

GAHC010163972022



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

Case No. : CrI.L.P./51/2022

THE STATE OF ASSAM
REPRESENTED BY PP ASSAM

VERSUS

PARAG GOSWAMI AND ANR.
S/O LATE RADHA NATH GOSWAMI, RESIDENT OF VILLAGE B.G ROAD,
JYOTI NAGAR, PS AND DIST SIVASAGAR, ASSAM

2:SMTI GEETA KAKOTI @ GEETA KAKOTI BARUAH.
W/O SHRI DIGANTA BARUAH
RESIDENT OF VILLAGE GANAKPATY
WARD NO. 10
SEUJPUR
PS AND DIST SIVASAGAR
ASSAM

Advocate for the Petitioner : PP, ASSAM

Advocate for the Respondent : MR H R A CHOUDHURY (R-1,2)

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

21.06.2023

(M. Zothankhuma, J.)

1. Heard Ms. B. Bhuyan, learned Additional Public Prosecutor and Mr. G.

Choudhury, learned counsel appears for the respondent no.1. Mr. Choudhury submits that he will not be appearing for the respondent no.2 as he has not heard from the respondent no.2, despite trying to contact the respondent no.2.

2. We find that this case has been adjourned on 4 consecutive dates by the learned counsel for the respondent no.1 and accordingly, no adjournment is being allowed today.

3. This is an application under Section 378(3) Cr.P.C, praying for leave to file an appeal against the impugned judgment of acquittal dated 28.12.2021 passed by the learned Court of the Special Judge, Sivasagar, in Special (POCSO) Case No.30/2020.

4. At the very outset, it may be stated that the respondent no.1 had been charged with sexually abusing a minor girl and accordingly the police had initially registered a case under Section 120(B)/354 A/34 IPC and Section 10 of the POCSO Act. The respondent no.2, on the other hand had been charged with voluntary causing hurt and as such, she was charged under Section 323/120(B) IPC. The FIR that had been registered against the respondents resulted in the registration of Sivasagar P.S. Case No.897/2018 against the respondents. However, pursuant to a Public Interest Litigation taken *suo moto* by this Court, the police submitted a supplementary charge-sheet, wherein they added Section 10 and 16 of the POCSO Act. Thereafter the learned Special Judge (POCSO) in Special (POCSO) Case No.30/2020 framed charges against the respondent no.1 under Section 354 IPC and Section 10 of the POCSO Act and against the respondent no.2 under Section 323/354/109 IPC and Section 10/17 of the

POCSO Act. The charges were later altered by the learned Special Court against the respondent no.1 under Section 376(2) IPC and Section 6 of the POCSO Act. Against the respondent no.2, charges were framed under Section 323 of the IPC.

5. After examination of prosecution witnesses and examining the respondents under Section 313 Cr.P.C., the learned Special Judge, Sivasagar acquitted the respondents of the charges framed against them.

6. The learned Additional Public Prosecutor submits that the learned Trial Court had found the victim girl to be above the age of 18 years, after the ossification test conducted on her, by applying the margin of error of (-) or (+) 2 years in favour of the respondent no.2, by adding 2 years to the age of the victim girl. She submits that if 2 years could have been added to the age of the victim girl, similarly 2 years could have been taken away from the age of the victim girl, thereby showing the victim girl's age to be 14 years. She submits that despite the victim having stated clearly that the respondent no.1 had given her a drink, which made her fall asleep and that the respondent no.1 had seen she had been raped one particular day, when she had not taken the drink, the learned Trial Court had however not accepted the statement of the prosecutrix on the ground that she had given contradictory statements. The Additional Public Prosecutor submits that the victim girl had never given contradictory statements, as clearly seen from the evidence given by the victim girl. She further submits that despite the statement of the victim girl under Section 161 Cr.P.C. and under Section 164 Cr.P.C. having clearly disclosed the guilt of the respondent no.1, the learned Trial Court had not considered the same. Further,

the fact that the respondent no.2 used to beat up the victim girl having been proved in the evidence, the learned Trial Court's finding that the charge under Section 323 IPC could not be established beyond all reasonable doubt, as no such statements had been made by her under Section 164 Cr.P.C. was not correct. Further, if any alleged contradiction had been made by a witness, the witness has to be confronted with the same during recording of evidence, in terms of the statement recorded under Section 161 and 164 Cr.P.C. Thereafter, the I/O has to questioned to contradict the witness's statement in her evidence, as provided in the judgment of the Apex Court in the case of ***V.K. Mishra & Another vs. State of Uttarakhand & Another*** reported in ***(2015) 9 SCC 588***.

7. The learned counsel for the respondent no.1, on the other hand submits that the victim girl was not a minor at the time of commission of the offence and the learned Trial Court having considered her age to be above 18 years after the ossification test, no POCSO case could be made against the respondent no.1. He also submits that the evidence does not show that the provisions of Section 376 IPC can be attracted. As such, there is no ground to allow the application for leave to appeal.

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

9. We are of the view that an application under Section 378(3) Cr.P.C. can be allowed when there are reasons to believe that the order of acquittal was erroneous or resulted in a miscarriage of justice. The conditions for allowing

such an application can vary, depending upon various factors. In the present case, the crime is very heinous and no doubt requires the Court to look into the evidence of the parties very carefully. The consideration and finding of the age of the victim girl by the learned Trial Court as over 18 years, after the ossification test and after adding 2 years, due to there being a margin of error of plus or be an addition or minus 2 years in the age of a victim, in our mind does not appear to be unjustified, keeping in view the fact that there are two views possible for coming to a decision with regard to the age of the victim girl. With regard to the offence under Section 376 (2) IPC, the learned Trial Court had acquitted the respondent no.1 from the charge, on the ground that the victim girl had not stated in her statement under Section 161 Cr.P.C. or under Section 164 Cr.P.C. that the respondent no.1 had committed rape upon her, which had been stated in her evidence before the learned Trial Court. Thus, the learned Trial Court did not find the evidence of the victim to be reliable. The manner in which the evidence of a witness is to be contradicted has been clearly spelt out in the case of **V.K. Mishra (supra)**, i.e. the contradictions to that part of the statement under Section 161 or Section 164 Cr.P.C. has to be put to the witness by confronting her with the same and it has to be recorded in the evidence. Thereafter, the person who records the statement under Section 161/164 Cr.P.C. is also required to be questioned with regard to whether the said statement had been made by the witness. The same, prima facie, does not appear to have been done by the learned Trial Court. As such, the evidence of the victim girl had to be considered by the learned Trial Court as it was given and coming to a finding whether it inspired the confidence of the Court, without juxtaposing the same with the other statements. However, the same has not been done.

10. We are of the view that sufficient reasons have been made out by the applicant for preferring an appeal against the impugned judgment. Consequently, we allow the application under Section 378(3) Cr.P.C. and grant leave to appeal. It is made clear that any observations and findings made in this order, shall not taken to be the final observations and findings in the case at the time of hearing the appeal.

11. I.A. is accordingly disposed off.

JUDGE

JUDGE

Comparing Assistant