

GAHC040004712022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : CRL.A(J)/7/2022

Gopal Thapa
S/o Late Dhan Bahadur Thapa,
Permanent Resident of Village Pholbari, PO Khowron, PS Barikund Tinali, District
Udalguri (Assam), presently lodging at District Jail, Tezu, Lohit District (Arunachal
Pradesh)

VERSUS

THE STATE OF AP and Anr.
Through Public Prosecutor 2:XYZ (Victim)
Age: 0
Occupation

Advocate for the Petitioner : Dicky Panging

Advocate for the Respondent : P P of AP

BEFORE
HONBLE MR. JUSTICE NELSON SAILO
HONBLE MR. JUSTICE NANI TAGIA

ORDER

Date : 17.08.2023
(Nelson Sailo, J.)

Heard Mr. D. Panging, learned Amicus Curiae, Ms. T. Jini, learned Additional Public Prosecutor for the State respondent and Ms. H. Jeram, learned counsel appearing for the victim girl.

[2.] This is a jail appeal filed by the accused/appellant against the judgement dated 09.02.2022 passed by the Court of the learned Special Judge, Protection of Children from Sexual Offences (POCSO), East Session Division, Tezu, Lohit District, Arunachal Pradesh, in POCSO Case No. 16/LDV/2021 by which he was convicted under Section 4 of the POCSO Act and sentenced to undergo 20 years rigorous imprisonment.

[3.] The case of the prosecution in brief is that a written FIR was received on 15.08.2021 which was submitted by the mother (PW-2) of the victim girl to the effect that on 14.08.2021 at around 6 p.m. when she came back home, she found her daughter aged about 6 to 7 years not inside the house but near the compound of their neighbour. When she scolded her for not staying in the house, her daughter said that she did not want to stay in the house alone because an old man called Gopal Thapa (appellant) had raped her twice when he found her alone in the house. She said that the first incident

happened around 2 months ago in her paternal uncle's house and the second time about a month back in their own house. Accordingly, the FIR was registered and the case investigated into. Upon completion of the investigation, the case Investigation Officer (IO) finding a *prime facie* case established against the appellant under Section 376AB IPC read with Section 4 of the POCSO Act submitted the chargesheet. Thereafter, charge was framed against the appellant under the aforesaid Section on 04.10.2021 and to which, the appellant pleaded not guilty and claimed for trial. Accordingly, trial against the appellant/accused commenced.

[4.] During trial, the prosecution examined as many as 6 prosecution witnesses including the victim girl. After the prosecution led their evidence, the appellant was examined under Section 313 of the Cr.P.C. As for the defence, no evidence was adduced apart from cross examining some of the prosecution witnesses. Thereafter, upon hearing the parties, the learned Trial Court passed the impugned judgment and order convicting the appellant as already stated in the preceding paragraph.

[5.] Mr. D. Panging, learned Amicus Curiae, submits that the statement of the Victim girl was recorded under Section 164 Cr.P.C, in which she has stated that one day when her mother had gone to the shop, the victim girl was alone in the house and the appellant came to their house and asked for a cup of tea. She thereafter, served a cup of tea to him and the appellant started touching her private parts and after removing her underwear he laid on top of her on the

floor and committed rape upon her. The appellant thereafter, threatened her not to tell anyone about the incident and not even to her mother or else he would beat them. The victim girl also stated that after many days, the date which she does not remember, a similar incident happened for the second time in the house of her uncle. On that day there was no one in the house and while she was playing, the appellant on seeing her held her hand and brought her inside the house and committed rape upon her after making her lie down on the bed. The appellant again threatened her and asked her not to tell anyone about the incident including her mother. The learned Amicus Curiae submits that the version of the victim girl during the trial however is that the first incident happened in the house of her uncle and the second incident happened in her house. Similarly, the version of the mother of the victim girl who was examined as PW-2 was that the first incident happened in the house of the uncle of the victim girl and subsequently, in her own house. He therefore, submits that there is a variation in the story of the prosecution as narrated by the victim girl herself before trial and during the trial.

[6.] The learned Amicus Curiae further submits that apart from the opinion given by the Doctor after examining the victim girl about her age, there was no other document produced during the trial to establish the age of the victim girl.

[7.] Ms. T. Jini, learned Additional Public Prosecutor, on the other hand, submits that the Doctor who was examined as PW-5 during the trial deposed that upon examination, he found the age of the victim girl to be approximately 6

to 7 years. This finding was on the basis of the ossification report from radiological examination. The Doctor further deposed that the breast of the victim girl was not developed which only showed that she was a minor. In his cross examination, he stated that there was sign of penetration because the hymen of the victim girl was torn but it was an old tear. According to him the age of the tearing could be between 10 to 12 days. He also found that the victim to have 24 teeth. The learned Additional Public Prosecutor therefore, submits that in the absence of any evidence to the contrary regard the age of the victim girl, the learned Trial Court is only justified in relying upon the evidence of the doctor.

[8.] Further, she submits that the version of the victim girl during the trial is that the appellant committed rape upon her on two occasions i.e, first one was in the house of her uncle (PW-4) and the second one was in her own house. Her version is duly corroborated by the statement of PW-2 her mother whom she had informed and who had filed the FIR before the Officer-In-Charge of Shantipur Police Station in Lower Dibang Valley District. Although, the victim girl may have stated that the incident that happened in her house and the second one in the house of her uncle, the same can be considered to be only a minor discrepancy and does not go the root of the matter so as to vitiate the conviction of the appellant. She submits that, on the other hand, testimony of the victim girl is cogent, truthful and trustworthy and therefore, the same can be safely accepted and acted upon. In support of her submission, the learned Additional Public Prosecutor relies upon the Apex Court decision rendered in ***State of Punjab Vs. Gurmeet Singh and Ors.*** reported in (1996)2 SCC 384.

She thus submits that under the given facts and circumstances, the conviction and the sentence of the appellant may not be interfered with and the appeal be dismissed.

[9.] Ms. H. Jeram, learned counsel appearing for the victim girl adopts the argument of Ms. T. Jini, learned Additional Public Prosecutor and submits that the evidence led by the prosecution witnesses clearly establishes that rape was committed upon the victim girl and that the version of the victim girl is trustworthy and also corroborated by the evidence of the other prosecutions witnesses. Therefore, the conviction and sentence imposed on the appellant may not be interfered with by this Court.

[10.] We have heard the learned counsels for the rival parties and perused the materials available on record. As may be seen in the FIR dated 15.08.2021 lodged by PW-2 before the Officer-In-Charge of Shantipur Police Station is to the effect that the appellant committed rape upon her daughter i.e., the victim girl. The first incident happened around 2 months back and the second incident happened in their house about a month ago in her absence. She came to learn about the incidents from her daughter on 14.08.2021 when she scolded her for not being inside the house. After registering the FIR, the Police conducted an investigation and upon concluding the same and finding a *prima facie* case against the appellant for having committed an offence under Section 376 AB IPC read with Section 4 of POCSO Act, filed the chargesheet.

[11.] During trial, the victim girl was examined as PW-1. In her examination-in-chief, she deposed that she knew the accused person who was standing on the dock and that he had done wrong to her. She stated that the appellant had asked her to prepare a cup of tea and when she went inside, he followed her and he pulled down her underwear and his own underwear and committed rape upon her. She felt pain and asked him not to do so. The appellant asked her not to tell her mother about the incident otherwise he would kill her and her mother. The appellant had committed this kind of act upon her twice. The first incident happened in the house of her uncle and the second, in her own house. In her cross-examination, PW-1 reiterated the fact that the appellant had done bad things to her.

[12.] P.W-2 who is the mother of the victim girl, in her examination-in-chief deposed that her daughter had informed her about the incident of the appellant having committed rape upon her. She stated that her daughter had informed her that the incident took place in the house of her paternal uncle and thereafter, for the second time in their own house. Upon hearing this, she went to the house of her brother-in-law who brought the appellant and he was confronted with the allegation. Her brother-in-law said that the old man could not have committed such an offence. Thereafter, they all went to Roing Police Station for lodging the FIR. In his cross examination, he stated that he did not remember who drafted the FIR and that prior to lodging of the FIR, he enquired about the incident personally and he himself decided to report the matter to the police.

[13.] PW-3, in her examination-in-chief stated that she did not see the incident with her own eyes and she came to know about the incident when the mother of the victim girl came to their house making hue and cry and accusing the appellant for raping her daughter. She then called her husband and upon his arrival, the mother of the victim girl had a quarrel with him and she also assaulted the appellant. The mother of the victim girl then took her husband to Roing and maybe they had gone to Roing Police Station. Cross examination of PW-3 was declined by the defence.

[14.] PW-4, in his examination-in-chief deposed that he knows the appellant and that he used to stay in their house and took care of their cattle. While he was in Assam, he received a phone call from his wife who informed him about the incident. He then rushed back to his house where he was informed by the victim and her mother that the appellant had raped the victim girl. He then asked the appellant whether the same was true or not. The appellant denied the allegation and said that he did not commit rape upon the victim girl and that he was only teasing her. Thereafter, they went to Roing Police Station and the mother of the victim lodged the FIR. The victim was also taken to hospital by her parents and others. In his cross examination, PW-4 stated that the appellant was staying with him since a year back and he cannot say whether he was a man of good or bad character. The victim girl had not previously told them anything about having been teased by the appellant.

[15.] PW-5 is the Doctor who examined the victim girl. In his examination-in-chief, he stated that he had mentioned the age of the victim girl to be 6 to 7

years as per the X-Ray report. Her breast was not developed, which showed that she was a minor. As per his findings, he opined that the victim girl was sexually abused and sexually penetrated. In his cross-examination, he stated that the reason why he said that there was sign of penetration was because the hymen of the victim girl was torn though it was an old tear of about 10 to 12 days old. He also stated that it is possible that tearing of the hymen can be caused by inserting a foreign body and that there was no facility to prove whether male organ was inserted in the private part of the victim or not except by collecting swab. He also found the victim girl to be a minor on the basis of the X-ray report and the eruption of her tooth which he found to be 24 in numbers. He said he was not a dentist and he did not consult an orthopaedic.

[16.] PW-6 is the I.O, who deposed that he filed the chargesheet against the appellant under Section 376 AB IPC read with Section 4 of the POCSO Act, on the basis of his investigation, including the statements made by the informant, the victim girl and by the admission of guilt made by the appellant. He stated that he did not collect any documents regarding her age but he made a requisition to the Medical Doctor to determine the age of the victim. He also stated that he did not find any motive for lodging the false case against the appellant by the victim and her parents. Since the victim girl was not studying in school, he did not bother to find out her school certificate regarding her age.

[17.] From the evidence led by the prosecution witnesses importantly, from the medical examination report of the victim girl, it may be seen that on her physical examination, her height was found to be 117 cm, her weight was

17 kg and she had 24 numbers of teeth. From the Ossification report, her age was opined to be approximately 6 to 7 years and the victim girl herself during her examination under Section 164 Cr.P.C also stated that she was 7 years old. However, the learned Trial Court relying upon the medical examination report accepted the age of the victim girl to be 6 to 7 years. It may also be noticed that the age of the victim girl has not been disputed at any stage. We therefore, do not find any infirmity in the conclusion arrived at by the learned Trial Court on the age of the victim girl.

[18.] Insofar as the charge framed against the appellant for having committed penetrative sexual assault upon the victim girl, the victim girl during the trial deposed that the appellant after pulling down her underwear and his own underwear committed rape upon her by inserting his male organ on hers. The incident first happened in the house of her uncle and thereafter, in her own house for the second time. PW-2 who is the mother of the victim girl also deposed that her daughter informed her that she was raped by the appellant in the house of her paternal uncle and thereafter, for the second time in their house. Upon being informed she went to the house of her brother-in-law (PW-4) and thereafter, they went to Roing Police Station for lodging the FIR. It is seen that the version of the victim girl is corroborated by the evidence of the PW-2 and also the other witnesses.

[19.] The version of the PWs-3 & 4 who are the husband and wife also corroborates the version of PW-2 about PW-2 having come to their house after

she was informed by her daughter that she was raped by the appellant. In order to cast any doubt on the commission of the alleged offence, there is also no suggestion or indication anywhere that there was some sort of enmity between the family of the victim girl and the appellant or with the PW Nos- 3 & 4. The victim girl in her statements recorded under Section 164 Cr.P.C has stated that the incident happened in her house and thereafter, it happened for the second time in the house of her uncle. However, in her deposition before the Trial Court, she stated that the incident first happened in the house of her uncle and later on in their own house. Although, there is some inconsistency as to where the incident first happened but the fact remains that the victim girl has been consistent with the fact that she was raped by the appellant on two occasions. The fact of her being subjected to sexual intercourse has been established from the medical examination conducted by the Doctor on her.

[20.] The Apex Court in the case of ***State of Punjab Vs. Gurmeet Singh & Ors.*** (supra), in the given facts of that case held that in cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her

statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.

[21.] In the case of ***Sunil Kumar Sambhudayal Gupta (Dr.) Vs. State of Maharashtra***, reported in ***(2010) 13 SCC 657***, the Apex Court has held that while appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters, without effecting the core of the prosecution case, should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again, without justifiable reasons.

[22.] In the present case as well, as stated earlier, the version of the victim girl is consistent that the appellant had committed rape upon her on 2 occasions. The victim girl undisputedly is a minor girl aged about 7 years and we find no materials available on record to discredit her version. As already stated earlier, there also appears to be no elements of enmity between the family of the victim girl and that of the appellant. Therefore, upon due consideration, we find no ground to interfere with the order of conviction passed

by the learned Trial Court. Insofar as the sentence imposed by the learned Trial Court, it is seen that the learned Trial Court has imposed the minimum sentence prescribed under the relevant Sections of law and therefore, the same also requires no interference. In the result, the appeal is found to be without any merit and the same is rejected and dismissed.

[23.] As a token of appreciation for the assistance rendered by Mr. D. Panging the learned Amicus Curiae, we direct that he be paid the prescribed fee in this regard by the Arunachal Pradesh State Legal Services Authority.

[24.] Registry to send back the LCR immediately.

JUDGE

JUDGE

Comparing Assistant