

GAHC010262982022



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

Case No. : I.A.(Crl.)/1/2023

MD. MOHIRUDDIN
S/O MOSEER ALI, R/O NO. 3 DAKSHIN RANGA PANI, P.S.- BOKO, DIST.-
KAMRUP (R), ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY THE P.P., ASSAM.

2:RINIKI BEGUM
W/O NUR ALI
R/O GARIGAON FAKIRPARA
P.S.- JALUKBARI
DIST.- KAMRUP (METRO)
ASSAM

Advocate for the Petitioner : MR. A M BORA

Advocate for the Respondent : PP, ASSAM

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

ORDER

Date : 19-06-2023
(M. Zothankhuma, J)

Heard Mr. AM Bora, learned senior counsel for the applicant. Also heard Ms.
B Bhuyan, learned Additional Public Prosecutor appearing for the State

respondent No. 1 as well as Ms. SS Zia, learned Legal Aid Counsel appearing for the informant/respondent No. 2.

2. The learned senior counsel for the applicant submits that the evidence given by the two prosecutrix twin sisters before the learned trial Court does not make out a case of the applicant having committed aggravated penetrative sexual assault, though the evidence may be said to prove that sexual assault had been inflicted upon the prosecutrix. He also submits that a statement made under Section 164 Cr.PC is not substantive evidence and it can only be used either to corroborate or contradict the statement of a prosecutrix. In this respect, he has relied upon the decisions of the Apex Court in ***Ram Kishan Singh vs. Harmit Kaur & Anr.***, reported in **(1972) 3 SCC 280**, ***Shaji vs. State of Kerala***, reported in **(2013) 14 SCC 266** and ***Baik Nath Sah vs. State of Bihar***, reported in **(2010) 6 SCC 736**.

3. He also submits that the evidence of the prosecutrix does not show that there has been any aggravated penetrative sexual assault and as such, the statements made by the prosecutrix under Section 164 Cr.PC cannot come to the aid of the prosecutrix, in proving that the applicant had committed any aggravated penetrative sexual assault. He further submits that the evidence of the prosecutrix did not require any rebuttal to be made by the applicant in his defense, as no case under Section 6 of the POCSO Act had been made out.

4. Ms. B Bhuyan, learned Additional Public Prosecutor submits that the evidence of the prosecutrix, coupled with the statements of the prosecutrix made under Section 164 Cr.PC and the evidence of the Doctor clearly shows that the applicant had committed aggravated penetrative sexual assault on the private parts of the prosecutrix and as such, the charge framed against the applicant had been fully proved. She further submits that the mother of the

prosecutrix, i.e., PW3 in her evidence had stated that she had seen the applicant touching the breasts of her daughters in an indecent way. She accordingly submits that the application should be rejected.

5. Ms. SS Zia, learned Legal Aid Counsel for the informant, while supporting the submissions made by the learned Additional Public Prosecutor further submits that when a child is a victim, a child cannot be tutored since it is incomprehensible for a child to understand a sexual act. Therefore, the child will be able to understand about the incident only if the child has gone through the same. Thus, victims of sexual assault must be dealt with, with more sensitivity and the evidence should not be appreciated in the manner, in which the regular evidence is appreciated. In this aspect, she has relied upon the judgment of the Madras High Court in the case of ***A Muthupandi vs. State, represented by the Inspector of Police, Tiruppur All Women Police Station, Tiruppur District*** (Criminal Appeal Nos. 245 of 2016 & 154 of 2017) disposed of on 03.04.2023. She thus submits that as per the medical report, the incomplete tears in the hymen were associated with digital penetration or fingering beyond seven days. She thus submits that as the Doctor's evidence clearly points to the redness and tenderness of the private parts of the prosecutrix, the examination of which has been done on the date of filing of the FIR, there is no escape for the applicant from the allegation that he had been responsible for the offence of aggravated penetrative sexual assault on the two prosecutrix. She accordingly prays that the application should be rejected.

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

7. The issue that has been brought before us requires the evidence of PW1 and PW2 to be looked into so as to decide whether the said evidence showed that there has been any offence of aggravated penetrative sexual assault made

out.

8. On considering the decision of the Madras High Court in Criminal Appeal Nos. 245 of 2016 & 154 of 2017, we do not find any ground to have any different view with the said decision. However, the decision made in the above case is not applicable to the facts of this case, inasmuch as, PW1 and PW2 have made categorical statements with regard to the specific acts done by the applicant in their statements made under Section 164 Cr.PC. The evidence of PW1 and PW2 was taken three years after the statements were made under Section 164 Cr.PC and there was no reason for them not to have stated the same thing that they had stated in their statements made under Section 164 Cr.PC, while adducing their evidence before the learned Trial Court. As such, it cannot be said that at the time of giving their evidence, the PW1 and PW2 were incapable of stating what they had stated earlier.

9. PW1, prosecutrix, in her evidence has stated as follows:-

“

During the tuition time sir touched my body and I felt bad. Other than touching my body sir did not do anything. Then I told my mother and my mother filed the case. After my mother gave the case the Police brought me to the court. One sister in court asked me about the incident and I said as I have said today. Ext 1 is the statement given to the Magistrate baido Ext 1(1) and 1(2) is my signature.

XXXXXXXXXX

During the study time sir touched my hand and asked me to study properly. I do not remember what I have stated before the Magistrate. The Magistrate did not read over the statement to me that I have stated before the Magistrate that sir touched my hand. I like to play lodu. And I play. I

did not understand whether sir touched me out of love affection or for some other purpose. As sir tried to love me I went and told my mother and my mother filed the case. And I was brought to the Court I stated before the Magistrate as my mother had tutored me to say."

10. PW2, prosecutrix, in her evidence has stated as follows:-

"..... During our tuition hours Kera sir would touch the body over clothes and I felt bad. And I narrated to my mother. Then my mother filed the case. After the mother filed the case Police brought me to the Police Station. I do not remember whether Police took me to the court or to the medical. But the signature shown to me on the paper is mine. Ext 2 is the paper and 2(1) and 2(2) is my signature.

XXXXXXX

During tutition hours if I am not able to study sir would touch my body meaning thereby my hand and on my back (pithi) and asked to study properly. That is why I felt bad and told my mother and my mother filed the case. Whatever I have stated today is true. Whenever I have stated before I do not remember.

I have stated before the Police and Magistrate as taught by my mother."

11. A perusal of the evidence adduced by the two prosecutrix shows that the applicant had touched the hands and body of the prosecutrix. There is no evidence given by the PW1 and PW2 with regard to the applicant having committed aggravated penetrative sexual assault, which is found only in the statements made by PW1 and PW2 under Section 164 Cr.PC before the learned Magistrate. The statements made under Section 164 Cr.PC by PW1 and PW2 has however been exhibited by PW1 and PW2. The fact that the applicant has

committed sexual assault on PW1 and PW2 by touching their bodies seems quite apparent. However, the question is with regard to whether the statements made under Section 164 Cr.PC could have been considered as evidence, in proving the case of aggravated penetrative sexual assault. In the case of **Ram Kishan Singh** (supra), the Apex Court has clearly held that a statement made under Section 164 Cr.PC is not substantive evidence and can only be used to corroborate or contradict a witness. PW1 and PW2 have however not stated in their evidence what they had stated in their statements made under Section 164 Cr.PC. As such, we are of the *prima facie* view that the statements made by PW1 and PW2 under Section 164 Cr.PC could not have been used as substantive evidence, for proving the case against the applicant. In the case of **Sunil Kumar Sambhudayal Gupta (Dr.) & Anr. vs. State of Maharashtra**, reported in **(2010) 13 SCC 657**, the Apex Court has held that if the witness in his statement under Section 161 Cr.PC has not disclosed certain facts but meets the prosecution case first time before the Court, such version lacks credence and is liable to be discarded. In the present case, the evidence of PW3 is to the effect that she had seen the applicant touching the breast of her daughters in an indecent way. The same has never been made by her to the Police under Section 161 Cr.PC and seems to have been made for the first time only during recording her evidence and as such, the said evidence appears to lack credence. Thus, on considering that the conviction seems to have been made by the learned Trial Court on the basis of the statements made by the prosecutrix under Section 164 Cr.PC, the applicant has made out a case for suspension of sentence and bail. Accordingly, in light of the above, the sentence made in pursuant to the judgment and order dated 29.11.2022, passed by the court of the learned Additional Sessions Judge cum Special Judge (POCSO), Kamrup

(Metro) in Sessions Case No. 415/2018 is suspended. The applicant is released on bail on furnishing a bail bond of Rs.50,000/- with one surety of like amount, to the satisfaction of the learned Trial Court. The bail is subject to the condition that the applicant shall not be involved in any other case of similar nature, the violation of which will result in automatic cancellation of the bail.

12. The observations and findings made in this order shall not have any effect on the findings to be made at the time of final hearing and shall not prejudice the case of any of the parties.

13. Interlocutory application stands disposed of.

JUDGE

JUDGE

Comparing Assistant