

GAHC010002772019



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

Case No. : CRL.A(J)/7/2019

BAISAKU GOALA,
SIVASAGAR.

.....Appellant

-VERSUS-

1. THE STATE OF ASSAM,
REP. BY PP, ASSAM.

2. SHRI DINESH BHUMIJ,
SON OF LATE RAMSING BHUMIJ,
VILLAGE- NAPHUK FOREST GATE, (DIPHU JUNGLE), P.S.- SONARI,
DISTRICT- SIVASAGAR, ASSAM.

..... Respondents

- B E F O R E -

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE MALASRI NANDI

For the Appellant : Mr. A. Ahmed, *Amicus Curiae*.

For the Respondents : Mr. K.K. Das, Additional Public Prosecutor, Assam for respondent
No.1/State.

Date of Hearing : 22.11.2023 & 24.11.2023.

Date of Judgment : 30.11.2023.

JUDGMENT & ORDER (CAV)

(M. Zothankhuma, J)

Heard Mr. A. Ahmed, learned *Amicus Curiae* and Mr. K.K. Das, Additional Public Prosecutor, Assam for the State/respondent No.1.

2. The present appeal has been filed against the impugned judgment dated 16.08.2018 passed by the learned Sessions Judge-cum-Special Judge, Sivasagar in SPL.(P) Case No.02/2015, by which the appellant has been convicted under Section 6 of the POCSO Act, 2012 and sentenced to undergo rigorous imprisonment for life with the fine of Rs.2,000/- (Rupees two thousand), in default, to undergo simple imprisonment for 2(two) months.

3. The prosecution case in brief is that an FIR dated 21.12.2014 was submitted by the father of the victim girl to the Officer-in-Charge of the Sonari Police Station, to the effect that his daughter went missing at around 1 P.M. on 21.12.2014 and after making a search for her, they found her at around 3 P.M., in the jungle in the middle of Sonari Tea Garden. She had been left unconscious after being raped. After bringing her back to the house, she was admitted to Naphuk Garden Hospital and thereafter referred to AMCH, Dibrugarh.

4. Consequent to the FIR submitted by the father of the victim, who is Prosecution Witness-5 (PW-5), Sonari P.S. Case No.281/2014 under Section 3 of the POCSO Act, 2012 was registered. Investigation of the case was done by the Investigating Officer (PW-20) and examination of the victim girl was done by a doctor. After recording the statement of the victim under Section 164 Cr.P.C. and on conclusion of the investigation, the Investigating Officer submitted the

charge-sheet, having found a prima-facie case under Section 6 of POCSO Act, 2012 against the appellant.

5. The learned Trial Court framed charge under Section 6 of the POCSO Act against the appellant, to which he pleaded not guilty and claimed to be tried. Thereafter, the learned Trial Court examined 22 Prosecution Witnesses (PWs) and one Court Witness (CW). Examination of the appellant was done under Section 313 Cr.P.C. and thereafter, the learned Trial Court passed the impugned judgment, having found that the prosecution had proved the guilt of the appellant under Section 6 of the POCSO Act, 2012 beyond all reasonable doubt.

6. Mr. A. Ahmed, learned *Amicus Curiae* appearing for the appellant has prayed for setting aside the impugned judgment on the ground that the victim girl (PW-2) in her evidence has not stated that the appellant had sexually assaulted her, by using any part of his body on her.

Secondly, the FSL report relied upon by the learned Trial Court did not prove that the blood found on the frock and undergarment of the victim, matched the blood of the appellant, inasmuch as, the letter dated 29.06.2015 issued by the Scientific Officer, DNA Typing Unit of Serology Division, Directorate of Forensic Science, Assam, Kahilipara, which is exhibited as Ext.10, refers to the blood collected from one Shri Bikash Gowala. On the other hand, the appellant's name as per the examination of the appellant under Section 313 Cr.P.C. is Sri Baisagu Guwala @ Baishak @ Jagat Goala, son of Pradip Goala. Thirdly and in the alternative, as the evidence of the victim girl did not prove that the appellant had sexually assaulted the victim, the learned Trial Court could have at best convicted the appellant under Section 8 of the POCSO Act, 2012 for aggravated sexual assault.

7. Mr. Ahmed, learned *Amicus Curiae* thus prays that the impugned judgment should be set aside and the appellant should be acquitted from the charge framed against him or in the alternative, convict the appellant under Section 8 of the POCSO Act, 2012.

8. Mr. K.K. Das, learned Additional Public Prosecutor, Assam, on the other hand, submits that the evidence of the victim girl, coupled with the evidence of the Doctor who examined the victim, clearly shows that the appellant had raped the minor girl. He further submits that the seizure list dated 28.01.2015 which has been exhibited as Ext.8 and the Report of the FSL dated 29.06.2015, which was exhibited as Ext.10, show that the blood found on the frock and undergarment of the victim matched the blood of the appellant.

9. Mr. Das, the learned Additional Public Prosecutor also submits that the statement made by the victim girl under Section 164 Cr.P.C. is in consonance with her testimony given before the learned Trial Court. Further the injuries sustained by the victim girl, all point to the fact that she had been raped. He also submits that the evidence of PW-14, who is the mother of the victim shows that when the victim regained her senses in AMCH, Dibrugarh, the victim on being asked by her uncle stated that the appellant had taken her to a jungle and had assaulted her there by committing a bad act on her.

10. Mr. Das also submits that as per the statement of the victim given under Section 164 Cr.P.C., the appellant had made her walk with him to the jungle where he assaulted her. The victim stated that the appellant told her that he would take her to the house of *didima* (grandmother), but the appellant took her to the jungle.

He submits that as there is no infirmity with the impugned judgment

passed by the learned Trial Court, the same should not be interfered with.

11. We have heard the learned counsels for the parties.

12. The evidence of PW-1, who is the Doctor working in Sonari Hospital, is to the effect that on 24.12.2014, the victim, who was around 4 years old was brought for medical examination. On examination, he informed the police of the incident, as he believed that the girl was the victim of sexual harassment or had been bitten by some poisonous animal. Finding vaginal smear and crust of semen near her thigh, he put it in a sterilized bottle and handed it over to the police. He also saw injury near her vagina.

13. The evidence of PW-2, who is the victim girl, is to the effect that she knew the appellant. She further stated that she was hurt when the appellant assaulted her on her stomach with a stick. She also stated that the appellant was her maternal uncle.

14. The evidence of PW-3, who was the staff nurse, is to the effect that she was on duty when the victim girl was brought to Rojapukhuri S.D.C.H for medical examination. The Doctor collected the specimen of vaginal smear and crust of semen from the thigh of the victim. Seizure list was made and she signed on the same.

15. The evidence of PW-4, who is a tea garden labourer, is to the effect that the appellant was his neighbor and that the victim was his niece. He stated that the incident took place about 8/9 months back and that the victim had told him that the appellant had raped her. On the day of occurrence, he saw the family members of the victim searching for her. Then he along with Subash and Deven also started searching for her. Later Subhash found the victim in the jungle in an unconscious state and the victim was brought home. The victim's

panties were removed and blood was oozing from her urinary tract. The victim was taken to the garden hospital and later to Rajapukhuri Hospital. The police seized a blood stained frock and blue coloured panties belonging to the victim. He identified his signature in the seizure list, which recorded the seizure of the blood stained frock and blue coloured panties of the victim. He also indentified his signature in the seizure list pertaining to one pair of male underpants, light blue in colour with stains of blood and semen.

16. The evidence of PW-5, who is a day labourer, is to the effect that the appellant is his neighbor and the victim was his daughter. On coming home one day and learning that his 5 year old daughter had gone missing, he along with the others went searching for her in the jungle. Subhash Bhumij found her inside the jungle and carried her. There was no cloth on her person. She was taken to the garden hospital and thereafter to the AMCH, Dibrugarh where she was treated for 25 days. On being asked, the victim stated that the appellant had taken her away and assaulted her. PW-5 also stated that the victim sustained bleeding injury in her neck and private parts. He also stated that the police seized blood stained clothes of the victim and that he lodged an FIR.

17. The evidence of PW-6, who is the Medical Officer, Department of Forensic Medicine, AMCH, Dibrugarh, is to the effect that he examined the victim girl on 22.12.2014 and also on 27.12.2014, as per the requisition made from the Department of Paediatric Surgery.

As per the evidence given by PW-6, the hymen of the victim girl was torn and there was a vaginal tear, besides her vulva being swollen with multiple abrasions.

The opinion of PW-6 with regard to the injuries sustained by the victim is

to the effect that evidence of recent sexual intercourse was not detected on her person. However, findings were suggestive of forceful vaginal penetration.

18. The evidence of PW-7, who is a labourer, is to the effect that the victim was his niece and that he knew the appellant. The incident took place when the victim was around 4 years of age. On being asked by the mother of the victim as to the whereabouts of the victim, they went in search of the victim. The younger brother of PW-7, i.e. Subash Bhumij found her in the jungle and brought her home. The victim was in an unconscious state and was taken to the hospital. Blood was oozing out from the victim's private parts. The victim was later shifted to AMCH, Dibrugarh and was treated there. After getting well, the victim came back home after about 2 months. PW-7 further stated that the victim on being asked, stated that the appellant had taken her to the jungle and had sexual intercourse with her. The police seized a pair of blood stained panties in his presence and he gave his signature as a witness in the seizure list.

19. The evidence of PW-8, who is a Government employee, is to the effect that he came to know from his wife that someone had taken away the victim, who was taken to the hospital and that he had heard that the appellant had committed a bad act on the victim.

20. The evidence of PW-9, who is the Judicial Magistrate First Class, Sivasagar, is to the effect that on 26.02.2015, the victim, aged about 4½ years, daughter of PW-5 was produced before her in connection with Sonari P.S. Case No.281/2014 under Section 6 of the POCSO Act. PW-9 stated that she had recorded the statement of the victim under Section 164 Cr.P.C., wherein she stated that the appellant had assaulted her stomach with a stick, besides her neck, due to which she felt pain.

21. The evidence of PW-10, who was a tea garden employee, is to the effect that as he was the V.D.P. Secretary. He was a signatory to the seizure list regarding the seizure of the underwear of the appellant.

22. The evidence of PW-11 is to the effect that she knew the appellant and that the victim was her granddaughter. As the victim could not be found, a search was made for her. Around 4 P.M., Subhash found the victim inside the jungle with her panties removed and in an unconscious state. She was taken to the hospital and later to the AMCH, Dibrugarh where she was kept for a month. On enquiry, the victim stated that the appellant had called her away at the time of the incident. She further stated that the victim was around 6 years old at the time of the incident.

23. The evidence of PW-12, who is a casual labourer in the tea garden, is to the effect that she knew the accused and the victim who was her niece. At the time of the incident, the victim was around 4½ years old. As the victim had gone missing, a search was conducted for her. Around 4 P.M., Subhash Bhumij found her lying in an unconscious in the middle of the forest and took her home. Thereafter she was taken to the garden hospital and thereafter, shifted to the Rajapukhuri and later to the AMCH, Dibrugarh where she was under treatment for about a month. On removal of the panties, blood was oozing from her genitals. The victim regained senses after three days. When asked, the victim stated that the appellant had told her that he would take her to her grandmother's house, but he had taken her towards the garden.

24. The evidence of PW-13, who is the driver, is to the effect that he knew the appellant as well as the victim. On hearing that the victim had gone missing, a search was conducted. Later she was found in the jungle of the Sonari garden. She was then taken to Naphuk hospital and thereafter to AMCH,

Dibrugarh where she was treated. From there she was taken to the GMCH, Guwahati. When PW-13 asked the victim as to what happened, she told him that at the time of the incident the appellant had taken her. The police seized a blood stained frock and panties belonging to the victim. He had put his signature in the seizure list.

25. The evidence of PW-14 is to the effect that the victim was her daughter and that she knew the appellant. As the victim could not be found, an extensive search was made for her. Later Subhash Bhumij found her lying in the jungle in an unconscious state. Blood was oozing from her urinary tract. She was taken to the garden hospital and from there to AMCH, Dibrugarh wherein an operation was performed on her. Thereafter she was taken to Guwahati and she was treated there. The victim regained her senses in AMCH, Dibrugarh. PW-14 also stated that when the victim's uncle asked her, the victim stated that the appellant Baisagu had taken her to a jungle and after assaulting her there, he had committed a bad act on her. PW-14 also stated that the victim was under treatment in Guwahati for about 40 days.

26. The evidence of PW-15, who is the staff nurse of AMCH, Dibrugarh, is to the effect that she was on duty at AMCH, Dibrugarh on 05.01.2015. The police questioned the victim in her presence.

In her cross-examination, PW-15 stated that she did not know what the girl was asked by the police.

27. The evidence of PW-16, who is a house wife, is to the effect that she knew the appellant as well as the victim who was around 5 years old at the relevant point of time. On the day following the incident, she went to a *dharna* which was staged by a women's organization in Namphuk. There she learnt that

the appellant had raped the victim inside the garden.

28. The evidence of PW-17, who is house, is to the effect that she knew the appellant as well as the victim. She stated that the incident had taken place in December, 2014. When the victim was brought from AMCH, Dibrugarh, after she was treated there and admitted in Naphuk Garden Hospital, she along with other women visited her and asked her about the incident. The victim said that the appellant had raped her. PW-17 also stated that bite marks were present on her cheek and neck and an operation had to be performed on her in Dibrugarh and Guwahati. Police questioned her.

29. The evidence of PW-18, who is Housewife, is to the effect that both the victim and the appellant were known to her. About 2 years back, one Tultul Bora of Ladies Self Help Group had informed her about the incident of rape at Diphu Line near Naphuk Forest Gate. She went to the protest and learnt that the victim was raped by the appellant.

30. The evidence of PW-19, who is home maker, is to the effect that the appellant was known to her. On 12.12.2015, she took part in the *dharna* on the plea of rape of victim. She went to see the victim in the hospital.

31. The evidence of PW-20, who was the Investigating Officer (I.O.), is to the effect that while he was posted as In-Charge Suffrai Out Post under Sonari Police Station, the then O/C Sonari Police Station received an FIR submitted by PW-5. Sonari P.S. Case No.281/2014 under Section 3 of the POCSO Act was consequently registered. He was entrusted to investigate the case. He seized the frock and underwear of the victim which contained blood stains. He also seized the underwear of the appellant which contained semen and blood stain. He also stated that the victim was initially sent for medical examination to

Sonari, wherefrom she was referred to AMCH, Dibrugarh. The victim was also sent to the Court for recording her statement under Section 164 Cr.P.C. He also seized the vaginal smear and semen particulars collected by the Doctor from the inner thigh of the victim in a glass slide and sent the same to FSL, Kahilipara, Guwahati. He also stated that the blood sample of the appellant was collected from the jail doctor and sent to FSL, Guwahati. The vaginal smear and semen particulars collected in the glass slide was also sent for examination at FSL.

On collecting the FSL report, PW-20 found that the amplified loci of Ext. No. DNA 1158/15 matched the amplified loci of the Ext. No. DNA 1159/15. Thereafter he submitted the charge-sheet against the appellant under section 6 of the POCSO Act. He also collected the photocopy of the birth certificate of the victim, which showed the date of birth of the victim as 21.06.2009.

32. PW-21, who was working as the Scientific Officer, Serology Division, Directorate of Forensic Science, Kahilipara, Guwahati (FSL), in his evidence stated that on 30.01.2015, he received one parcel in connection with Sonari P.S. Case No.281/2014. On opening the parcel, he found five articles, which were as follows:

1. *One old and dirty check multi coloured frock contains stain of suspected blood and semen, marked as 'A'.*
Sero-3441/A.
2. *One green coloured old and dirty torn panty contains stain of suspected blood and semen, marked as 'B'.*
Sero-3441/B.
3. *One vaginal smear glass slide marked as 'B' (sent by DNA Div.) MR No.87/14.*
Sero-3441/C.

4. *One air tight glass vial contains crusts of semen taken from inner aspect of thigh of the victim. MR No.86/ 14. Sero-3441/D.*
5. *One light blue and white & Cheek underwear (Jangia) contains semen and blood, marked as 'E'. Sero-3441/E.*

He also stated that the result of the examination was as follows:

1. *Exh. No. Sero-3441/A, Sero-3441/E gave positive test for human semen.*
2. *Exh. No. Sero-3441/B, Sero-3441/D gave negative test for human semen.*
3. *Exh. No. Sero-3441/C done by DNA unit in this laboratory, report will be sent separately.*

In his cross-examination, PW-21 stated that no blood stain was found in the above mentioned exhibits and that he had not compared the semen found in Ext., i.e. Sero-3441/A and Sero-3441/E, as he had no such facility and this comparison could be done only by the DNA unit.

33. The learned *Amicus Curiae* has taken a stand that the appellant had not sexually assaulted the victim by using any part of his body. As per the evidence of the victim, who stated that the appellant Baisagu assaulted her on her stomach with a stick and he did nothing more than that. The fact that a stick had been used by the appellant, as per the evidence given by the victim, goes to show that the stick had been inserted into the vagina of the victim, which amounts to penetrative sexual assault in terms of Section 3(b) of the POCSO Act, 2012. Even though the victim did not say that the appellant put his private parts into her vagina, even if we are to hold that the appellant had used a stick

on the victim, coupled with the injuries on the victim as enumerated by the Doctor (PW-6), we are of the view that the appellant had caused aggravated penetrative sexual assault on the victim as he had inserted a stick into the vagina of the victim. We would like to clear that the victim girl, who was 4 years old might have seen the private parts of the appellant as a stick. In any event, even insertion of a stick into the vagina of the victim amounts to penetrative sexual assault as Section 3(b) of the POCSO Act, 2012 states that a person is stated to commit penetrative sexual assault if he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person.

34. The statement of the victim girl taken under Section 164 Cr.P.C. by the Judicial Magistrate, is to the effect that her maternal uncle Baisagu assaulted her on her stomach with a stick indiscriminately. He also assaulted her on her neck. She felt a lot of pain. The victim also stated that the appellant made her walk with him to the jungle and assaulted her there. She stated that her uncle Baisagu was very bad and her mother and others had taken her to a doctor. Her uncle Baisagu told her that he would take her to the house of *Didima*, but he took her to the jungle.

Thus, as can be seen from the above, there is no contradiction in the evidence given by the victim girl *vis-à-vis* her statement under Section 164 Cr.P.C.

35. The evidence of the victim girl and her statement made under Section 164 Cr.PC show that she had been taken into the jungle by the appellant. The victim stated that the appellant had assaulted her on her stomach with a stick which hurt her. This is corroborated by the evidence of PW-6 (Medical Officer), who testified that the findings were suggestive of forceful vaginal penetration.

Further, we are of the view that the victim, who was 4 years old might have been assaulted in her private parts not only by the stick, but by the private parts of the appellant also. Further, the evidence of Medical Doctor shows that there was tear in her vagina and there were multiple abrasions over her swollen vulva, besides there being injuries to her neck.

36. The evidence of Court Witness (CW) No.1, who was the Medical and Health Officer-1 of the Civil Hospital, Sonari, is to the effect that the victim was brought to the hospital and his findings recorded in the register are as follows,

“General behavior:- Patient in subconscious state. Marks of violence in the Body:- (1) Nail marks over chest and neck, (ii) cut mark over centre of lower lip, (iii) Fourchette torn, (iv) Vaginal tear seen, (v) Bleeding per vagina seen (vii) Hymen torned, (viii) Vagina- abrasion with tear vaginal introitus (ix) dry semen seen over inner aspect of thigh.”

37. The evidence of PW-22, who is the Scientific Officer, DNA Typing Unit of Serology Division, Directorate of Forensic Science, Assam, Kahilipara, Guwahati, is to the effect that two parcels had been sent for examination and the description of the articles and the result of the examination showed that Ext.DNA 1157/15 gave negative result for the presence of spermatozoa. However, the amplified loci of Ext. No. DNA 1158/15 matched with the amplified loci of the Ext. No. DNA1159/15, which relates to the amplified products regarding the blood collected from the appellant and the check coloured frock and undergarment of the victim. “Loci” refers to the specific physical location of a gene of a chromosome.

38. The appellant was examined under Section 313 Cr.P.C on 31.10.2017, wherein he denied all the allegations against him by stating that it was false or that he had no knowledge. However, with regard to the question put to him,

regarding seizure of his blood stained underwear containing semen and blood stain, the appellant answered that the police forcibly took his underpants after assaulting him. When he was asked whether he had anything more to say on the case and the evidence, the appellant stated that he was innocent. He further stated that on the said date, he went to see a cock fight and after returning home, he came to know about the incident. On the next day, the police asked him to appear at the Police Station and forcibly kept his *jangia* (under pant) and asked him to go home and in the evening on the same day, he was again called to the Police Station and arrested by the police. He stated that he was falsely implicated in this case.

39. The appellant was again examined under Section 313 Cr.P.C. on 29.06.2018, wherein he stated that he had no knowledge with regard to the questions put to him and that he was falsely implicated in the case.

40. In the examination of the appellant under Section 313 Cr.P.C., the name of the appellant has been reflected as Sri Baisagu Guwala @ Baishak @ Jagat Goala, son of Pradip Goala. In the letter No.SDPO/CRD/SNR/15/61-63, dated 29.01.2015 issued by the SDPO, Charideo, Sonari, which is a part of the case record, it states that blood samples had been taken from the accused person, namely, Shri Bikash Gowala @ Boisagu. As such, the same shows that the present appellant is also known as Bikash Gowala.

41. The DNA test done on the blood stains of the check coloured frock and on the panty/undergarment of the victim showed that the same matched with the blood sample taken from the appellant. Further, the DNA test proved that the gene in the chromosome of the appellant matched the vaginal smear in the glass slide and crust of semen taken from the inner thigh of the victim, which was exhibited vide Ext.-2. The report of the Directorate of Forensic Science,

Kahilipara, dated 29.06.2015 (Ext.10) coupled with the evidence of PW-22, who is the Scientific Officer, DNA Typing Unit of Serology Division, Directorate of Forensic Science, Kahilipara and the letter No.SDPO/CRD/SNR/15/61-63 issued by the SDPO, Charideo, Sonari clearly shows that the blood stains found in the coloured frock and undergarment of the victim matched the blood sample taken from the appellant.

42. In view of the facts noted above and as the DNA test matched the blood of the appellant with blood stains present in the frock and the undergarment of the victim, we do not find any infirmity in the findings of the learned Trial Court in convicting the appellant under Section 6 of the POCSO Act, 2012.

43. Accordingly, the appeal stands dismissed.

44. Send back the LCR.

45. We record our appreciation for the assistance rendered by learned counsel Mr. A. Ahmed as *Amicus Curiae* in conducting this appeal. He shall be paid the honorarium by the Assam State Legal Services Authority as per rules.

JUDGE

JUDGE

Comparing Assistant