

(2024) 11 GAU CK 1282
In the Gauhati High Court
Case No : CrI.A. Of 295 Of 2018

Sri Ramdhan Namasudra @ Manoranjan

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 19-11-2024

Acts Referred:

Code of Criminal Procedure, 1973 — Section 53(A), 164, 313, 374(2)

Indian Penal Code, 1860 — Section 302

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

Citation : (2024) 11 GAU CK 1282

Hon'ble Judges : Sanjay Kumar Medhi, J; Mitali Thakuria, J

Bench : Division Bench

Advocate : A. Devi, B. Bhuyan, R. Das

Final Decision : Dismissed

Judgement

Sanjay Kumar Medhi, J

1. The present appeal has been preferred under Section 374 (2) of the Code of Criminal Procedure, 1973 against the judgment and order dated 24.04.2018 passed by the learned Special Judge, Nagaon, Assam in Special Case No. 48 (N) of 2016. By the aforesaid judgment, the appellant has been convicted and sentenced to undergo rigorous imprisonment for life and also to pay fine of Rs. 10,000/- in default R.I. for another 6 (six) months under Section 302 IPC and to undergo rigorous imprisonment for life and also to pay fine of Rs. 10,000/- in default R.I. for another 6 (six) months under Section 6 of the POCSO Act concurrently.

2. The case involves the brutal killing and rape of a seven-year-old child who would be referred to as the victim in the judgment.

3. The criminal law was set into motion by lodging of an Ejahar by PW-3, the cousin of the deceased. As per the Ejahar which was lodged on 27.12.2015, the appellant had lured the deceased on the pretext of buying chocolate by giving

Rs. 10/-to her. Thereafter, as she did not return, her mother PW-2 made a search and the body of the deceased was found in an abandoned latrine. The Ejahar had specifically named the appellant as the accused person.

4. After completion of the investigation, the charge sheet was submitted whereafter charges were framed. As the appellant had denied the charges, the trial had begun. In the trial, 15 nos. of prosecution witnesses were examined along with the aspect of proving certain documents and exhibits. After completion of the evidence of the PWs, the appellant was examined under Section 313 of the Cr.P.C. wherein he had denied the allegations. It may be mentioned that it was thereafter that the defence had adduced evidence through 2 (two) nos. of witnesses in which certain aspects were revealed.

5. After completion of the evidence and other procedures established by law, the matter was considered which culminated in the aforesaid judgment.

6. We have heard Ms. A. Devi, learned Legal Aid Counsel. We have also heard Ms. B. Bhuyan, learned Senior Counsel & Addl. Public Prosecutor, Assam assisted by Ms. R. Das, learned counsel.

7. Ms. Devi, the learned Legal Aid Counsel has submitted that the case is based on circumstantial evidence and the materials on record would not constitute a complete chain to come to a definite conclusion of complicity of the appellant. She has highlighted that apart from the fact that there was no eye-witness or any direct evidence, even the forensic evidence collected was not in accordance with law. She has also submitted that the requirement of having a DNA examination under Section 53-A of the Cr.P.C. was done away with and therefore there was no conclusive material to connect the appellant with the offence. She has submitted that though the offence in question is a heinous one, without conclusive materials to connect the appellant with the same, the learned Sessions Court had committed error in law in convicting the appellant. On the other hand, the learned Addl. Public Prosecutor has submitted that the impugned judgment is based on relevant materials and the conclusion arrived at is on the basis of the allegation being proved beyond all reasonable doubts.

8. To appreciate the rival contentions, it would be necessary, as an Appellate Court to look into the materials more specifically, the depositions of the witnesses. As mentioned above, 15 nos. of prosecution witnesses were examined which included 2 (two) numbers of Doctors and the Investigating Officer. PW-12 is the Doctor who had conducted the post-mortem over the body of the deceased and PW-14 is the Doctor who had examined the appellant.

9. PW-1 is a seizure witness. PW-2 is the mother of the deceased and her deposition is of significance. She narrates that on the fateful evening of December, 2015, while the deceased was warming herself by sitting beside a fire, the appellant had come to their place and sat near her and was conversing with her whereafter, he had left. Thereafter, the deceased had told her that the appellant would give her chocolates and therefore, she wanted to go to the

appellant's house which the PW-2 had resisted. However, on the pretext of going to the house of the elder brother of PW2, the deceased had left. Since about half an hour had passed and the deceased did not return home, the PW-2 had gone to the house of her brother who was examined as PW-11 and asked for her daughter which was replied that she had not come to their house. Thereafter, PW-2 had gone to the house of the appellant and asked his younger sister and she had replied that the appellant had gone somewhere by keeping his bicycle at home and she did not know where he had gone. While the search was going on, PW-10 told PW-2 that she could hear the sound of a child crying near the latrine in the backside of their house. On such information, PW-2, along with other villagers had gone near the latrine and found her daughter naked inside the latrine and was bleeding through her urinary organ. Though she was tried to be taken to the hospital, it was detected that the daughter had already passed away. The matter was accordingly informed to the Gaon Burah- PW5, who had consequently informed the police. Thereafter, police had come and made certain seizures and had taken the body of the deceased for post-mortem. In the cross-examination, a suggestion was given to her that some passerby on the road had abducted the daughter and committed bad act on her which was negated.

10. PW-3 is the informant, who had lodged the Ejahar, PW- 4 is the father of the deceased, who is a seizure witness as well as inquest witness, PW- 5 is the Gaon Burah, who had arrived at the place of occurrence and had informed the police. PW-6 is the shopkeeper from whose shop the deceased had purchased chocolates and biscuits who deposed that such purchase was made by the deceased by giving Rs. 10/-. PW-7 is another seizure witness who had also stated that he had gone to the house of the appellant, who, however was not found there. PW-7 had covered the body of the deceased with a white cloth. He had also stated that the wife of the appellant had told him that the appellant had come to their house with a girl. PW-8 is a resident of the village and had submitted that the appellant lives in the house of his elder sister and that near the place of occurrence there was a Health Sub-Centre wherein persons reside. PW-9 had stated that she was sitting with her husband- PW-11 and another person Kanu Namasudra- PW-7 near a fire. It may be mentioned that the period was an evening of late December in the year, 2015. Then the appellant had come and asked for water and thereafter proceeded to the house of the deceased. The timing which has been stated by the said PW-9 matches with the timing of the incident stated by the other witnesses. PW-10 is the wife of PW-8. PW-11 is the husband of PW-9 who had also stated that the appellant had come to their place and had water and went away towards the house of the deceased and after half an hour, the mother of the deceased had come to their house in search for the deceased.

11. PW-12 is the Doctor who had conducted the post-mortem on the deceased. He opined in the following manner regarding the death:

"In my opinion the cause of death was (homicide due to) asphyxia due to

compression of wind pipe of neck. Signs of sexual assault is present in the body, the time of death is within 24 hours of post-mortem done. Signs of throttling is present in neck. Ext. 6 is my report and Ext. 6 (1) is my signature. It is a case of brutal murder besides wild sexual harassment. Sexual assault (supra) was so forceful so there was rectal injury causing complete perineal tear."

12. PW-13 is the Scientific Officer, who had done the forensic test on the samples collected from the deceased as well as the appellant. PW-14 is the Doctor who had examined the appellant. In his cross-examination however he had stated that no injuries or redness were found in the private parts of the appellant. PW-15 is the Investigating Officer who had investigated the case. He had stated that he has seized the underwear and pant of the appellant and other articles.

13. As indicated above, based on the deposition of the aforesaid witnesses, the appellant was examined under Section 313 of the Cr.P.C. where he had denied the allegations and the evidence against him. However, thereafter on 03.01.2018 the appellant had deposed as DW-1 in which he admits that the police took away his clothes which he was wearing and also that there was collection of pubic hair, nail clippings and semen from him. DW-2 is the wife of the appellant. The statement under Section 313 of the Cr.P.C. was recorded on 23.11.2017 whereas the appellant had deposed as DW-1 on 03.01.2018.

14. Ms. Devi, the learned Legal Aid Counsel has submitted that in a matter involving rape there is a necessity to conduct a DNA test under Section 53A of the Cr.P.C. It is submitted that in the instant case no such DNA test was done and therefore, there was a lacuna in the prosecution case. As regards the forensic examination, she has submitted that no matching of the blood stains or the semen were done with that of the appellant and in this regard there was also a direction of this Court on an earlier occasion even whereafter no such matching could be done. She has also highlighted the aspect that the PW-2, mother of the victim, in her statement recorded under Section 164 of the Cr.P.C. did not mention about any money which was said to be offered by the appellant to the deceased to buy chocolates.

15. By relying upon the case of *Rahim Beg & Another vs. State of U.P.* reported in (1972) 3 SCC 759 the learned counsel for the appellant has submitted that presence of injuries on the male organ of a person accused of rape of a minor girl is necessary without which there cannot be a conclusive proof of complicity of such accused in such offence. She submits that there are lacuna in the prosecution case and in absence of any eye-witness, the chain of events would not be complete to involve the appellant with the offence in question. It is reiterated that the scientific evidence is not adequate as there was no matching of the semen.

16. Per contra, Ms. Bhuyan, the learned Addl. Public Prosecutor, Assam has submitted that the materials on record and the evidence are sufficient to come to the conclusion of guilt of the appellant in the instant case. She submits

that the evidence of all the 15 nos. of prosecution witness are consistent and though it is a case of circumstantial evidence, the depositions are such that it would lead to only one conclusion of involvement of the appellant with the offence. She has submitted that the appellant was directly named in the Ejahar lodged on 27.12.2015 by the PW-3.

17. The mother of the deceased who had deposed as PW-2 had given a vivid description of the events when the appellant had come to their house in the evening and was seen to be talking to the deceased near the fire, whereafter the deceased wanted to go to his house as he had lured her to give chocolates for Rs 10/-. PW-2 with her motherly instinct had asked her not to go and thereafter, on some pretext the deceased had left by saying that she would visit the house of the PW-11 who is the brother of PW-2. Since the deceased had not return to their house, after half an hour, a search was made in the house of PW-11, who had stated that the deceased did not come to their house whereafter all of them had gone to the house of the appellant where he was not found. Thereafter, it was heard from PW 10 that she could hear the cry of a child behind their house near the abandoned latrine whereafter the naked body of the deceased was found with injuries which has been recorded in the post-mortem report as follows:

"Wounds, Position, Character

- 1) Rt. Cheek – multiple < 1 cm discrete marks of bruises present.
- 2) 4 in no. in same vertical plane –bruises- in left side of neck- < 1 cm.
- 3) 3 Nos. same size marks in right neck posteriorly.
- 4) Left breast –curvilinear bruise 3 in nos.
- 5) Vaginal injury as described.
- 6) Anal injury as described.

...

11) Organs of generation external and internal

Vagina is torn, due to forceful penetration. Causing rectum injury, causing complete perennial tear. Laceration present in vagina, causing pelvic hemotoma and circular bruise in vulva. Rigor mortis is present. Details. Small bruises in the neck and cheek are like nail marks, bruises in left breast are like teeth marks, no pubic hair is collected as it is absent. The thyroid cartilage is fractured, vagina is torn, lacerated causing complete perennial tear and rectal injury. Vaginal laceration inside cause pelvic hematoma."

18. The learned Addl. Public Prosecutor has submitted that the version of PW-2 has been corroborated by the versions of PW-6, PW-7, PW-9 and PW-11. She submits that PW-6, who is the shopkeeper had deposed that during that time the deceased had come to his shop and purchased chocolates and biscuits for Rs 10/-. Though PW-7 had made a statement that the wife of the appellant had told

him that the appellant had come to the house with a girl, the said version will not have any adverse impact inasmuch as, the other witnesses have consistently deposed that on their visit to the house of the appellant at that time, he was not found and his sister and wife had told that he had left for some place leaving behind his bicycle.

19. The learned Addl. Public Prosecutor has submitted that the medical evidence and scientific evidence would play a significant role in the present case. By controverting the submission that no matching being done, the learned Addl. Public Prosecutor has submitted that in the report of the Scientific Officer, there are positive results regarding presence of blood in the nail clippings of the appellant and spermatozoa in his underwear. She has explained that though presence of spermatozoa in the underwear may be possible in normal circumstance, however, the presence of blood in the nail clippings of the appellant would prove his involvement in the offence.

20. The learned Addl. Public Prosecutor has also submitted that though in the examination made under Section 313 of the Cr.P.C., the appellant had denied the allegations were made against him by the PWs, he, as DW-1 had admitted that the police had taken away his clothes which he was wearing and had also collected pubic hair, nail clippings and semen. She has highlighted the results of the forensic test which was proved as Ext. 7, more specifically the following aspects pertaining to the appellant.

Serial No. 6 with regard to gave positive test for human blood in the nail clippings.

Serial No. 7 gave positive test for spermatozoa in the swab.

Serial No. 8 positive test for human blood in the pubic hair.

Serial No. 9 positive test for spermatozoa in the underwear and pant.

21. As regards the reliance on the case of Rahim Beg (supra), the learned Addl. Public Prosecutor has submitted that in the subsequent case of State of Himachal Pradesh vs. Raghubir Singh reported in (1993) 2 SCC 632 the Hon'ble Supreme Court had distinguished the case of Rahim Beg (supra) and had also laid down that it would be limited to the facts of the said case. She submits that the chain of events in the present case is complete which would lead to only one conclusion of the involvement of the appellant.

22. The learned Addl. Public Prosecutor has relied upon the case of Veerendra vs. State of Madhya Pradesh reported in (2022) 8 SCC 668 wherein the Hon'ble Supreme Court has laid down that each and every defect would not be fatal to the case of the prosecution if the materials otherwise are sufficient to prove the involvement of the accused beyond all reasonable doubt. On the aspect of the Section 53A of the Cr.P.C. pertaining to DNA Test, the following has been laid down.

"53. In view of the nature of the provision under Section 53A Cr.P.C and the decisions referred (supra) we are also of the considered view that the lapse or omission (purposeful or otherwise) to carry out DNA profiling, by itself, cannot be permitted to decide the fate of a trial for the offence of rape especially, when it is combined with the commission of the offence of murder as in case of acquittal only on account of such a flaw or defect in the investigation the cause of criminal justice would become the victim. The upshot of this discussion is that even if such a flaw had occurred in the investigation in a given case, the Court has still a duty to consider whether the materials and evidence available on record before it, is enough and cogent to prove the case of the prosecution. In a case which rests on circumstantial evidence, the Court has to consider whether, despite such a lapse, the various links in the chain of circumstances forms a complete chain pointing to the guilt of the accused alone in exclusion of all hypothesis of innocence in his favour."

23. She has also submitted that the witnesses are rustic villagers and even then, their evidence are consistent. In this connection reliance has been made upon the case of Pundappa Yankappa Pujari vs. State of Karnataka reported in (2014) 12 SCC 372 wherein it has been laid down that minor discrepancies are to be overlooked wherein the witnesses are villagers.

24. The rival submissions have been duly considered and the materials placed before this Court including the LCR have been carefully perused.

25. The evidence on record which has been discussed above would show that the versions of the prosecution witness are consistent. The mother of the deceased who had deposed as PW-2 had narrated the entire incident and her statement and deposition are fully corroborated by the PW-6, PW-7, PW-9 and PW-11. PW-6, who is the shopkeeper from whom the deceased had purchased chocolates and biscuits for Rs 10/- at that time, PW-7, PW-9 and PW-11 were present when the appellant had first came to them who were warming near a fire and had asked for water and thereafter had gone to the house of the victim.

26. We have noted that though in the examination made under Section 313 of the Cr.P.C., the appellant had denied the allegations made against him in the depositions of the PWs, he as DW-1 had admitted that the police had taken away his clothes which he was wearing and had also collected his pubic hair, nail clippings and semen. We have also seen that the Serological Report which was proved as Ext. 7 contains, amongst others, the following items, Sl. No. 6 Nail Clippings, Sl. No. 7 - swab, Sl. No. 8 - pubic hair and Sl. 9 - underwear & pant which gives positive test for blood and spermatozoa, the details of which have been recorded above. We have noted that the examination under Section 313 of the Cr.P.C. was done on 23.11.2017 whereas the appellant had deposed as DW1 subsequently on 03.01.2018.

27. The medical evidence which has been adduced by the Doctor -as PW12 pertaining to the examination of the body of the deceased and the Doctor as

PW14 pertaining to the examination of the appellant would show that the subsequent scientific examination done including the serological test are consistent with the depositions made by them as well as by the Scientific Officer as PW-13. It is true that PW14 in his cross-examination had submitted that no injuries or redness were found in the private parts of the appellant. The aforesaid material however has to be examined from the point of view of the serological and scientific test done on the materials collected from the appellant including his clothes, pubic hair, nail clippings and semen. As rightly pointed out by the learned Addl. Public Prosecutor, Assam, all the aforesaid items gave positive test. Much emphasis has been made by the learned counsel for the appellant that no matching was done. We have however noticed that there is a clear admission regarding collection of the aforesaid items by the appellant as DW1 which significantly was recorded subsequent to the statement made by the appellant under Section 313 wherein he had categorically admitted of the collection of the aforesaid items from him. There is no material or even a suggestion that the examination of the materials done in the scientific test did not belong to the appellant.

28. The learned counsel for the appellant had relied upon the case of *Rahim Beg* (supra) with regard to the necessity of injuries on the male organ wherein the victim is a minor. As indicated above, in the subsequent of *Raghubir Singh* (supra) a distinction has been carved out in the following manner.

"7. Dr Ghatate, learned senior counsel for the respondent submitted, by reference to *Rahim Beg v. State of U.P.* that the absence of injuries on the penis of the respondent should be treated as sufficient to negative the prosecution case. We are afraid we cannot agree. Inferences have to be drawn in every case from the given set of facts and circumstances. There is no inflexible axiom of law which lays down that the absence of injuries on the male organ of the accused would always be fatal to the prosecution case and would discredit the evidence of the prosecutrix, otherwise found to be reliable. The presence of injuries on the male organ may lend support to the prosecution case, but their absence is not always fatal. *Rahim Beg* case was based on its peculiar facts and the observations made therein were in a totally different context and cannot advance the case of the respondent. The observations in *Rahim Beg* case cannot be mechanically pressed into aid in every case regardless of the specific circumstances of the crime and absence of the fact situation as existing in that case. Every case has to be approached with realistic diversity based on peculiar facts and circumstances of that case. Doctor Sharma who had examined the respondent had found him to be capable of sexual intercourse and according to his opinion the absence of injury on his male organ was not suggestive of the fact that he had not indulged in sexual intercourse with the prosecutrix, then offender years of age. His evidence was not at all challenged on this aspect by the defence."

29. Apart from the fact that in the subsequent decision of *Raghubir Singh*

(supra), the said case of Rahim Beg (supra) has been distinguished and limited, we have noticed that in the said case of Rahim Beg (supra), the expression used is only a likelihood of injury and not a categorical finding of presence of such injuries.

30. With regard to the submission that Section 53A of the Cr.P.C. has not been complied with as no DNA test has been conducted, it would be necessary to examine the aspect of the aforesaid provision, the relevant portion of which reads as follows:

“(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely;

(i) the name and address of the accused and of the person by whom he was brought

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and”.

(v) other material particulars in reasonable detail.”

31. The said provision is only an enabling provision which empowers the prosecution to go for a DNA requirement and failure to make such a DNA test would not, in our opinion, render the prosecution case bad in law.

32. The Hon’ble Supreme Court in the case of State of Punjab vs. Karnail Singh reported in (2003) 11 SCC 271 has made certain significant observations on the aspect of giving benefit of doubt. It has been explained that such doubts has to be a reasonable one and the aspect of balancing with the plight of the victim is essential which is also towards the cause of justice. For ready reference, the relevant portion of the aforesaid judgment is extracted herein below:

“12. Exaggerated devotion to the rule of benefit of doubt must not nurture

fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law. Prosecution is not required to meet any and every hypothesis put forward by the accused. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. Vague hunches cannot take place of judicial evaluation. A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth."

33. In view of the aforesaid discussions and the materials available on record, we are of the view that there is no scope for interference with the impugned judgment and order dated 24.04.2018 and the conclusion arrived at by the learned Special Judge, Nagaon, Assam in Special Case No. 48 (N) of 2016 are based on cogent materials.

34. The appeal accordingly stands dismissed.

35. Send back the LCR.

36. Before parting we would like to record out appreciation for the assistance rendered by the learned Legal Aid Counsel and she would be entitled to the prescribed fee.