
(2023) 12 GAU CK 0009
In the Gauhati High Court
Case No : Criminal Appeal No. 278 Of 2022

Md. Babu Ali @ Imran Ali

APPELLANT

Vs

State Of Assam And Anr.

RESPONDENT

Date of Decision : 12-12-2023

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 164, 207, 313, 374

Indian Penal Code, 1860 — Section 366A

Protection of Children from Sexual Offences Act, 2012 — Section 4, 5, 6

Citation : (2023) 12 GAU CK 0009

Hon'ble Judges : Mridul Kumar Kalita, J

Bench : Single Bench

Advocate : M.K. Borah, B. Sharma

Final Decision : Allowed

Judgement

1. Heard Mr. M.K. Borah, learned counsel for the appellant. Also heard Mr. B. Sharma, learned Additional Public Prosecutor, appearing for the State of Assam.

2. This appeal has been preferred by the appellant, Md. Babu Ali @ Imran Ali under Section 374 of the Code of Criminal Procedure, 1973 impugning the Judgment and Order dated 27.09.2022, passed by learned Special Judge, POCSO, Karbi-Anglong, Diphu in POCSO Case No. 02/2016, whereby the present appellant was convicted under Section 4 of the POCSO Act, 2012 and was sentenced to undergo simple imprisonment for 7 years and to pay a fine of Rs. 10,000/- and in default of payment of fine to undergo further simple imprisonment for two months.

3. The facts relevant for consideration of the instant appeal, in brief, are as follows:-

i. That on 16.01.2016, the informant Smti Mina Bora had lodged an FIR before the In-Charge of Diphu Bazar TOP, Diphu, inter-alia, alleging that the daughter of the first informant (herein after referred to as victim), who was aged about 14

years at that time was lured away by the appellant when she had went for shopping.

ii. On receipt of the said FIR, Diphu P.S. Case No. 13/2016 under Section 366 A of the Indian Penal Code was registered and investigation was initiated. Ultimately, after completion of the investigation, the Investigating Officer laid the charge-sheet under Section 366 A of the Indian Penal Code and Section 4, 5 and 6 of the POCSO Act, 2012 against the present appellant.

iii. The appellant appeared before the learned Trial Court and faced the trial.

iv. After furnishing necessary copies of documents as referred to in Section 207 of the Code of Criminal Procedure, 1973 and after hearing both the sides, learned Trial Court had framed the charge under Section 4 of the POCSO Act, 2012 against the present appellant and when the said charge was read over and explained to the present appellant, he pleaded not guilty to the said charge and claimed to be tried.

v. During trial the prosecution side examined as many as 8(eight) prosecution witnesses including the informant as well as the victim. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 during which he pleaded his innocence. However, no defence evidence was adduced on behalf of the appellant. Ultimately, after consideration of the materials available on record, the present appellant was convicted and sentenced by the learned Trial Court in the manner as already stated hereinabove. The said Judgment and Order of conviction and sentence has been impugned in the instant appeal.

4. Before I consider the submissions made by learned counsel for both the sides, let me go through the evidence of the prosecution witnesses which is available on record.

5. PW-1 Smti Mina Bora is the informant of this case. She has deposed that she knows the accused and the victim. The victim girl is her daughter. The occurrence took place two years back. On the date of occurrence at about 9-30 PM, she and the victim went to bed. Later on at about 12:00 midnight, when she woke up, she did not find her daughter on the bed. She could find that the door was locked from outside. Then she started shouting. Hearing her shouts, nearby resident namely, Purnima Bania came and opened the door. Thereafter, she went to railway station and searched for her daughter. She could learn that the accused took away her victim daughter and she lodged the ejahar which is exhibited as Exhibit-1. She has further deposed that after a few days, police took her (PW-1) to Lanka Udali where the grandmother of the accused stayed. Police recovered the victim girl and the accused from a field of sesame cultivation. Then the police brought the victim girl and the accused to Diphu Police Station. Police got the victim medically examined and statement of the victim recorded in the Court. At the time of occurrence, the age of the victim was 11 to 12 years.

In cross-examination, PW-1 told that her house is situated near the house of the

accused. The accused was known to her and there was visiting terms between them. On the date of occurrence, she slept by shutting the door from inside. After awaking, she did not find the door in broken condition. She herself did not write the ejahar. She denied the suggestion that the victim girl eloped with the accused on her own volition.

6. PW-2 Miss Purnima Bania deposed that she knows the informant, the accused and the victim girl. She could not say how long ago the occurrence took place. On the date of occurrence at about 12:00 midnight, she heard hue and cry of the informant. Her house is situated near the house of the informant. Hearing hue and cry, she came to the house of the informant and found the door of the house of the informant locked from outside. Then she called the informant from outside. The informant asked her to unlock the door. As she had no key, she broke the lock by means of a stone. Coming out of the house, the informant told her the fact of missing of her victim daughter. On the next day morning, she went to Nagaon. Later on, she did not hear anything about the occurrence.

Cross-examination of this witness was declined by the defence.

7. PW-3 Smti. Baby Kour stated that she knows the informant, the accused and the victim girl. She could not recollect the exact date of the occurrence. At the time of occurrence, she was not at Diphu. She stayed in Guwahati. After one month when she returned to Diphu, she came to know that the accused eloped with the victim. Later on, she heard that the mother of the accused produced the accused and the victim in the PS.

Appellant side declined to cross-examine this witness also.

8. PW-4 Smti. Basanti Kour stated that she know the informant, the accused and the victim. She could not recollect the exact date of the occurrence. At the time of occurrence, she was not at Diphu. She stayed in Calcutta. After three month when she returned to Diphu she came to know that the victim eloped with the accused. She did not know after how many days, police recovered the victim and the accused.

Appellant side declined to cross-examine this PW-4.

9. PW-5 Dr Mercy Rongpharpi deposed that on 26.01.2016, she was attached with Diphu Civil Hospital and on that day, she examined the victim in connection with Diphu P.S. Case No. 13/2016 under Section 366A of the Indian Penal Code. She learned about the positive history of sexual intercourse from the victim. On examination, she found no external injury. Hymen was absent. The victim was not pregnant at the time of examination. The age of the victim girl was below 16 years. Exhibit-2 is the medical examination report. Exhibit-2(1) is her signature.

In cross-examination, PW-5 stated that she could not say whether the evidence of sexual intercourse detected was recent or not.

10. PW-6 Shri Bijon Kumar Singha deposed that on 16.01.2016, when he was

working at Diphu Town Out post as an A.S.I., the informant Mina Bora lodged an ejahar at the Outpost stating therein that on 14.01.2016, at about 4:00 PM, her daughter went for shopping and at that time the accused Babu Ali kidnapped her by enticing and the accused kept her confined at Hojai. At that time, the age of the victim was 14 years. After getting the ejahar, the In-Charge of Town OP Shri Nitumoni Hazarika after making GDE bearing No.450 sent the same to the Diphu for registration of a case. In this regard, Diphu Police Station registered a case under Section 366A of Indian Penal Code and endorsed him to take preliminary steps of the investigation. He interrogated the informant at the Police Station. On 17.01.2016 he went to the place of occurrence, prepared a sketch map of the place of occurrence and recorded the statements of the witnesses. As the house of the accused situated at the place of occurrence, he searched the house of the accused, but he did not find the accused and victim girl. On 18.01.2016, he sent messages to all the Police Stations about the occurrence. On 21.01.2016, the mother of the accused and her son-in-law produced the victim girl at Town Outpost. The mother of the victim girl was also along with them. Thereafter, he recorded the statement of the victim girl. On 22.01.2016, he got the victim medically examined and on the same day her statement was recorded by the Court. On 29.02.2016, he collected the medical report of the victim girl and as the victim was minor, he prayed before the Court to allow him to add the Sections 4, 5 and 6 of the POCSO Act against the accused. He tried his level best to arrest the accused person, but could not arrest him. On completion of his preliminary investigation, he returned the case diary to the Officer-In-Charge for further investigation.

In cross-examination, he told that he did not complete the Investigation.

11. PW-7 Shri Padmeswar Saud deposed that on 22.03.2016, he was working as Second Officer at Diphu Police Station. He told that A.S.I. Bijon Singh almost completed the investigation except arresting the accused. He also tried his best to arrest of the accused, but he could not find out any clue of the accused. On 21.04.2016, he submitted the charge sheet against the accused person under Section 366A of the Indian Penal Code and under Section 4, 5 and 6 of the POCSO Act bearing C.S. No.22/2016. Exhibit-3 is the charge sheet while Exhibit-3(1) is his signature.

In cross-examination, PW-7 stated that preliminary investigation was not done by him. He also did not collect the statement of the victim from the Court. He only submitted the charge sheet in this case.

12. PW-8 is the victim who testified in her evidence that the informant Smti Mina Bora is her mother. She knew the accused Md. Babu Ali. The incident took place about 8 years back. At that time, she was 11 years old and she was staying with her mother at Diphu Garwan Basti near Power House. The incident took place at about 8:00 to 9:00 PM. On that day, she was staying in their house along with her mother. At that time, somebody knocked at their door and she opened the door. As it was dark, she did not see anybody. As soon as door was opened,

somebody put a cloth over her head and took her somewhere. She recovered herself in a bamboo thatched house, but she did not know where it was. She saw the accused Babu Ali there. She asked him to take her to her house. Then the accused beat her with bamboo stick and by his hand. The accused committed rape on her in the said house. He kept her in that house for a week and raped her in that week. The foods provided to her by the accused were intoxicated. After seven days, her mother along with police recovered her and the accused in that house. Police brought her and the accused to the Police Station. Police interrogated her. Police got her medically examined and produced her before the Court. Magistrate in the Court recorded her statement. Exhibit-P-4/PW-8 is her statement recorded under Section 164 of of the Code of Criminal Procedure, 1973. Exhibit-P-4(1)/PW-8 is her signature.

During her cross-examination, she has stated that police interrogated her in the Police Station. She denied the fact that she had stated before police that she went to Hojai with a boy on the day of occurrence. She also denied the fact that she had love affair with the accused for three years. She further denied the suggestion that the accused did not commit rape on her. Earlier she came to the Court for giving deposition in a case. In that case, she deposed before the Court to dismiss that case as she was a student of Class-IX. She was taken by a car. In that house, she met many people. She knew the accused Babu only. She did not know other persons. She did not ask anybody in that house as to why she was taken to that house. She lived In Diphu since her childhood. Sometimes she saw the accused. She has denied the fact that she went willingly to the accused Babu Ali. She also denied the suggestion that what she stated on the day of her deposition in the Court was all false.

13. Learned counsel for the appellant has submitted that learned Trial Court had erred in coming to the finding of guilt of the present appellant only on the basis of uncorroborated testimony of the victim, that is, PW-8. He has submitted that the version of the alleged incident narrated by PW-8 during trial is entirely different from her version which she had stated during her examination under Section 164 of the Code of Criminal Procedure, 1973.

14. Learned counsel for the appellant has also submitted that the medical report of the victim girl also does not corroborate the testimony of PW-8 as no sign of any injury was found on the victim girl though she had stated in her testimony that she was assaulted by the appellant.

15. It is also submitted by learned counsel for the appellant that the medical evidence, that is, the evidence of PW-5, who is the doctor, also is not sufficient to come to a conclusion as to whether the victim was subjected to sexual intercourse as the doctor, in her testimony could not say as to whether the victim was subjected to recent sexual inter-course or not.

16. Learned counsel for the appellant has cited a ruling of this Court in "Rafiquddin Vs. State of Assam" reported in 2021 (1) GLT 106, wherein, this

Court gave the benefit of doubt to the accused on the ground that the statement of victim which was recorded under Section 164 of the Code of Criminal Procedure, 1973 was inconsistent and contradictory with the evidence which she gave in the Court.

17. Similarly, the learned counsel for the appellant has also cited a ruling of this Court in "Sri Abhijit Dutta Vs. State of Assam and another" reported in 2019 (1) GLT at Page-17, wherein, the accused was given benefit of doubt on the ground that the testimony of the victim was not corroborated and was not supported by the medical evidence.

18. On the other hand, learned Additional Public Prosecutor has submitted that the PW-8, who is the victim, has categorically implicated the present appellant in the offence alleged against him. He has submitted that in sexual offences, the evidence of victim is sufficient to come to the conclusion of guilt of the appellant and in such offences, corroboration of the testimony of the victim girl is not necessary. It is also submitted by learned Additional Public Prosecutor that conviction can be based solely upon the testimony of victim girl unless there are compelling reasons for seeking such corroboration.

19. In support of his contention, learned Additional Public Prosecutor has cited ruling of Hon'ble Apex Court in State of Punjab Vs. Gurmit Singh And Others reported in reported in (1996) 2 SCC 384 and Phool Singh Vs. State of Madhya Pradesh (2022) 2 SCC 74.

20. I have considered the submissions of learned counsel for both the sides and have perused the evidence on record very carefully.

21. In this case, it appears that learned Trial Court has convicted the present appellant mainly on the basis of the testimony of the victim girl which she has deposed during the trial as PW-8. However, if we consider the statement of the victim girl which she had made under Section 164 of the Code of Criminal Procedure, 1973 and which has been exhibited as Exhibit-P4, it appears that she had stated therein that she left with the present appellant on her own and she came to Hojai in a bus, which is quite contradictory to her statement which she had made while deposing as PW-8, wherein, she had stated that she is unaware as to who took her by putting a cloth over her head when she opened the door in between 8:00 to 9:00 PM and when she recovered her senses, she found herself in a bamboo thatches house, whereas, in her statement gave under Section 164 of the Code of Criminal Procedure, 1973 she has stated that she came to Hojai along with the present appellant in a bus and then went to the residence of the relatives of the appellant, where, she also met the mother of the appellant. She has categorically stated in her statement under Section 164 of the Code of Criminal Procedure, 1973 that neither the appellant nor any of his family member had assaulted her while she was with them. She has also not stated anything about subjecting her to sexual intercourse by the appellant when her statement was recorded under Section 164 of the Code of Criminal Procedure,

1973.

22. It is also pertinent to note that though the mother of the victim has stated in her testimony that the victim and she had gone to bed to sleep on the day of incident at about 9:30 PM and she only came to know that victim is not there at about 12:00 midnight, whereas, the victim has stated in her testimony that someone had knocked the door of the house at about 8:00 to 9:00 PM and when she opened the door, somebody put cloth on her and took her away. There is no explanation as to why the victim did not call her mother when she heard someone knocking on the door and why she herself went to open the door without informing her mother, which does not appear to be a normal conduct under such circumstances. There is no evidence of any hue and cry or shouting by the victim at the time when she was taken away from her house. Further, though the victim has deposed that she recovered herself only in a thatched house, however she has also stated during her cross examination that she was taken away by a car, which she had stated for the first time before the trial court while deposing as PW-8. In her statement made before the Investigating Officer under Section 161 of the Code of Criminal Procedure, 1973, nor in her statement recorded under section 164 of the Code of Criminal Procedure, 1973 she had stated any such facts. Such a variance in different versions narrated by the PW-8 regarding the alleged incident makes her testimony unsafe for reliance.

23. As regards the question as to whether the conviction may solely be on the basis of testimony of prosecutrix, there is no doubt that if the testimony of the prosecutrix is found to be trustworthy, unblemished, credible and if her evidence is found to be of sterling quality the conviction can be based only on her testimony. However, if it is not so and if it does not inspire the confidence of the Court, it is always safe to seek further corroboration of her statement by other supporting evidence. In the instant case, though on the medical examination of the victim girl her hymen was found absent which is indicative of the fact that she might have been subjected to sexual intercourse at some point of time, however same is not conclusive in nature. As regards the question as to whether the victim was forcefully subjected to sexual intercourse recently before such medical examination or not, no such conclusive evidence is there as the medical evidence on record also failed to suggest that the victim was subjected to forceful sexual intercourse. Moreover, considering the fact that the testimony of the victim girl while she has deposed before the Court is inconsistent and totally contradictory to her statements which she has made while her statement was recorded under Section 164 of the Code of Criminal Procedure, 1973, as well as made under Section 161 the Code of Criminal Procedure, 1973, this court is of considered opinion that it may not be safe to rely on sole testimony of the victim girl (PW-8), to arrive at a finding of guilt of the present appellant. As the testimony of the victim girl does not inspire confidence and same remained uncorroborated in material particulars, the appellant is entitled to get benefit of doubt in the instant case.

24. For the reasons stated above, this court is unable to concur with the finding of learned trial court in convicting and sentencing the present appellant under section 4 of the POCSO Act, 2012. Accordingly, the conviction and sentence imposed on the appellant under section 4 of the POCSO Act, 2012 by the impugned judgement is hereby set aside. The appellant be set at liberty forthwith if not required in connection with any other case.

25. This Appeal is accordingly allowed.

26. Let, the case record of POCSO case No. 2/2016, with a copy of this judgement be send back to the Court of learned Special Judge, POCSO, Karbi Anglong, Diphu. Let, also a copy of this judgement be sent to the Superintendent, District Jail, Diphu.