

GAHC010017792022



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

Case No. : CRL.A(J)/23/2022

ANANDA KARMAKAR
S/O. SRI GOPAL KARMAKAR, R/O. DIGHALTARANG T.E., KHUMSANG
LINE, P.S. BAGHJAN, DIST. TINSUKIA, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

:: BEFORE ::

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

For the Appellant : Mr. K. Goswami, Amicus Curiae

For the Respondent : Ms. S. Jahan, Addl. Public Prosecutor

Date of Hearing : 23.06.2023

Date of Judgment : 28.06.2023

JUDGMENT & ORDER (CAV)

(Mridul Kumar Kalita, J)

1. This Criminal Appeal (Jail) has been registered on receipt of an appeal petition from the appellant, namely, *Ananda Karmakar*, who has been detained

in the District Jail, Tinsukia, through the Superintendent District Jail, Tinsukia, impugning the judgment dated 12.11.2021, passed by the Court of learned Special Judge, Tinsukia, in POCSO Case No. 12(T)/2019 whereby the present appellant has been convicted under section 6 of the POCSO Act, 2012 and sentenced to undergo rigorous imprisonment for 20(twenty) years with a fine of Rs.2000/- and in default of payment of fine to undergo simple imprisonment for 6(six) months.

2. The facts relevant for adjudication for this jail appeal, in brief, are as follows:-

(i) That on 29.04.2019, the father of the victim "*X*" (*real name not disclosed*) lodged an FIR before the Officer-in-Charge of the Baghjan Police Station, *inter alia*, stating that on 29.04.2019 at around 3:30 p.m. the present appellant took his daughter to Section No. 16, Dighaltarang Tea Estate and committed 'bad act' on her. On receipt of the said FIR, the Officer-in-Charge of the Baghjan Police Station registered Baghjan PS Case No. 16/2019 under section 376(2)(i) of the Indian Penal Code read with Section 4 of the POCSO Act, 2012 and Sri Chitra Ranjan Buragohain, SI of Police was entrusted with the investigation of the case. On completion of the investigation, the Investigating Officer, having found sufficient evidence against the present appellant, laid the charge-sheet ,against the present appellant, under Section 376(2)(i) of the Indian Penal Code read with Section 4 of the POCSO Act, 2012 in the Court of Special Judge, Tinsukia.

(ii) The present appellant was arrested during the course of investigation and he faced trial remaining in judicial custody.

(iii) During trial, the prosecution side examined eight prosecution witnesses including the victim and nine documentary evidences were exhibited. The appellant was examined under section 313 of the Code of Criminal Procedure, 1973, during which he pleaded his innocence. The relevant portion of his statement under the section 313 of the Code of Criminal Procedure shall be discussed hereinafter in this judgment. The appellant declined to adduce any evidence in his defence. Ultimately, by the judgment, which is, impugned in this appeal, present appellant was convicted and sentenced in the manner as described in Paragraph No. 2 of this judgment herein before.

3. Before considering the submissions made by learned counsel for both sides, let us go through the relevant evidence, which is available on record.

4. PW-1, who is the father of the victim has deposed that his daughter "X" was born on 22.11.2014 and he has exhibited the date of birth certificate of his victim daughter as M. Ext.- 1. He has stated that on the day of incidence, he was in the garden on his duty and he returned back at about 4.00 p.m. and came to know that the appellant had taken away his daughter to the garden after his son (PW-3) to a shop for buying something. He also came to know that his son returned home after sometime and informed his wife that the appellant has taken away his sister to garden and on hearing this, the wife of PW-1 went in search of the victim. Thereafter, the wife of PW-1 noticed people of the locality gathered and they found that the appellant was coming with the victim on a bicycle and the victim was crying. PW-1 has also stated that his wife and the people who gathered there found that the victim was stained with mud and tea leaves had also stuck to her body. He has also stated that immediately,

thereafter, his daughter (victim) was taken to the garden hospital and nurses examined her and gave her the first aid and informed his wife that they found injury in her vagina. PW-1 has further stated that when his daughter was taken to the hospital, he was informed about this and he also reached the hospital. Thereafter, he lodged an FIR which is exhibited as Ext. 1.

During cross examination, PW-1 has stated that though he was not in talking terms with the appellant but he did not had any enmity with him. He has also stated that his daughter had not told anything about the incident to him.

5. PW-2, who is the mother of the victim "X", has deposed that on the date of incidence, her son and daughter had gone to a shop and after sometime her son came home and informed that the appellant gave him Rs.5/- to bring biscuits from a shop and when he had gone to the shop, the appellant took her daughter in a bicycle and went to the garden. PW-2 has further stated that after being informed by her son about the fact that the appellant has taken away her daughter to the garden, she went to the garden in search of her daughter and also informed her neighbours and when they were searching, they found the appellant was coming from the garden on a bicycle with victim "X". PW-2 has stated that she found that her daughter was crying and leaves were stuck on the garments of her daughter. She has also stated that she immediately took her daughter (victim) to garden hospital and nurses who were there told her that her daughter had sustained injuries on her private parts. PW-2 has further deposed that, thereafter, her husband (PW-1) lodged the *ejahar* and thereafter, the Police sent her daughter to the hospital for medical examination and also sent her to the Court for recording her statement.

During cross-examination, some suggestive questions were put by the defence side, which she answered in negative.

6. PW-3, is the brother of the victim, who had deposed before the trial court, on 30th September, 2019, when his age was eight years. The learned Special Judge, Tinsukia examined him for ascertaining his ability to give reasonable answer to the question posed to him. After finding that he was able to give reasonable answers, his deposition was recorded. PW-3 has stated that the appellant gave him Rs.5/- and asked him to bring biscuits for him from the shop and thereafter he took her younger sister away in his bicycle. PW-3 has further stated that he immediately returned home and told his mother about the said fact and later on his mother found his younger sister in company of the appellant when they were coming together. He has also stated that he also gave his statement before the Court under Section 164 Cr.P.C.

During his cross-examination, he has reiterated that the appellant gave him Rs.5/- and asked him to go to the shop. He has denied the suggestion that what he had stated before the Court was tutor to him.

7. PW-4, Smt. Sabina Toppo, has deposed that she is a nurse at Dighaltarang Tea Estate Hospital and on the date of incidence, at about, 6.00 P.M., the victim girl was brought to the hospital by her mother and her mother had told them that the appellant had taken her daughter to a jungle. PW-4 has further deposed that on examination, she found the body of the victim girl was wet and there were tea leaves in her vagina. The girl was complaining of pain in her vaginal parts and she did not allow them to examine her vagina.

During cross-examination, PW-4 has deposed that she does not know how the tea leaves were found in the vagina of the victim girl and the victim girl did not tell anything about the incident nor did she find any visible injury.

8. PW-5, Smt. Sushila Topno, has deposed that she is also a nurse at

Dighaltarang Tea Estate Hospital and on the date of incident, though she was not on duty, she was present in the Hospital and at about 6:00 P.M. on that day, the victim was brought to the hospital by her mother and her mother had informed her that her daughter was taken to the jungle by the appellant. PW-5 has further deposed that she noticed the body of the victim girl was wet and tea leaves were attached to her body, the victim did not allow them to examine her vagina and she was complaining of pain. Thereafter, the victim was referred to the Tinsukia Civil Hospital.

During cross-examination, PW-5 deposed that the victim girl did not tell them anything about the incident. It is also stated that they did not clinically examined the victim in their hospital.

9. PW-6, Dr. Lovelin, has deposed that on 29.04.2019 she was working as Medical and Health Officer at Tinsukia Civil Hospital and on that day at about 10.00 P.M. she examined the victim ("X") in connection with Baghjan Police Station Case No. 16/2019, the victim was brought an identified, SI, Sri Chitra Ranjan Buragohain and the parents of the victim also accompanied her. PW-6 has further deposed that the parents of the victim gave the history of the kidnapping of the victim girl by one boy to a nearby bushes and suspected sexual assault. She has further deposed that on examination of the victim girl, she found following:-

“General physical examination – Normal. Clothing – mud stained. Teeth could not be examined properly as the victim was uncooperative. There was old nail abrasion on her back.

Local examination over the perineum, on inspection, redness in and around the hymen seen. Tenderness and congestion

present. Per vaginal examination was not done. Vaginal smear from in and around the hymen taken and as per report, examination of supplied smear does not show any spermatozoa. USG of pelvic organs advised and reports gave normal study. Radiological examination was done and as per report, the age of the victim was 3 to 5 years."

PW-6 has also opined that she found signs of suggestive of recent use of force consistent with recent sexual assault and as per the estimated physiology and radiological examination, the age of the victim was three to five years.

During cross-examination, PW-6 has stated that she give her report on the basis of the finding of redness, congestion and tenderness in and around the hymen to the victim. She has also stated that the said injuries may not be sustained by other means.

10. PW-7, who is the victim "X", was examined before the learned trial court on 10th March, 2021 when she was of six years of age. Before examining her, learned trial court had put certain questions to her to test her competency as a witness and on the basis of such examination, learned trial court was of the opinion that the witness was able to give rational reply to the question posed to her.

During her examination, she had stated that she knew the appellant. She also mentioned the name of the appellant as Ananda Karmakar. She has also stated that the appellant took her to garden drain, where the accused opened her pant and thereafter she had stated that the garbage on the drain fell on her.

During cross-examination, she had answered in negative to question as to whether she stated before the Police about the facts that the appellant opened

her pant.

11. PW-8, Sri Chitra Ranjan Buragohain, who is the Investigating Officer of this case has deposed that on 29.04.2019 when he was posted as Officer-in-Charge of Baghjan Police Station, he received one written FIR from the father of the victim wherein, it was, *inter alia*, alleged that on the same day at about 3:30 P.M., the appellant sexually assaulted his five years old daughter. He has further stated that on receipt of the said FIR, he registered Baghjan Police Station Case No. 16/2019 under Section 376(2)(i) of the Indian Penal Code read with Section 4 of the POCSO Act, 2012 and took up the investigation.

During investigation, he visited the place of occurrence and also visited the Dighaltarang Tea Estate Hospital where the victim was getting medical treatment. He also examined the witness, drew the sketch map of the place of occurrence after visiting the said place and also took steps for recording the statement of the victim girl under Section 164 Cr.P.C. ultimately after completion of the investigation, finding sufficient evidence, he submitted the charge-sheet against the present appellant, which is exhibited as Ext.-7.

During cross-examination, PW-8 has stated that though he visited the place of occurrence he did not find any incriminating materials at the place of occurrence. He is also stated that he also did not seize any wearing apparel either of the accused or the victim girl.

12. Mr. K. Goswami, learned Amicus Curiae, during the course of his submission, has fairly stated that the evidence on record weigh heavily against the present appellant and the fact that the victim have different statements before the Police under Section 161 Cr.P.C. and before the learned trial court during hearing, *ipso facto*, does not make the testimony of victim girl unreliable

considering the fact that she was found to be in between three years to five years of age at the time when the incident happened. The learned Amicus Curiae also cited a ruling of Delhi High Court in “***Court of its Own Motion – Vs- State***”, reported in ***2018 SCC OnLine DEL 10301***, wherein it was observed as follows:-

“81. The dynamics of child sexual abuse are the same internationally. First and foremost, it is essential to understand the manner in which the children recount. Children do not disclose in one go but do so in piece meal. To accord the same treatment to a child as one would to an adult would result in grave injustice.

82. It needs no elaboration that the children would be reluctant and unlikely to disclose an entire adverse experience in proper detail in their first statement to the police, let alone the necessary details. The fear for themselves or their family; an apprehension that they would be disbelieved; inability to identify themselves as victims; pressure or threats from the perpetrator; relationship to the perpetrator; fear of embarrassment, shame or self-blame; fear of stigmatization; lack of trust with the investigating agency amongst other would be some of the reasons which would act as barriers to a child making a disclosure of a complete incident in a single meeting.

It Was also observed that-

(ii) A seemingly contradictory initial account is not a reason in itself to disbelieve the subsequent accounts by the victims. The multiple statements placed by the

investigating agency should be carefully scrutinized by the Trial Courts in order to ensure that complete justice is done.

13. The learned Additional Public Prosecutor has also submitted that considering the fact that when the incident happened the victim was in between three to five years and considering the fact that at that age it may not be possible for a victim child to describe the entire adverse experience in minutest of detail to the Police when her first statement was recorded, hence, the variance in her testimony from her statement which was recorded under Section 161 Code of Criminal Procedure should not be given much importance and should not be a ground for not disbelieving her statement which she made before the Court, if it is corroborated in material by other evidence. She has also submitted that the evidence of PW-3 who is the brother of the victim clearly shows that he was given money by the appellant and was sent to the shop to bring biscuits and meanwhile the appellant took the victim to the garden and this shows that the appellant intentionally took away the victim from her brother and subjected her to sexual assault.

14. We have considered the submissions of learned counsel for both sides have gone through the materials on record including the impugned judgment.

15. Considering the testimony of PW-6, the doctor, who examined the victim girl as well as on perusal the material exhibit No 1, which is the birth certificate of the victim, there is no dispute that the victim was less than five years of age on the date of alleged offence and hence is a 'child' within the meaning of Section 2(d) of the POCSO Act , 2012. We also find no reasons to disbelieve the testimony of the victim recorded during the trial when she says that the

appellant took her to garden drain and open her pants. The testimony of two nurses i.e., PW-4 and PW-5 to the effect that they found the body of victim wet corroborates the fact that the victim was taken into the drain. Though the Appellant denied all the incriminating evidence against him, he had admitted during his examination under section 313 of the code of criminal procedure, 1973 that he lifted the victim girl while she was lying in the tea garden and brought her back. We also do not find any reason to differ with the views of learned trial court which relied on the testimony of PW-3, who is the brother of the victim, and who stated that it was the appellant who took away his sister to the garden in a bicycle after sending him to a shop by giving money to him.

16. Considering the circumstances under which the victim was taken by the appellant to the garden away from her brother and thereafter recovery of the victim, from the custody of the appellant in wet and crying condition with tea leaves attached to her wearing apparel and body only indicates that something wrong was done with her by the appellant. We also agree with the submission of learned *Amicus Curie* as well as learned Additional Public Prosecutor that considering the age of the victim, her deposition made in the court, that appellant took her to drain and open her pants, which appears seemingly contradictory to the initial account given by her before the Investigating Officer and in her statement under section 164 Cr.P.C may still be believed, more so, in light of the other evidence which indicates that the victim was found in company of the appellant in wet and crying condition complaining pain in her private parts. The testimony of PW-6, the doctor, who examined the victim on the date of incident itself, who found redness in and around hymen and also found tenderness and congestion in that area also suggests that the victim was subjected to sexual assault.

17. Penetrative sexual assault is defined in Section 3 of the POCSO Act, 2012 as follows-

A person is said to commit "penetrative sexual assault" if--

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) 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; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

Whereas sexual assault is defined in section 7 of the POCSO act as follows:-

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

18. Learned trial court convicted the appellant under section 6 of the POCSO Act, 2012 for the offence of aggravated penetrative sexual assault on the victim, however, considering the medical evidence as well as testimony of victim and other witnesses, we are of the considered opinion that the evidence available on record, though leads to the inference that the victim was subjected to sexual assault, it falls short for convicting the appellant for penetrative sexual assault within the meaning of the offence of penetrative sexual assault as defined in Section 3 of the POCSO Act, 2012. As the victim was less than 12 years of age on the date when the offence of sexual assault was committed on her, this case falls within the meaning of aggravated sexual assault under section 9(m) of the

POCSO Act, 2012. Punishment for aggravated sexual assault is prescribed in section 10 of the POCSO, 2012 as follows-

Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

19. In view of discussions made above and reasons stated in foregoing paragraphs, we are of the considered opinion that though there are materials on record to show that the appellant had committed the offence of aggravated sexual assault on the victim, however, the evidence falls short of suggesting, beyond reasonable doubt, that the appellant has committed aggravated penetrative sexual assault on the victim, hence, the conviction of the appellant under section 6 of the POCSO Act, 2012 is hereby converted into conviction under section 10 of the POCSO Act, 2012 and appellant is sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs 2000/- and in default of payment of fine to undergo further simple imprisonment for two months.

20. This jail appeal is accordingly disposed of.

21. Send back the LCR along with a copy of this judgment.

JUDGE

JUDGE

Comparing Assistant