Crl.A. 57/2016
BEFORE

HON’BLE MRS JUSTICE RUMI KUMARI PHUKAN

JUDGMENT AND ORDER (CAV)

This appeal is directed against the Judgment and order dated 10.2.2016 passed by the learned Sessions Judge, Golaghat in Special (POCSO) Case No.31/2015 convicting the accused appellant under Section 6 of the POCSO Act and sentencing him to undergo rigorous imprisonment for 10 years and to pay fine of Rs.5,000/- in default of payment of fine , S.I. for another one month and further convicting him for offence U/S 366 IPC and sentencing him rigorous imprisonment for a period of seven years and also fine of Rs.2000/-, in default of fine S.I. for another 10 days. Sentence of both the counts will run concurrently.

2. One Smti July Begum, the mother of the victim girl lodged an FIR on 30.9.2014 before O/C Golaghat Police Station to the effect that her daughter was kidnapped by the accused appellant Saddam Hussain on 29.9.2014 at about 4.30 PM. On these facts Golaghat P.S.Case No. 804/2014 was registered and criminal law was set into motion. The victim girl was examined by the doctor and her statement was recorded U/S 164 CrPC. On completion of the investigation charge-sheet was laid against the accused appellant U/Ss 366(A)/376/344 IPC read with Section 4 of POCSO Act.

3. The accused appellant was produced before the trial Court and he stood the trial. After hearing the learned counsel for the parties charges U/S 366 IPC read with Section 6 of the POCSO Act framed and explained to the accused person to which he pleaded not guilty.

4. In course of trial prosecution examined as many as 5 witnesses including the M.O. and I.O. and defence examined none. The plea of defence is of total denial. At the conclusion of the trial the Court held the accused guilty U/S 366 IPC as well as Section 6 of the POCSO Act and convicted him as aforesaid.

5. Being aggrieved with the aforesaid Judgment and order the present appeal has been preferred raising certain grounds that the prosecution suffers from various infirmities apart from the fact that the learned trial Court has not taken into consideration about the plea of juvenility of the accused appellant.

6. According to the learned counsel for the appellant Mr.J.I.Barbhuiya there are serious contradiction among the witnesses and there is no material whatsoever to prove the ingredient of section 366 IPC as well as section 5 of the POCSO Act to convict the accused appellant under Section 6 of the Act. Further, it has been contended that the learned Court below failed to apply its judicial mind to the legal proposition relating to the evidence adduced by the prosecution and the contradiction thereof. The age of the victim girl is not conclusively proved to be minor. Furthermore, the plea of juvenility has not been decided as per the prescribed provision of Juvenile Justice Care & Protection Act and has summarily disposed of the matter basing on the medical report/ossification report which is not at all proper. The ratio laid down in AIR 1982 SC 1297 in case of Jaya Mala -vs- Home Secretary to determine the age of a person has not been followed, it contends. Similarly reliance placed by the trial Court upon the statement of the victim recorded U/S 164 CrPC has also been assailed on the ground that it is not the authentic version of the girl as it was recorded after she was handed over to her parents and she was produced thereafter which is again contradictory to her evidence in course of trial. Accordingly it has been submitted that the judgment and order of conviction is liable to be set aside. 7. On the other hand, learned counsel for the State Respondents Mr. B. Sarma, learned Addl. P.P. Assam has vehemently contended that the victim was a minor at the relevant period as per the testimony of informant (her guardian) as well as the victim girl and as per the medical report. So the learned trial Court has rightly convicted the accused and it deserves no interference.

PLEA OF JUVENILITY:

7. As the issue of juvenility of the accused appellant also raised before this Court so the same was taken into consideration. At the time of hearing of the bail application U/S 389 CrPC (I.A.1133/2016) the matter of juvenility was ta

ken up for hearing and matters on records as well as finding of the trial Court as regards the plea of juvenility is gone through. It was found that the learned trial Court in order to ascertain the juvenility of the accused appellant, rejecting the birth certificate produced by the father of the appellant on the ground of dissimilarity in the name of appellant preferred to rely upon the ossification test given by the medical officer and hold that the accused is above 18 years and hence major.

Whether an offender was a juvenile on the date of commission of offence or not is essentially a question of facts which is required to be determined on the basis of the materials brought on record by the parties. A broad distinction has been made between juveniles in general and juveniles who have committed offences. Determination of age, therefore, assumes great importance and responsibility therefor has been cost on juvenile Justice Board. The legislature amended the provisions of the Act of 2000 by the Amendment Act, 2006 and substituted Section 2(i) and included Section 7-A.These provisions were, however, confined to courts and proved inadequate for the Boards. In Juvenile Justice (Care and Protection of Children) Rules, 2007, which are comprehensive guide for implementing the provisions of the juvenile Justice Act, 2000, Rule 12 was subsequently introduced for giving effect to Section 7-A by providing the procedure to be followed by courts, Boards and Child Welfare Committees in determining the age of a child or juvenile or a juvenile in conflict with law. These provisions are interconnected.(Hari Ram v State of Rajasthan, (2009) 13 SCC 211: (2010) 1 SCC (Cri)987.)

Determination of accused’s age for protection under the Act, is a complex exercise, where no fixed norms and abstract formula can be laid down. A Juvenile shall derive full benefit from the welfare legislation. Courts should also ensure that protection under the Act, is not misused by unscrupulous offenders involved in serious crimes. Therefore, a cautious approach, prescribed. (Babloo Pasi v Stat eof Jharkhand ,(2008) 13 SCC 133: (2009) 3 SCC (Cri) 266.).

The Act has provided specific provisions for determination of age of juvenile as prescribed below:

12. Procedure to be followed in determination of Age.? (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining -

(a) (i) the matriculation or equivalent certificates, if available; and in the absence
whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or th

e juvenile in conflict with law.
(4) If the age of a juvenile or child or the juvenile in conflict with law is fo
und to be below 18 years on the date of offence, on the basis of any of the conc
lusive proof specified in sub-rule (3), the court or the Board or as the case ma
y be the Committee shall in writing pass an order stating the age and declaring
the status of juvenility or otherwise, for the purpose of the Act and these rule
s and a copy of the order shall be given to such juvenile or the person concerne
d.
(5) Save and except where, further inquiry or otherwise is required, inter alia,
in terms of section 7A, section 64 of the Act and these rules, no further inqui
ry shall be conducted by the court or the Board after examining and obtaining th
e certificate or any other documentary proof referred to in sub-rule (3) of this
rule.
(6) The provisions contained in this rule shall also apply to those disposed off
cases, where the status of juvenility has not been determined in accordance wit
h the provisions contained in subrule (3) and the Act, requiring dispensation o
f the sentence under the Act for passing appropriate order in the interest of th
e juvenile in conflict with law.

8. In this context, we may gainfully refer to the observation of the Hon'bl
e Supreme Court in the case of Ashwini Kumar Saxena -vs- State of Madhya Pradesh
, reported in (2012) 9 SCC 750 in paragraphs 32, 33, 40,41,42 and 43, which read
s as follows-
32 Age determination inquiry contemplated under section 7A of the Act r/w Rul
e 12 of the 2007 Rules enables the court to seek evidence and in that process, t
he court can obtain the matriculation or equivalent certificates, if available.
Only in the absence of any matriculation or equivalent certificates, the court n
eed obtain the date of birth certificate from the school first attended other th
an a play school. Only in the absence of matriculation or equivalent certificate
or the date of birth certificate from the school first attended, the court need
obtain the birth certificate given by a corporation or a municipal authority or
a panchayat (not an affidavit but certificates or documents). The question of o
btaining medical opinion from a duly constituted Medical Board arises only if th
e above mentioned documents are unavailable. In case exact assessment of the age
cannot be done, then the court, for reasons to be recorded, may, if considered
necessary, give the benefit to the child or juvenile by considering his or her a
ge on lower side within the margin of one year.
33. Once the court, following the above mentioned procedures, passes an order; t
hat order shall be the conclusive proof of the age as regards such child or juve
nile in conflict with law.....
40. Legislature and the Rule making authority in their wisdom have in categorica
l terms explained how to proceed with the age determination inquiry. Further, Ru
le 12 has also fixed a time limit of thirty days to determine the age of the juv
enility from the date of making the application for the said purpose. Further, i
t is also evident from the Rule that if the assessment of age could not be done,
the benefit would go to the child or juvenile considering his / her age on lowe
r side within the margin of one year.
41. The Court in Babloo Parsi v. State of Jharkhand and Another [(2008) 13 SCC 1
33] held, in a case where the accused had failed to produce evidence/certificate
in support of his claim, medical evidence can be called for.
:22.The court held that the medical evidence as to the age of a person, though a
useful guiding factor is not conclusive and has to be considered along with oth
er cogent evidence can be called for. The Court held that : SCC p 142,para 22)
This court set aside the order of the High Court and remitted the matter to the
Chief Judicial Magistrate heading the Board to re-determine the age of the accus
ed.
42. In Shah Nawaz v. State of Uttar Pradesh and Another [(2011) 13 SCC 751], the
Court while examining the scope of Rule 12, has reiterated that medical opinion
from the Medical Board should be sought only when matriculation certificate or
equivalent certificate or the date of birth certificate from the school first at

tended or any birth certificate issued by a Corporation or a municipal authority or a panchayat or municipal is not available. The court had held entry related to date of birth entered in the mark sheet is a valid evidence for determining the age of the accused person so also the school leaving certificate for determining the age of the appellant.

43. We are of the view that admission register in the school in which the candidate first attended is a relevant piece of evidence of the date of birth. The reasoning that the parents could have entered a wrong date of birth in the admission register hence not a correct date of birth is equal to thinking that parents would do so in anticipation that child would commit a crime in future and, in that situation, they could successfully raise a claim of juvenility.

9. On such a finding that the trial Court did not address the issue of juvenility as per mandate of Rule 12 of the Act by conducting any proper enquiry and also in view of the fact that plea of juvenility can be raised at any stage by the appellant and the Court can entertain such plea even after conviction, U/S 7 (A) of the J.J. Act, this Court directed the trial Court to hold a proper enquiry in terms of the rules and to examine the school authority or the person concerned who issued such certificate and to give a finding accordingly vide order dated 6.12.2016.

10. Pursuant thereto, the learned District and Sessions Judge (successor in office) after holding an enquiry arrived at a finding that the accused was juvenile on the day of occurrence and his age was 15 years -11 months- 28 days, as on 29.09.2014 i.e. the date of occurrence. The report submitted by the learned Sessions Judge has been given after holding a proper enquiry as per the Rule by examining the witnesses from the school authority in due manner and accordingly accepting the same the accused appellant is held as juvenile. In view of such report accused who is found to be juvenile was released on bail by this Court.

FACTUAL BACKGROUND:

11. So far as the factual background of the case is concerned, it reflects that the victim girl eloped with the accused appellant for the first time as on 29.9.2014 while she was a student of Class-IX and then her mother July Begum lodged an FIR before O/C Golaghat P.S. which was registered as Golaghat P.S.Case No.840/2014 U/S 366A /34 IPC (relates to the present case). After completion of the investigation the charge-sheet has been filed against the accused appellant and the learned trial Court conducted the trial by framing charge U/S 366 IPC read with section 6 of the POCSO Act and convicted him as aforesaid. But during pendency of the present case said victim girl again eloped with the accused appellant as on 26.5.2015 and accordingly her mother lodged an intimation to the O/C concerned and on the basis of which Golaghat P.S.Case No.547/2015 U/S 366A IPC was registered and after completion of the investigation charge-sheet was also submitted against him vide Sessions Case No. 96/2015, which was tried by the learned Sessions Judge, Golaghat U/S 366 IPC. The learned Assistant Sessions Judge who held the trial, finally acquitted the accused appellant from the charge by holding that there was no abduction on the part of the accused in view of the admission of the victim girl that she herself eloped with the accused appellant and performed nikah with him and thereafter consumed the marital life as husband and wife vide Judgment and order dated 18.12.2015. But the trial of the present case (which was filed earlier in the year 2014) concluded in the year 2016 vide order dated 10.2.2016 and by this order the accused appellant has been convicted under Section 366 IPC as well as Section 6 of the POCSO Act, which is now under challenge.

It is to be noted that the aforesaid aspects has been admitted by the I.O. in his cross examination and the learned counsel Mr. Barbhuiya has also produced all the relevant documents pertaining to the Sessions Case No. 96/2015 (subsequent case) and the same is not disputed by the prosecution. This Court take judicial note of the aforesaid admitted facts of the case.

EVIDENCE ON RECORD:

12. Let us examine the evidence adduced in this case particularly the victim and also the other witnesses. The victim girl as PW 3 (name withheld) has deposed that on 29.9.2014 she called the accused person to wait on the road and the

reafter she eloped with him out of love and affection and they lived together as husband and wife in Golaghat and thereafter they proceeded to Dergaon and then to Goalpara and again to Bilasipara. After living together as husband and wife when the accused went to Kokrajhar in connection with his job then her in laws harassed her for which after four months she informed her mother and returned back to her parental house, and thereafter gave her statement U/S 164 CrPC vide Ext.9. She further stated that accused performed nikah with her by executing the Kabin nama, Ext. 8 and the accused continued sexual intercourse with her while living together as husband and wife.

The said victim in her cross examination has specifically stated that with an intention to enter into a merital life with the accused appellant and to live together as husband and wife, she herself eloped with the accused person without any inducement on the part of the accused person. The accused never misbehaved or tortured her during her stay with him as husband and wife and she still loves him and intend to reside with him.

It is to be noted here FIR in the present case was filed as on 30.9.2014 and she gave evidence as on 14.10.2015 i.e. after one year of the occurrence and she has not any way implicated the accused person for his conduct while taking her and also raised no objection as against the sexual conduct and all happened with due consent of the victim girl. However, after return of the victim girl from the accused, when she was produced before the Magistrate from the custody of the guardian her statement was recorded U/S 164 CrPC vide Ext. 9, wherein she has stated that on the fateful day the accused person forcefully took her from the way and thereafter forcefully performed the nikah and as the accused person beaten her as she could not perform household work so after residing with him for few months she fled away to her house. Further it was stated that accused forcefully indulged in physical relation with her. As it apparent from the testimony of the victim girl, she has given quite different version at different stage. On perusal of the impugned judgment it reflects that the learned trial Court has relied on the statement of the victim given under Section 164 CrPC but has not discussed about the evidence given in course of trial. The statement given under Section 164 CrPC is not the substantive piece of evidence, as it is not tested by the cross examination, while the testimony given during the course of trial being tested by cross examination and same can be treated as substantive piece of evidence under the law and can be read as evidence.

13. The mother of the victim/informant Juli Begum, PW 2 and sister of the victim Smti Sunmoni Begum as PW 4 have stated that on 29.9.2014 the victim girl went out to a tailor but she did not return and thereafter they came to know that the accused has taken away the victim along with him, for which the FIR was filed. Later on, in the month of February, 2015 the victim informed over phone to PW 2 that she will return home and accordingly the PW 2 taken her back. On her return she told that she was tortured by the accused appellant for her inability to cook in the kitchen so she returned back.

14. It is to be noted that apart from these, PW 2 and PW 4 no other independent witness has been examined by the prosecution regarding forceful abduction of the victim girl. That apart the victim herself as PW 3 has stated that she herself eloped with the accused appellant at her own will and after performing nikah the lived together as husband and wife and no sort of physical torture or sexual harassment has been raised against him. This is an important aspect of the matter.

15. Another crucial aspect of the matter deserves consideration is about the age of the victim girl. The informant has produced and exhibited one birth certificate of the victim girl vide Ext.7 which was seized by the police which reflects that the date of birth of the victim girl is 14.8.2001 (registered on 5.2.2007) and according to the same the age of the victim girl was about 14 years and the victim girl also in her evidence stated her age as 14 years. On the other hand, the medical officer Dr.Sanjit Phukan/PW1 after examining the victim as on 13.2.2015 has also opined that the age of the victim girl is above 14 years and below 18 years. The oral testimony as regards the age of the victim stands corroborated by the medical evidence and as such, even if some deviation is made, the

victim can be held as minor below 18 years at the time of occurrence. The submi ssion of the learned counsel for the appellant for addition of three years to th e purported age of the victim, by relying to the decision in Jaya Mala (supra) w ill also cannot help the Court to arrive at a conclusion that the victim was maj or at the time of occurrence as the present case does not solely dependent upon the medical evidence but the school certificate of the victim has also been prod uced. The medical opinion rendered by the PW 1 cannot prevail over the birth ce rtificate of the victim issued by the competent authority (Registrar, Birth and Death, Office of the Directorate of Health Service.)

16. Now, we are confronted with the crucial question as to whether the accus ed can be held guilty for the kidnapping as well as committing aggravated penetr ative sexual assault upon the victim, while the victim is a consenting party ?

In the instant case, we have a background that the victim despite minor repeatedly eloped with the accused appellant out of love and affection and in he r evidence in the present case as well as in other case as mentioned above she has no way raise any allegation against the accused person. In the given backgro und while she voluntarily went to the accused and stayed with him for months tog ether as husband and wife, after performing nikah and herself returned to her p arents for being annoyed for the conduct of her in laws in absence of appellant but showing her eagerness to continue the marital life with the accused appellan t, depict a case of elopement rather than a case of abduction. The girl appears to have sufficient maturity as on repeated occasion she fled to the accused app ellant at her own volition. In order to constitute a offence of abduction, there must be some sort of enticement on the part of the accused while taking the gir l out of the lawful guardianship of her parents.

17. What amounts to kidnapping from lawful guardianship is defined under Sec tion 361 IPC which reads as follows:-

Kidnapping from lawful guardianship-Whoever takes or entices any minor under si xteen years of age if a male or under eighteen years of a male if a female or an y person of unsound mind out of keeping of lawful guardian of such minor or pers on of unsound mind without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

18. Sections 363 IPC provides for punishment for kidnapping and Section 366 IPC deals with Kidnapping, abducting or inducing woman to compel her marriage. The following two sections reads as follows-

363. Punishment for kidnapping.-Whoever kidnaps any person from 1[India] or fro m lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

1[363A. Kidnapping or maiming a minor for purposes of begging.-

(1) Whoever kidnaps any minor or, not being the lawful guardian of a minor, obt ains the custody of the minor, in order that such minor may be employed or used for the purpose of begging shall be punishable with imprisonment of either descr iption for a term which may extend to ten years, and shall also be liable to fin e.

(2) Whoever maims any minor in order that such minor may be employed or used fo r the purposes of begging shall be punishable with imprisonment for life, and sh all also be liable to fine.

(3) Where any person, not being the lawful guardian of a minor, employs or uses such minor for the purposes of begging, it shall be presumed, unless the contra ry is proved, that he kidnapped or otherwise obtained the custody of that minor in order that the minor might be employed or used for the purposes of begging.

(4) In this section,-

(a) 'begging' means-

(i) soliciting or receiving alms in a public place, whether under the pretence of singing, dancing, fortune-telling, performing tricks or selling articles or o therwise;

(ii) entering on any private premises for the purpose of solicit›ing or receivi ng alms;

(iii) exposing or exhibiting, with the object of obtaining or extorting alms, a

ny sore, wound, injury, deformity or disease, whether of himself or of any other person or of an animal;
(iv) using a minor as an exhibit for the purpose of soliciting or receiving alms;
(b) 'minor' means-
(i) in the case of a male, a person under sixteen years of age; and
(ii) in the case of a female, a person under eighteen years of age.]
366. Kidnapping, abducting or inducing woman to compel her mar›riage, etc.-Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; 1[and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid].

19. While dealing with the similar aspect as to whether a minor girl alleged to be taken away by the accused person, had left her father's protection, knowing and having capacity to know the full import of what she was doing and voluntarily joined the accused, it has been held in S. Varadarajan -vs- State of Madras, reported in 1965 AIR 942, that it could not be said that the accused had taken away her from her lawful guardian within the meaning of Section 361 IPC. It has been held that that there is a distinction between 'taking' and 'enticing' and to prove an offence under said section of law, something more had to be done in a case of that kind, such as, inducement held out by the accused person or an active participation by him in the formation of the intention, either immediately prior to the minor leaving her father's protection or acts of earlier stage. If the evidence fails to establish one of these things the accused would not be guilty of the offence merely because after she had actually left her guardian's house or a house where her guardian had kept her. Thus taking or enticing away a minor out of keeping of a lawful guardian is an essential ingredient of offence of kidnapping.
20. Now in the instant case the victim herself went out from her guardianship out of her love and affection, without any pursuation/ enticement on the part of accused/appellant and she remained with him out of own volition and such an affair cannot be held as an enticement in the eye of law. In view of the proposition laid down in the case of S. Vadarajan (supra) and taking note of the evidence on record it c an be held that it is not a case of kidnapping as the same could not be said to be an act of taking away or enticing away a woman below eighteen years of age but it could be a mere case of elopement. Moreover in the given background, charge at best could have been made U/S 363 IPC rather than Section 366 iPC Accordingly it can be arrived at that no offence under Section 363 IPC has been established against the appellant and he is therefore, entitled to acquittal. Accordingly finding of guilt of the accused appellant U/S 366 IPC is hereby set aside.
21. The reliance placed by the learned trial Court upon the statement of the victim U/S 164 CrPC by discarding the evidence given in course of trial appears to be not proper. Resultantly, conviction and sentence U/S 366 IPC is hereby set aside.
22. The accused appellant has also been convicted U/S 6 of the POCSO Act, which prescribes punishment for aggravated penetrative sexual assault, but as it appears while arriving to the said conclusion, the learned trial Court has totally excluded from its consideration as to the statement of the victim, who al through has stated that they resided as husband and wife and continue such sexual affair out of such relation. Such continuance sexual affairs cannot be stated as aggravated penetrative sexual assault as defined under the Act.
The Section 6 provides for the punishment for aggravated penetrative sex

ual assault and Section 5 provides the definition of aggravated penetrative sexual assault.

For better appreciation of the matter relevant provisions of Sections 3, 4, 5 and 6 of the POSCO are reproduced below:

3. Penetrative sexual assault : A person is said to commit \penetrative sexual assault\ if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

4. Punishment for penetrative sexual assault- Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

5.AGGRAVATED PENETRATIVE SEXUAL ASSAULT : (a) Whoever, being a police officer, commits penetrative sexual assault on a child -

(i) within the limits of the police station or premises at which he is appointed; or

(ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known as, or identified as, a police officer; or

(b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a .

(i) within the limits of the area to which the person is deployed; or

(ii) in any areas under the command of the forces or armed forces; or

(iii) in the course of his duties or otherwise; or

(iv) where the said person is known or identified as a member of the security or armed forces; or

(c) whoever being a public servant commits penetrative sexual assault on a child; or

(d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or

(e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or

(g) whoever commits gang penetrative sexual assault on a child.

Explanation.-When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j) whoever commits penetrative sexual assault on a child, which-

(i) physically incapacitates the child or causes the child to become mentally il
l as defined under clause (b) of section 2 of the Mental Health Act, 1987 (14 of
 1987) or causes impairment of any kind so as to render the child unable to perf
orm regular tasks, temporarily or permanently; or
(ii) in the case of female child, makes the child pregnant as a consequence of s
exual assault;
(iii) inflicts the child with Human Immunodeficiency Virus or any other life thr
eatening disease or Infection which may either temporarily or permanently impair
 the child by rendering him physically incapacitated, or mentally ill to perform
 regular tasks; or
(k) whoever, taking advantage of a child's mental or physical disability, commit
s penetrative sexual assault on the child; or
(l) whoever commits penetrative sexual assault on the child more than once or re
peatedly; or
(m) whoever commits penetrative sexual assault on a child below twelve years; or
(n) whoever being a relative of the child through blood or adoption or marriage
or guardianship or in foster care or having a domestic relationship with a paren
t of the child or who is living in the same or shared household with the child,
commits penetrative sexual assault on such child; or
(o) whoever being, in the ownership, or management, or staff, of any institution
 providing services to the child, commits penetrative sexual assault on the chil
d; or
(p) whoever being in a position of trust or authority of a child commits penetra
tive sexual assault on the child in an institution or home of the child or anywh
ere else; or
(q) whoever commits penetrative sexual assault on a child knowing the child is p
regnant; or
(r) whoever commits penetrative sexual assault on a child and attempts to murder
 the child; or
(s) whoever commits penetrative sexual assault on a child in the course of commu
nal or sectarian violence; or
(t) whoever commits penetrative sexual assault on a child and who has been previ
ously convicted of having committed any offence under this Act or any sexual off
ence punishable under any other law for the time being in force; or
(u) whoever commits penetrative sexual assault on a child and makes the child to
 strip or parade naked in public, is said to
commit aggravated penetrative sexual assault.

6. Punishment for aggravated penetrative sexual assault : Whoever, commits aggra
vated penetrative sexual assault, shall be punished with rigorous imprisonment
for a term which shall not be less than ten years but which may extend to impris
onment for life and shall also be liable to fine.

23. It is discernible from the definition of aggravated offence, indicates c
ommission of offence by a certain class of person mentioned therein and the same
 is not applicable to the accused appellant (individual character). The observat
ion of the trial Court regarding commission of repeated aggravated assault will
not be proper in view of the fact that the victim girl voluntarily continued suc
h physical relation with the accused appellant and she did not make a whisper an
ything about any forceful conduct of the accused appellant. However, the victim
being a minor in the instant case the accused appellant cannot be eschewed from
the offence of Section 4 of the POCSO Act which is a special Act , which specifi
cally provide that any sexual penetrative assault upon a minor is an offence. Ac
cordingly, accused appellant is liable to be convicted U/S 4 of the Act and the
conviction is converted to the aforesaid section of law. However, the accused ap
pellant being a juvenile, sentence is to be awarded by the Juvenile Justice Boar
d .
24. Accordingly the matter is remanded to the Juvenile Justice Board, Gola
ghat District for awarding the sentence as per law. As the accused appellant was
 behind the bars for a certain period, prior to release on bail by this Court a

nd the parties has already consumed a marital life at their own choice, the same can be considered by the JJB while awarding the sentence after giving an opportunity of being heard on the point of sentence.

25. With the findings and discussion above, the Appeal is partly allowed . Return the LCRs.