

(2022) 10 GAU CK 0010
In the Gauhati High Court
Case No : Criminal Appeal No. 451 Of 2019

Anjan Kr. Manjhi

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 19-10-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 164, 313, 374
Protection Of Children From Sexual Offences Act, 2012 — Section 2(1)(d), 3, 4, 30
Indian Penal Code, 1860 — Section 361, 363, 366A
Evidence Act, 1872 — Section 74

Citation : (2022) 10 GAU CK 0010

Hon'ble Judges : Ajit Borthakur, J

Bench : Single Bench

Advocate : S K Barkataki

Final Decision : Dismissed

Judgement

1. Heard Mr. SK Barkataki, learned counsel for the appellant as well as Ms. SH Bora, learned Addl. P.P., Assam appearing for the State respondent.

2. This appeal under Section 374 of the Code of Criminal Procedure ('Cr.P.C.' for short) is preferred against the Judgment and Order, dated 23.09.2019, passed by the learned Special Judge (POCSO Act), Karbi Anglong in POCSO Case No. 12 of 2018 (Special Case No. 136/2018) corresponding to GR Case No. 303/2018 & Borlangphar PS Case No.14/2018 under Section 363 of the Indian Penal Code 1860, ('IPC' for short) read with Section 4 of The Protection of Children from Sexual Offences Act, 2012 ('POCSO Act' for short) whereby the appellant has been convicted and sentenced to undergo rigorous imprisonment for 6 months under Section 363 of the IPC and rigorous imprisonment for 7 years and fine of Rs.1,000/- in default, simple imprisonment for 2 months under Section 4 of the POCSO Act.

3. The prosecution case is that an FIR was lodged on 24.03.2018, before the Officer –In-Charge of Borlangphar PS by the victim's father alleging that on

23.03.2018, his daughter, aged about 17 years, went to Lumding for collecting her admit card for examination and since then, she had not returned home. He suspected that the accused/appellant herein might have kidnapped her.

4. Based on the above FIR, Borlangphar PS Case No. 14/2018 under Section 366 A of the IPC was registered and on completion of investigation, the investigating officer laid a charge-sheet under Section 366 A of the IPC read with Section 4 of the POCSO Act against the accused/appellant. Thereafter, the Court of learned Special Judge (POCSO Act), Karbi Anglong, Diphu, after perusal of the materials on record and on being satisfied, framed charges as charge-sheeted. In course of trial of the case, the prosecution examined 06 (six) witnesses. After closing the evidence of the prosecution side, the statement of the appellant was recorded. The defence plea is of total denial and has not examined any witness in defence. Thereafter, on hearing the argument of the learned counsel of both sides and appreciation of evidence on record, the learned trial court convicted and sentenced the appellant as stated above.

5. Mr. SK Barkataki, learned counsel appearing for the accused/ appellant, submitted that the impugned Judgment and order is bad in law and facts basically on three grounds. Firstly, Mr. Barkataki contended that the learned trial court over emphasized on the erroneous age factor of the alleged victim girl ignoring the fact that the appellant is a young youth aged about 22 years. According to Mr. Borkataki, learned counsel, in the instant case, the prosecution has suppressed important documents relating to the age proof of the alleged victim girl. Mr. Barkataki contended that although the burden of proof in criminal trial is always on the prosecution, the learned trial court observed that the onus of proof shifted on the accused/ appellant herein. It has been further contended that one of the seized school leaving certificates showed the age of the alleged victim girl to be of more than 17 years.

6. Secondly, Mr. Borkataki further contended that the victim in her evidence and statement under Section 164 Cr.P.C. stated that she voluntarily accompanied the accused out of love and affection towards him and moved to Bihar where she stayed with him as wife and husband respectively.

7. Thirdly, Mr. Borkataki, learned counsel for the appellant, contended that while recording the statement under Section 313 CrPC, the learned trial court omitted to seek the appellant's explanations against all the material incriminating oral and documentary evidence that have been taken into consideration in the impugned judgment causing thereby injustice to him. Mr. Barkataki also contended that the questions were in more complex form being descriptive, which were not understandable to the accused, who is a young youth without any knowledge of the impact of those question answers on the merits of the case against him.

8. Per contra, Ms. SH Borah, learned Additional Public Prosecutor, contended that although the victim girl in her statement under Section 164 CrPC and in evidence

stated that out of love relationship with him for about 3 years, she voluntarily accompanied the accused/ appellant, her date of birth being 05.01.2001 as per HSLC pass certificate, as such, her age on the date of occurrence, that is, on 23.03.2018, she was aged below 18 years and as such, being a minor, her consent was immaterial. Ms. Borah, therefore, contended that in view of the abundance of cogent and convincing incriminating evidence, no interference in the well reasoned impugned judgment and order is, perhaps, warranted.

9. I have given due consideration to the above arguments advanced by the learned counsel of both sides and perused record inclusive the impugned judgment and order.

10. It may be pointed out that the POCSO Act has been enacted to provide a robust legal framework for the protection of children from sexual exploitations in different forms and the legislature has provided for stringent punishments. Section 2 (1) (d) of the aforesaid Act defines the term 'child' as any person below the age of 18 (eighteen) years. Section 30 of the POCSO Act speaks about presumption of culpable mental state on the part of the accused, which is, of course, a rebuttable presumption requiring the accused to prove that there had no such mental state with respect to the offence charged.

11. A perusal of the case record and as stated above, the learned trial court, by order, dated 05.09.2018, framed charges under Section 363 of the IPC read with Section 4 of the POCSO Act. In Sannaia Subba Rao vs State of A.P, reported in (2010) 4 SCC (Cri) 515, the Hon'ble Supreme Court held that the ingredients of Section 363 of the IPC involve an act of kidnapping of any person from the lawful guardianship. Kidnapping from the lawful guardianship is defined in Section 361 of the IPC, where it is stated that whoever takes or entices any minor under 16 (sixteen) years of age if a male, or under 18(eighteen) years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, a case of kidnapping is made out.

12. The most vital question in this case is the age of the alleged victim girl on the date of alleged occurrence that is, on 23.03.2018. In this regard, PW-1, the informant and father of the victim (PW-4), PW-2, the elder brother of the victim and PW-3, the elder sister of the victim stated that at the time of occurrence, the age of the victim girl (PW-4) was 17 (seventeen) years. PW-3 further stated that the police seized one School Leaving Certificate and another High School Leaving Certificate of 2017 by Ext.2, the seizure memo. Also PW-4, the victim girl, besides stating that at the time of occurrence, she was aged about 17 years and recognized M.Ext.1, the School Leaving Certificate and M. Ext.2, the High School Leaving Certificate of 2017, which were seized by Ext.2, the seizure memo. These two public documents show her date of birth as 05.01.2001. PW-6, the investigating officer, corroborated the aforesaid piece of evidence of seizure of the school certificates by Ext.2. Corroborating the aforesaid evidence, the medical evidence of PW-5, the doctor, stated that according to radiologist, the

age of the victim girl was below 18 years (16-17) vide Ext.4, the medical examination report. It may be mentioned that in case of age determined by radiologist test, the margin of error is 02 (two) years on either side.

13. The record of age in school admission register or High School Leaving Certificate is the best evidence to prove one's age being a public document within the meaning of Section 74 of Evidence Act. Therefore, based on the date of birth 05.01.2001, on the date of occurrence, that is, on 23.03.2018, the victim girl was aged 17 years 02 months and 16 days.

14. Accordingly, it is found that on the aforesaid date of occurrence, the victim girl (PW-4) was a 'child' as per the aforesaid definition under the POCSO Act.

15. Now, coming to the allegation of kidnapping of the victim girl, it is noticed from the evidence of PW-4, the victim, that on 23.03.2018 at about 10.30 am, she went to Lumding College to collect her Admit Card, by boarding a train from Borlungfar to Lumding along with the appellant. After getting down from rail at Lumding, the appellant, with whom she had a love relationship for about 3 years, proposed her for a trip to Lumding town to which she agreed. After roaming around in Lumding town, they returned to the rail station to return home. However, at the rail station, the appellant proposed her again to accompany him to Bihar State. She agreed to the proposal of the appellant and accordingly, the appellant took her to Bihar. The appellant kept her at his maternal uncle's house for about 1 month. During this period, both stayed together as husband and wife. Many times, the appellant indulged in sexual intercourse with her. Thereafter, her parents went there and brought back both of them and produced them at Borlungfar PS. Police sent her to get her statement recorded in court vide Ext.3, the statement. In cross-examination, she expressed her unwillingness to get the accused appellant punished for the offences.

16. Her (PW-4) above evidence has corroborated her statement vide Ext. 3 recorded under Section 164 CrPC in material particulars.

17. It may be noted that consent of a child is no defence. The Hon'ble Supreme Court in Prakash Vs.State of Haryana, reported in 2004 0 SCC (Cri) 290 held that the gravamen of the offence of 'kidnapping from lawful guardianship' defined in Section 361 of the IPC lies in the taking or enticing of a minor out of the keeping of the lawful guardian without the consent of such guardian. The parents are the natural and lawful guardian of a child. From the evidence of PW-1, the father, PW-2, the brother of the victim, PW-3, the sister of the victim and also from the evidence of PW-4, the victim girl, it transpires that she (PW-4) was taken away by the appellant from the custody of PW-1, her father, without his consent, which amounted to kidnapping from the lawful guardianship despite the victim (PW-4) had consented by reason of her being a child under the age of 18 years, her consent was immaterial and as such, it appears that the learned trial court rightly held the appellant guilty of the charge under Section 363 of the IPC. Accordingly, the conviction and sentence of the accused appellant under Section

363 of the IPC is affirmed.

18. With regard to the appellant's conviction under Section 4 of the POCSO Act, although the doctor PW-5, during examination of the victim minor girl on 10.05.2018 did not find any mark of injury on her body, PW-4 in her statement unequivocally stated that both she and the appellant lived together as husband and wife, for about 1 month at his maternal uncle's house in Bihar and indulged in sexual intercourse with her many times. The aforesaid unwarranted act of the appellant amounted to commission of 'penetrative sexual assault' defined in section 3, which is punishable under Section 4 of the POCSO Act. The appellant during the relevant period of commission of the offences was undisputedly a major. Therefore, his plea of innocence in his statement under Section 313 CrPC, in the absence of any evidence, cannot be relied on. Accordingly, the conviction and minimum sentence awarded to the accused appellant under Section 4 of the POCSO Act is hereby affirmed .

19. For the above stated reasons, the appeal stands dismissed. Return the LCR.

Appeal is disposed of accordingly