

(2023) 08 GAU CK 0048
In the Gauhati High Court
Case No : Criminal Appeal No. 201 Of 2021

Abu Bakkar Siddique And Anr.

APPELLANT

Vs

State Of Assam And Anr.

RESPONDENT

Date of Decision : 21-08-2023

Acts Referred:

Protection Of Children from Sexual Offences Act, 2012 — Section 4
Indian Penal Code, 1860 — Section 34, 342, 366, 366A, 368, 376(2)(i)
Code Of Criminal Procedure, 1973 — Section 164, 313

Citation : (2023) 08 GAU CK 0048

Hon'ble Judges : Susmita Phukan Khaund, J

Bench : Single Bench

Advocate : A A R Karim, D Das

Judgement

1. Heard Mr. AAR Karim, learned counsel for the appellants and Mr. D. Das, learned Addl. P.P. for respondent No. 1 and Ms. D. Saikia, learned Amicus Curiae for respondent No. 2.

2. This appeal is directed against the Judgment and Order dated 22.05.2019 passed by the learned Sessions Judge, Darrang, Mangaldai in connection with Special (POCSO) Case No. 5/2017 convicting the accused Abu Bakkar Siddique and Md. Khurshed Ali u/s 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act for short) and sentencing them to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs. 10,000/- with default stipulation.

3. The prosecution case is that on 28.01.2016 at about 12 noon the 14 year old victim 'X' was found missing and then her father 'Y' lodged an FIR and after registering a GD Entry, the FIR was forwarded to the police station from the Kharupetia Outpost to the Dalgaon PS and registered as Kharupetia P.S. Case No. 763/2016 u/s 342/366A/368/34 of the Indian Penal Code (IPC for short) and investigation commenced. The Investigating Officer (IO in short), forwarded the victim for medical examination and for recording her statement u/s 164 of the

Code of Criminal Procedure (Cr.PC for short). After completion of investigation charge-sheet was laid against the accused u/s 366A/376(2)(i)/34 of the IPC read with Section 4 of the POCSO Act. This case was committed and at the commencement of trial, a formal charge was framed u/s 366A/376(2)(i) and 34 IPC and read with and explained to the accused. Both the accused adjured their guilt and claimed innocence.

4. To substantiate its stance, the prosecution adduced the evidence of nine (9) witnesses and the witnesses were cross-examined in rebuttal. On the circumstances arising against them, several questions were asked to the accused u/s 313 Cr.PC and they denied their complicity.

5. The prosecution decided this case on the following points:-

“Points for determination:

[i] Whether on 28.01.2016 at 12 noon Miss A was forced or seduced to illicit intercourse with the accused persons?

[ii] Whether the accused persons on the same date, time and place forcefully committed rape on Miss A and thereby committed an offence U/S 376(2)(i)/34 IPC read with section 4 of POCSO Act?”

6. The learned counsel for the appellants Mr. A.A.R. Karim laid stress in his argument that the victim was missing for two days since 28.01.2016 but the FIR was lodged after a lapse of two days allowing enough scope for afterthought and fabrication. Four persons were implicated by the victim through her statement u/s 164 Cr.PC whereas charge-sheet was laid only against two. Her evidence is not consistent to her statement u/s 164 Cr.PC. There is no instance that the victim had raised alarm. The evidence of PW-2 is hearsay evidence. No injuries on the private parts of the victim were detected on her examination by the Medical Officer.

7. The learned counsel for respondent No. 2 Ms. D. Saikia laid stress in her argument that a new plea has been introduced. The plea regarding the age of the victim was not taken earlier. The victim’s father has earlier mentioned the age but the minority of the victim has remained unchallenged. The minor discrepancies in the evidence has to be discarded. Presumptions operate against the accused. The IO’s evidence clearly depicts that the victim was in a bad state of health. The delay regarding the medical examination was not confronted by the defence.

8. The learned Addl. PP Mr. D. Das laid stress in his argument that expert opinion is not a conclusive proof. The victim was examined after 9 or 10 days. No suggestion was made to the victim that she was not a minor.

9. On the anvil of these submissions, the question that falls for consideration is that whether the trial court has erred in convicting the accused?

10. In this case the informant (PW-1) has testified that the incident occurred

upon 2 years ago. His daughter 'X' was studying at Class-VIII at the time of the incident and she was only 14 years old. On the fateful day, his daughter visited her friend Marjina Begum's house at Duliapara but did not return till evening. They made a frantic search and received information that the VDP had apprehended her daughter along with 2 youths and handed her over to the Daipam Outpost. He immediately went to the Daipam Outpost and the victim was handed over to the Kharupetia Police Station. He visited Kharupetia Police Station and met his daughter and then he lodged the FIR at the Kharupetia Police Station. His daughter was forwarded for medical examination and also for her statement to be recorded by the Magistrate. In her cross-examination this witness did not at all implicate that the accused-persons sexually assaulted the victim. He has stated that he could not say anything about the incident which took place between the accused-person and his daughter.

11. The victim has however implicated the accused. She has testified as PW-3 that the incident occurred about 2 years ago. On the day of the incident, she went to her friend's house after school and had lunch in her friend's house. While returning from her friend's house, four persons came in an Auto rickshaw and suddenly waylaid her and forcefully took her in an Auto rickshaw. She identified two out of the four occupants in the Auto rickshaw who were facing trial. PW-3 further stated that the occupants of the Auto rickshaw gagged her and committed sexual assault on her and she became senseless. She did not know where she was taken by the accused as she became senseless. She regained her consciousness at the hospital.

12. The victim's evidence has corroborated the evidence of her father that she was 14 years at the time of the incident and was a student of Class-VIII. She has proved her signature on her statement u/s 164 Cr.PC as Exts.- 1(1) and 1(2).

A close scrutiny of her statement u/s 164 Cr.PC reveals that the victim stated that she could recognize two of the occupants of the Auto rickshaw and she did not know the other two occupants but she would be able to identify them if they are produced before her. She became unconscious after she was sexually assaulted by the four occupants and she could not recall when she gained consciousness.

Although PW-3 has deposed that she regained her sense at the hospital but in her statement u/s 164 Cr.PC which was recorded a week after the incident PW-3 stated that could not recall when she regained her senses after the incident. A question arises at this stage is why no endeavour was made by the investigating agency to get the other two occupants identified by PW-3. The other question that arises is why the father of the victim did not support the victim. He did not mention that the accused committed sexual assault on his daughter. Although uncorroborated evidence of prosecutrix is sufficient evidence against the perpetrators, yet when the victim's father chose not to disclose anything about sexual assault, doubt creeps in regarding the credibility of the victim's evidence. The investigating agency also made no endeavour to record the evidence of the

victim's friend Marjina Begum. PW-3 deposed that she went to Marjina's house after her school was over. This incident allegedly occurred at the time when the victim was returning from Marjina's house.

13. Marjina's father, Mosa Ali has testified as PW-2 that the victim is known to him. The incident occurred about 2 years ago. The victim came to his house on the day of the incident and after taking meal she left their house and she was proceeding to her uncle's house. Subsequently the victim was recovered from Bakultola.

On the contrary, the victim has deposed that from Marjina's house she was returning to her own house. The other witnesses Sheikh Abdulla (PW-4), Ishaf Ali @ Yosuf Ali (PW-5), Sukur Ali (PW-6) denied any knowledge about the incident.

14. The evidence of the IO is relevant. Sri Raj Kumar Mukhia has testified as PW-8 that on 30.01.2016, he was working as attached Officer at Kharupetia PS. On that day, the OC received an FIR from the informant and registered Kharupetia PS Case No.29/2016 u/s 342/366/368/334 IPC and entrusted him with the investigation. He found the informant at the police station and interrogated him. The IC of Daipam Outpost brought the victim as well as the accused to the police station. The health condition of the victim was deteriorated and he immediately sent her to Kharupetia CHC for medical treatment. He could not record the statement of the victim on the same day. This evidence of the IO is however not substantiated by the evidence of PW-1. PW-1 was silent about any health condition of his daughter. PW-3 has stated that she regained her consciousness in the hospital. On the contrary, the doctor who has examined the victim has not mentioned that the victim was found in an unconscious condition. The Medical Officer (MO in short) examined the victim at the Kharupetia CHC and her mental condition is reflected in Ext.-3 which clearly reveals that the victim was corroborative and fully conscious. Moreover the age of the victim was not affirmed as no Radiological Report was submitted.

The doctor is the best person to opine regarding the consciousness of the victim. It could not be affirmed through the evidence, after how many days the victim was recovered. The victim's evidence reveals that she became unconscious after the assault. Her father's evidence reveals that when her daughter did not return till evening he subsequently got information from the VDP that his daughter along with two youths have been apprehended by them and they were handed over to the Daipan Outpost. When he went to the Daipan Outpost he found his daughter and the other two youths. The FIR was lodged at the Kharupetia outpost on 30.01.2016 and the victim was examined by the MO on 09.02.2016. Her statement u/s 164 Cr.PC was recorded on 08.02.2016. It is mentioned in the FIR that the victim went missing on 28.01.2016 and she was recovered by the VDP on 30.01.2016 and handed over to the Daimpam OP by the VDP. Not a single member of the VDP was interrogated by the police. Neither the I/O, nor the PW-1 has stated that the victim was unconscious. Although victim has deposed that she regained her consciousness in the hospital, the MO did not

depose that she was unconscious.

Moreover contrary to her evidence the victim PW-3 has stated u/s 164 Cr.PC that she could not remember where she regained consciousness. The victim's evidence does not inspire confidence. It is also not clear from the evidence if the MO who examined the victim provided treatment to the victim. Although IO has stated that the victim was found in a bad state of health, yet the victim's father did not mention in his evidence that his daughter was in a bad state of health and his daughter was unconscious. The victim's evidence is contradictory to her statement u/s 164 Cr.PC. She has stated that she has deposed that she regained the consciousness in the hospital whereas in her statement u/s 164 Cr.PC she stated that she could not recall where she regained her senses. Her statement was recorded after 9 or 10 days of the incident. Her explanation in her statement u/s 164 Cr.PC that she could not recall where she regained her senses does not appear to be plausible. She has stated that she regained her consciousness in the hospital and the MO's evidence clearly reveals that she was examined after 9 days. Was she unconscious for 9 days? If she was taken to any other hospital earlier then, why was she not examined immediately after she was taken to any other hospital? If she was in such a bad state of health then why was she produced before the MO after 9 days? The FIR marked as Ext.-1 clearly reveals that the incident occurred on 28.01.2016 and the FIR was lodged on 30.01.2016. No explanation was given regarding the delay of 2 days in lodging the FIR. Why was the victim's father so slow in lodging the FIR?

15. It is apparent that the victim was a school going student and she was missing for 2 days but the FIR was lodged after the VDP party handed over the victim along with the accused-persons to the Daipam police station. Why did the victim's father wait for 2 days to lodge the FIR till the accused were caught with the victim by the VDP party? Not a single member of the VDP party was examined as a witness. The offence alleged is of a serious nature and the prosecution has to prove this case beyond a reasonable doubt.

16. In view of my foregoing discussions, it is hereby held that the prosecution failed to prove this case beyond a reasonable doubt. The victim's age was also not ascertained, and without ascertaining the age of the victim the accused-persons were convicted. The victim has also accused four miscreants but the police investigated this case and laid charge-sheet against two accused-persons. In this aspect too, the victim's evidence comes under cloud. I do not agree with the decision of the learned trial Court.

17. The impugned judgment and order of the learned trial Court convicting the accused u/s 4 of the POCSO Act is hereby set aside. The accused-persons are to be released forthwith, if they are not wanted in any other case. Sureties are to be discharged.

18. Ms. D. Saikia, learned Amicus Curiae, who has ably assisted this Court in conducting this appeal, may be paid the honorarium at the rate fixed as per rules.