40 - 50 times. She also stated that "at the time of the first incident, I was 19 years old". However, in her further cross examination, the victim stated that it was not true that she was more than 18 years of age at the time of the occurrence, though she was 17 years old at that time.

13. We have noticed that there is a Birth Certificate issued under the Registration of Births and Deaths Act, 1969, to the victim, showing her date of birth to be 02-10-1995, which was registered only on 13/09/2005. However, the said Birth Certificate had never been exhibited before the learned Trial Court. In view of the Birth Certificate not being exhibited by the Prosecution, to determine the age of the victim at the time of the start of the sexual relation between the parties, we would have to take recourse to Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (*hereinafter referred to as the 2015 Act)*, which provides that if birth certificates are not available, the last resort would be to have an Ossification test, to determine the age of the child in conflict with law. As Section 94 of the 2015 Act can also be applied to determine the age of a victim of sexual assault, it would be profitable to refer to the medical report of the victim, which is exhibited as Ext. 4 along with the evidence of the Doctor (PW-6), who had examined the victim. Ext. 4 shows the following result of the X-ray examination of the victim, as given by the Radiologist, which is as follows:-

> "*5. X-ray report as given by Radiologist:*
>
> *(i) X-ray wrist joint - Ossification complete age above 16 years.*
>
> *(ii) Rt. elbow Ossification complete age above 16 years.*
>
> *(iii) X-ray knee jt. Upper end of Tibia and fibula not ossified completely. The lower end of femur just ossified. Age between 17-18 yrs.*
>
> *(iv) Rt iliac crest Head of femur just ossified. The iliac crest not completely ossified. Age between 17-18 years.*
>
> *Opinion:-*
>
> *No sign of recent intercourse.*

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2. No sign of injury on her body and private part.

3. Age is between 17 to 18 years."

14. A perusal of the above shows that as per the ossification test conducted upon the victim, she was 17 to 18 years at the time when the incident had occurred.

15. In the case of ***Ram Suresh Singh vs. Prabhat Singh @ Chhotu & Another***, reported in ***(2009) 6 SCC 681*** and ***Jyoti Prakash Rai @ Jyoti Prakash vs. State of Bihar***, reported in ***(2008) 15 SCC 223***, the Supreme Court held that the age determined by an ossification test not being a precise one, a 2 year margin of error may be applied on either side of the age of the victim.

16. The Supreme Court in the case of ***Pawan Kumar Vs. State of Uttar Pradesh [(2023) 15 SCC 683], Vinod Katara Vs. State of U.P. [(2023) 15 SCC 210]*** and ***Rajni Vs. State of U.P. [AIR 2025 SC 2787],*** gave the age benefit of only 1 year on the lower side to a child/juvenile in conflict with law, as there cannot be an exact assessment of age in the medical test conducted upon the said child. In the case of ***Karan Vs. State of M.P.,*** reported in ***(2023) 5 SCC 504,*** the Supreme Court held that Ossification Test will only give a broad assessment of the age. It cannot give an exact age. It also held that there is a element of margin of plus or minus 1-2 years.

17. The Supreme Court in the case of ***Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir [(1982) 2 SCC 538]***, held that one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. The Supreme Court in the case of ***Ram Suresh Singh Vs. Prabhat Singh alias Chhotu Singh & Anr. [(2009) 6 SCC 681],*** held that if a medical report is to be considered for ascertaining the age of a juvenile in conflict with law, error of two years in determining the age of the juvenile is possible.

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18. In the case of **State of Uttar Pradesh vs. Chhoteylal**, reported in **(2011) 2 SCC 550**, the Supreme Court had held that there is no such Rule, much less and absolute one that two years have to be added to the age of the victim, determined by a doctor. This decision had been made on the basis of a three Judges Bench decision of the Supreme Court in the case of **State of Karnataka vs. Bantara Sudhakara @ Sudha & Anr**, reported in **(2008) 11 SCC 38**, wherein it has been stated at para 12 as follows:-

> "***12.*** *..... Additionally, merely because the doctor's evidence showed that the victims belong to the age group of 14 to 16, to conclude that the two years' age has to be added to the upper age-limit is without any foundation."*

19. The above being said, in the case of **Rajak Mohammad vs. State of Himachal Pradesh,** reported in **(2018) 9 SCC 248**, the Supreme Court has held that while it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts with the report of the radiological examination leaves room for ample doubt with regard to the correct age of the prosecutrix. The benefit of the aforesaid doubt would naturally go in favour of the accused.

20. Though there is a doubt as to whether the benefit of ± 1 or 2 years to a child in conflict with law is to be given, it is settled law that in the event of there being two views, one in favour of the accused and one in favour of the State, the view leaning in favour of the accused should be accepted. Though the question of whether a margin of ± 1 or 2 years is to be given, is a debatable question, the Supreme Court in the above cases has given the benefit of ± 1 or 2 years of age to the child in conflict with law, who has undergone an Ossification test.

21. In the case of ***Mahadeo v. State of Maharashtra***, reported in **(2013) 14 SCC 637**, it has been held that the procedure for determination of age of a juvenile in conflict with law under Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 would

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also apply for determination of the age of a rape victim. Keeping the ratio of the above decision in view, which is somewhat similar to Section 94 of the 2015 Act, we hold that the Ossification test can be conducted upon the victim of a sexual assault, for determining victim's age. Further, even if the benefit of ± 1 year is to be given to determine the age of the victim in the present case, the same would show that the victim was 18 years at the relevant time of the incident, in view of the ossification test having held the victim to be 17 - 18 years.

22. The contents of the statement made by the victim under Section 164 Cr.P.C. is reproduced herein below as follows :-

> "*On Oath,*
>
> *The incident took place about one year back. the sister-in-law (wife of elder brother) of Dipan Ghosh, often took me to her house under the pretext of making me do household chores. Instead, she used to take me near Dipan Ghosh and close the door. Dipan Ghosh used to mount on me and commit rape on me. Whenever I prevented him from doing so, he threatened me and made a promise that he would marry me. Out of fear of the threats, I did not disclose the matter to anybody. By making threats, used to took me to Dipan Ghosh. As a result, I missed my periods for three months and then I informed my mother about it. When my mother discussed the matter with she told my mother that she would either get my fetus aborted or get me married to Dipan. Thereafter, did not speak anything about the matter. In the mean time, my fellow villagers learnt about my pregnancy. They assured us that they would settle the matter. Accordingly, they called Dipan. In the Bichar (meeting for extrajudicial settlement), Dipan stated that he did not commit rape on me. As the settlement efforts failed, I filed this case. At present, I am seven months pregnant."*

23. We have also noticed that on account of the evidence of the victim not being corroborated with her statement made under section 164 Cr.PC, even with regard to the place of occurrence, the statement of the victim to the effect that the first incident of sexual intercourse was forceful, cannot be accepted by us, as it does not appear to be truthful. The fact that the victim had sexual intercourse with the appellant 40 to 50 times, which resulted in her pregnancy and the ultimate birth of a child, has proved that the sexual relation between the parties was consensual in nature. It is only because the appellant had subsequently declined to marry the victim that the victim's feelings for the appellant has turned sour, resulting in the

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registration of this case, to cause injury to the appellant. We are of the view that the present case is basically a case of the victim becoming bitter due to the appellant not marrying the victim. The consensual sexual act between the parties cannot be said to be forceful, only on account of a change in the relationship between the two parties, which in our view, would not attract the provisions of either the IPC or the POCSO Act, as the age of the victim would have to be considered to be above 18 at the time of the incident and as a sexual relation between two consenting adults cannot be said to be an offence.

24. For the reasons stated above, we are of the view that the conviction and sentence of the appellant by the learned Trial Court was not justified and is accordingly not sustainable. Consequently, the impugned judgment dated 26/03/2025 passed by the learned Additional Session Judge (FTC) Sribhumi, in Session case no. 32/2016, is hereby set aside. The appellant is acquitted of the charges framed against him under Section 376 IPC and Section 6 of the POCSO Act. The respondents are directed to immediately release the appellant from judicial custody, if not wanted in any other case.

25. The above being said, we find that the learned Trial Court had convicted the appellant under Section 376 IPC read with Section 6 of the POCSO Act. The learned Trial Court had also sentenced the appellant under both the provisions of law, which is however, not in consonance with Section 42 of the POCSO Act, 2012, which states as follows :-

> "***42. Alternate punishment.—*** *Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, [376A, 376AB, 376B, 376C, 376D, 376DA, 376DB], [376E, section 509 of the Indian Penal Code (45 of 1860), or Section 67B of the Information Technology Act, 2000 (21 of 2000], then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree."*

26. A reading of Section 42 of the POCSO Act clearly shows that when an act constitutes an offence punishable under Section 376 IPC and under the provisions of the POCSO Act, and the offender is found guilty under both the provisions of law, the offender shall be liable to punishment under the POCSO Act or under the IPC, whichever is greater in degree. As such,

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the learned Trial Court was required to sentence the appellant only under Section 376 IPC or Section 6 of the POCSO Act, but not under both the provisions. In any event, the impugned judgement dated 26/03/2025 having been set aside by this Court, the issue is no longer relevant, as the appellant has been acquitted of both the charges.

27. The appeal is accordingly allowed.

28. Send back the TCR.

JUDGE **JUDGE**

Comparing Assistant

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