

GAHC010240882019



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

Case No. : Crl.A./146/2021

ANNAS ALI
S/O- LATE AZMOT ALI
VILLAGE- CHARAKPARA,
P.S.- BARPETA
DIST- BARPETA, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY PP, ASSAM.

2:SHAH ALOM
S/O- LATE ASMAN ALI

VILLAGE- GAREMARI PATHAR

P.O.- PALHAJI

P.S.- BARPETA

DIST- BARPETA
ASSAM
PIN- 781309

Advocate for the Petitioner : MR S ISLAM

Advocate for the Respondent : MS. B SARMA(ADDL.PP, ASSAM)

**BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI**

JUDGEMENT AND ORDER (CAV)

Date : 28-08-2023

Heard Mr. S. Islam, learned counsel for the accused-appellant. Also heard Mr. P.S. Lahkar, learned Additional Public Prosecutor for the State/respondent No.1 and Ms. D. Saikia, learned *Amicus Curiae* for the respondent No.2.

2. This appeal has been preferred by the appellant against the judgment and order dated 23.07.2019 passed by the learned Special Judge, Barpeta in connection with Special POCSO Case No. 20/2018, whereby the appellant was convicted under Section 4 of Protection of Children from Sexual Offences Act, 2012(herein after referred as POCSO Act) and sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.2,000/-, in default simple imprisonment for three months.

3. The brief facts of the case is that the informant lodged an FIR on 27.04.2018 before the Officer-in-Charge, Barpeta P.S. stating *inter alia* that on 20.11.2017, the appellant forcefully took her minor daughter from his house under a death threat to marry her and kept her in his house for four days. According to his daughter, the present appellant committed rape on her on several times during her stay in his house. Knowing about the incident, the informant convened a village *bichar* (extra judicial settlement). The villagers recovered his daughter from the house of the appellant and *bichar* was held in presence of the accused/appellant and his family members. It was decided in the *bichar* that the present appellant had to marry his daughter when she would attain the age of majority. The appellant accepted the said decision taken in the *bichar* and promised that he would marry his daughter when she would attain the age of majority. Thereafter, the appellant used to visit his house and continued physical relationship with his daughter.

4. It is also alleged in the FIR that the second incident took place on 16.04.2018 when the

appellant came to his house and forcefully established physical relationship with his daughter. When his daughter asked the accused to get her married, the appellant left his house. When he told the guardians of the appellant about the matter, they stated that they would get their marriage solemnize. But he came to know that on 20.04.2018, the appellant got married to another girl.

5. On receipt of the complaint, a case was registered vide Barpeta P.S. Case No. 900/2018 under Section 343/417/506/34 IPC r/w Section 4 of POCSO Act and started investigation. During investigation, the investigating officer visited the place of occurrence, examined the witnesses and recorded their statements and the victim was produced before the Magistrate for recording her statement under Section 164 Cr.P.C. After completion of investigation, charge-sheet was submitted against the present appellant under Section 343/417/506 IPC r/w Section 4 of POCSO Act.

6. During trial, charge was framed under Section 4 of POCSO Act which was read over and explained to the appellant to which he pleaded not guilty and claimed to be tried.

7. To prove the guilt of the accused/appellant, the prosecution examined 5(five) witnesses. However, the appellant did not adduce any evidence in support of his defence. After completion of trial, the statement of the appellant was recorded under Section 313 Cr.P.C., wherein the incriminating materials found in the evidence of the witnesses were put to him to which he denied the same and pleaded his innocence.

8. After hearing learned counsel for the parties, the learned Special Judge, Barpeta convicted the appellant as aforesaid. Hence, this appeal.

9. The learned counsel for the petitioner has submitted that the prosecution has failed to prove the age of the victim which is the sole ingredient to proceed with the case for the offence under the provision of POCSO Act. It is also submitted by the learned counsel for the appellant that the victim was not examined by any doctor to prove any sexual assault caused

to the victim. There is also no any medical opinion regarding age of the victim. Under such backdrop, the appellant cannot be convicted under Section 4 of POCSO Act.

10. Pressing that the issue of determination of age has to be taken up as a preliminary point, the learned counsel for the appellant submitted that before the POCSO Court can even take cognizance of the case, the foundational fact has to be proved and the age of the victim must be established by the prosecution before the court can resort to the provision of Section 29 of the POCSO Act which speaks of the presumption or reverse burden cast upon the accused who is presumed to be guilty of having committed the offence as alleged and has to prove his innocence to discharge such a burden. It is further pointed out by the learned counsel for the appellant that in this case, no document was ever exhibited, no medical examination was carried out to determine the age of the victim at the relevant period.

11. In reply, the learned Additional Public Prosecutor has submitted that the proposition of the appellant on the issue of age determination cannot be considered by this Court at this juncture, since this question was not raised at the relevant time before the Special Court. Referring to the provision of sub-section 2 of Section 34 of POCSO Act, the learned Additional Public Prosecutor has further argued that the provision speaks of a situation when any question arises before the Special Court as to whether a person is a child or not, then the Special Court shall determine the age of such person after satisfying itself about the same.

12. It is also submitted that appellant/accused has not raised this question before the Special Court. To raise this issue at the appellate stage, it is incumbent upon the appellant to prove that the victim was major at the relevant time but nothing on record has revealed that the appellant has raised the question of determination of age.

13. The learned *Amicus Curiae* representing the respondent No. 2 has vehemently opposed the submission of learned counsel for the appellant and submitted that the conviction can be based on solitary evidence of the proesecutrix and no corroboration would be required unless there are compelling reasons which insisted the course for corroboration of a statement. It is

also submitted that regarding age of the victim, it appears from the evidence of the witnesses that the appellant took the daughter of the informant to his house and kept her for $\frac{3}{4}$ days and a village meeting was also held wherein the appellant assured that he would marry the victim girl when she would become major. According to the learned *Amicus Curiae*, the statement of the informant and the victim proved the fact that the victim was minor at the relevant time of incident.

14. The learned Additional Public prosecutor and the learned *Amicus Curiae* prayed for dismissal of the appeal.

15. In support of her submissions, learned *Amicus Curiae* representing the respondent No. 2 has placed reliance on the following case laws-

(I) AIR 2005 SC 3570 (State of M.P. vs Dayal Sahu)

(ii) Criminal Appeal Nos. 1156-1158 of 2005 (Ramdas & Ors. & State of Maharashtra)

(iii) AIR 2011 SC 697 (State of U.P. vs Chhoteylal)

16. P.W.1 is the informant. He deposed in his evidence that he lodged the FIR when the accused Annas Ali took his daughter and kept her in his house for $\frac{3}{4}$ days. When he did not find his daughter, he informed the matter to the villagers and a village meeting was called. In the said meeting, the accused assured that he would marry the victim girl when she would become major as she had not attained majority at that time. But in the meantime, the accused married another girl hence, he filed an FIR against the accused persons vide Ext. 1.

17. In his cross-examination, P.W.1 replied that he did not know whether his daughter consumed poison in Sarakpara village before he lodged the FIR. His daughter had love affair with the accused but he did not know how long she had been in an affair with the accused. He lodged the FIR after six months of the incident when the accused got married to another

girl.

18. P.W.2 is the victim. From her deposition, it reveals that when she was pursuing studies in Class-IX, accused Annas Ali took her to his house on a promise of marriage and kept her in his residence for four days and during that period, he had sexual relation with her. When her parents came to know about the incident, she was taken back to the house of her parents. Thereafter, a village meeting was held in presence of family members of accused Annas Ali along with other villagers. It was decided in the said meeting that the accused would marry her on attaining the age of majority. Even after village meeting, accused used to visit her residence and continued physical relationship with her on a promise of marriage. But subsequently, the accused got married to another girl. Thereafter, her father lodged the FIR. Her statement was recorded by the Magistrate under Section 164 Cr.P.C. vide Ext. 2.

19. In her cross-examination, P.W.2 replied that before his father lodged the FIR, she went to village Sarakpara. After seven months of the incident, she was examined by the police and produced before the doctor for medical examination but she refused to do so.

20. According to P.W.3, he heard that the daughter of the informant was kidnapped by appellant Annas Ali. After having confined the girl for $\frac{3}{4}$ days in the house of the accused, the girl was sent back to her parents house. Subsequently, Annas Ali got married to another girl.

21. In his cross-examination, P.W.3 replied that he was in Guwahati when the girl went to the house of the appellant. He did not know how she came to the house of the appellant. He was present in the meeting which was held in the house of Siddique Ali wherein it was resolved that as the age of the girl was less, so marriage could take place with the appellant on attaining her age of majority. A case was filed for not marrying the victim girl.

22. P.W.4 is another villager, he deposed in his evidence that while daughter of the informant studying in school, she was kidnapped by the accused/appellant Annas Ali and kept

her in his house about four days. Subsequently, there was a village meeting regarding the marriage of the girl with Annas Ali and Annas assured to marry her. However, since the girl was under age, marriage did not take place but the accused promised that he would marry the girl after attaining the age of majority. Subsequently, the accused got married to another girl.

23. In his cross-examination, P.W.4 replied that the meeting decided to get the girl married with accused on her attaining the age of majority after three months. The case was filed against the accused/appellant because he got married to another girl.

24. P.W.5 is the investigating officer. He deposed in his evidence that on 20.11.2017, he was working at Barpeta Police Station. On that day, on receipt of the FIR from one Shah Alam, a case was registered vide Barpeta P.S. Case No. 900/2018 and he was entrusted to investigate the case. Accordingly, he visited the place of occurrence, drew sketch map vide Ext. 3 and 4. He recorded the statements of the witnesses including the victim. The victim girl was also sent for medical examination but she refused to do so. The victim girl was produced before the learned Magistrate for recording her statement under Section 164 Cr.P.C. He also arrested the accused/appellant Annas Ali. On completion of investigation, charge-sheet was submitted against the accused/appellant Annas Ali under Section 343/417/506 IPC and Section 4 of POCSO Act vide Ext. 5.

25. In his cross-examination, P.W.5 replied that the incident occurred on 20.11.2017 but the FIR was lodged on 28.04.2018. He visited the place of occurrence on 29.04.2018. The victim girl appeared in the police station on her own.

26. From the evidence of the aforesaid witnesses, it reveals that at the relevant time as the victim was minor, no marriage was held between the victim and the appellant. A village meeting was held in presence of the family members of the appellant and other villagers to resolve the dispute between the parties regarding marriage. In the said village meeting, the appellant assured that he would marry the victim after attaining the age of majority. But

subsequently, the appellant got married to another girl as a result of which, the FIR was lodged. Though, the victim was sent for medical examination but she refused to do so. Hence, clinically as the victim was not examined by any doctor, it is not proved whether she was sexually abused by any person or not at the relevant time of the incident. Her age was also not proved by the medical officer. It appears from the record that the investigating officer seized one transfer certificate of the victim but which was not exhibited during trial. The original or Xerox copy of transfer certificate is also not available in the record as such, the prosecution has failed to prove the fact that at the time relevant time of incident, the victim was minor below the age of 18 years.

27. Based on the scrutiny of evidence adduced at the trial, I find substance in submission made on behalf of the appellant that the prosecution failed to prove, beyond all reasonable doubts, the fact that the victim was minor as on the date of occurrence. The Hon'ble Supreme Court has held in case of **Jarnail Singh v. State of Haryana** reported in **(2013) vol. 7 SCC 263** that "though Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 have been framed under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 (herein referred as J.J. Act) is applicable to determine the age of child in conflict with law, the aforesaid provision should be the basis for determination of age even of a child who is a victim of crime. The Court remarked that there was hardly any difference insofar as the issue of minority was concerned, between a child in conflict with law, and a child who is a victim of crime."

28. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of J.J. Rules, 2007. The 2007 Rules have been framed under Section 68(1) of the J.J. Act 2000. Rule 12 referred to above is reproduced as under:

"12. Procedure to be followed in determination of age- (1) in every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty

days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining--

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i),(ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub- rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

29. Identical provision is there under Section 94 of J.J. Act, 2015 which came into effect from 15.01.2016. In the present case, date of occurrence is 20.11.2017. Hence, in the present case Section 94 of J.J. Act is applicable.

30. Apparently in the case at hand, no exercise was carried out by the prosecution to establish that the victim was minor as on the date of occurrence by following the procedure prescribed in Section 94 of J.J. Act which is slightly different in the light of reasoning put forth by the Hon'ble Supreme Court in the case of Jarnail Singh (Supra). Further, in the case of **Rajak Mohammad vs. State of H.P.** reported in **(2018) vol. 9 SCC 248**, the Hon'ble Supreme Court has noted that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed. The Hon'ble Supreme Court, taking into account the facts and circumstances of that case

opined that the report of radiological examination left room for ample doubt with regard to the correct age of prosecutrix. In such case, the benefit of aforesaid doubt, naturally, must go in favour of the accused. In the case of *Sunil v. the State of Haryana* reported in **AIR 2010 SC 392**, the Hon'ble Supreme Court observed that conviction cannot be based on an approximate age of the victim. **In State of Madhya Pradesh vs. Munna @ Shambhoo Nath** reported in **(2016) vol. 1 SCC 696**, the Hon'ble Supreme Court held that the evidence of approximate age of the victim would not be sufficient to any conclusion about the exact age of the victim.

31. In the instant case, admitted position is that there is no birth certificate or school certificate produced before the learned trial court to ascertain the age of the victim. It also appears that though the victim was produced before the medical officer but she refused to do any medical examination. As such, she was not medically examined by any radiologist to ascertain her age.

32. It also appears from the evidence of the victim that at the relevant time, she was pursuing her studies in Class-IX. So she was a literate girl as she had signed everywhere. Therefore, it is not a case of the prosecution that the victim did not attend any school. As a matter of fact, no effort was made by the prosecution to establish the age of the victim in accordance with statutory provision. The evidence of the victim and her father i.e. P.W.1 and P.W.2 reveal that she was minor at the relevant time of the incident as because in the village meeting, it was decided that as the victim girl was minor, the marriage between the victim and the appellant was not held at the relevant time and it was disclosed by the appellant that she would marry the victim girl on attaining the age of majority. On the basis of such statements of P.W.1 and P.W.2, this Court cannot come to the conclusion that the victim was minor at the relevant time of incident.

33. In view of the above, the contention of the appellant in the light of Section 29 of POCSO Act is quite tenable in the light of the fact that there was failure on the part of the prosecution to establish the essential foundational facts to attract the provision of POCSO Act.

From all counts, from the analysis of evidence adduced during trial, contention of the learned counsel for the appellant, it is crystal clear that the offence under Section 4 of POCSO Act has not been proved beyond reasonable doubts and benefit of doubt goes in favour of the appellant.

34. In the result, this Court is of the view that the prosecution case suffers from several infirmities, as noticed above, and it is not a fit case where conviction could have been recorded. The learned trial court has committed error of law as well as appreciation of facts of the case in view of settled criminal jurisprudence. Hence, the impugned judgment and order dated 23.07.2019 passed by the learned Special Judge, Barpeta in connection with Special POCSO Case No. 20/2018 under Section 4 of POCSO Act is hereby set aside and the appeal stands allowed. Release the accused/appellant, if not wanted in any other case.

35. Send back the LCR.

JUDGE

Comparing Assistant