

GAHC040000222024

2024:GAU-AP:962



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

Case No. : Crl.A./1/2024

Onik Osik

S/o Late Obang Osik, resident of Mirbuk village, PO Pasighat, East Siang District, AP

VERSUS

The State of AP and Anr
represented by the PP, AP

2:XXX

Age: 0

Occupation :

through her father Shri Takep Nonang
resident of Debing village

PO Ruksin

PS Pasighat

East Siang District

A

Advocate for the Petitioner : Dicky Panging, Kirmar Ado, Doge Lona, D Tamuk

Advocate for the Respondent : P P of AP, Punyo Harming, Jartum Gadi, Jumge Karbak, Tamo Taggu, Keeke Loya

- B E F O R E -

HON'BLE MR. JUSTICE ARUN DEV CHOUDHURY

For the Appellant

: Mr. D. Panging, Advocate.

For the Respondents : Mr. J. Tsering, Addl. PP.
: Mr. K. Loya, Advocate.

Date of hearing : 29.10.2024

Date of judgment : 29.10.2024

JUDGMENT & ORDER (ORAL)

1. Heard Mr. D. Panging, learned counsel for the appellant. Also heard Mr. J. Tsering, learned Public Prosecutor for the State of Arunachal Pradesh and Mr. K. Loya, learned counsel for the respondent No. 2.
2. The present appeal is filed under Section 374 (2) of the Code of Criminal Procedure, 1973 assailing the Judgment and Order dated 22.12.2023 passed by the learned Special Judge (POCSO), Pasighat, East Siang District in PSG SC (POCSO) Case No. 12/2020, whereby, the accused/appellant is convicted under Section 10 and 18 of the POCSO Act and sentenced him to undergo imprisonment for a period of 5 (five) years with a fine of Rs. 5,000/- for offences under Section 10 of the POCSO Act and also sentenced him to undergo imprisonment for a period of 2 (two) years and 6 (six) months with a fine of Rs. 5,000/- for offences under Section 18 of the POCSO Act and further in default to pay the fine, to serve another period of three months.
3. The prosecution case as unfolded from the materials available on record is to the effect that the appellant had sexually assaulted five years old daughter of the informant, who was living with her elder sister in her in-laws house at Mirku village for schooling purpose by trying to penetrate his penis into his daughter mouth several times wherever appellant found her alone. It was also alleged that the appellant had been sneaking into her bedroom at night. It was further alleged that the appellant frequently forced the victim to sit over his penis and crotch areas on the pretext of massaging appellant chest and body. Accordingly, PSG PS case No. 218/19 under Section 376(2)(f) IPC read with Section 6/8 of

POCSO Act was registered and investigation was initiated.

4. Upon completion of the investigation, the investigating officer had submitted charge-sheet under Section 354A (1)(i) IPC read with Section 6/8/10/12/18 of POCSO Act on 25.11.2019 against the accused/appellant namely Onik Osik.
5. Based on the charge sheet submitted by the Investigating Officer, charges were framed against the accused/appellant under Section 354A (1)(i) IPC read with Section 6/8/10/12/18 of POCSO Act. The charges were read out and explained to the accused/ appellant but the accused had pleaded not guilty and claimed to be tried. Hence, the matter went up to trial.
6. In order to bring home the charges, the prosecution had examined as many as 5 (five) witnesses, who were cross examined by defence. The statement of the accused/appellant was recorded under Section 313 Cr.P.C. The defence did not adduce any evidence, however, the Court had examined one witness as CW-1. After conclusion of the trial, the learned trial court convicted the accused as recorded hereinabove.
7. Mr. Panging, learned counsel for the appellant, submits that the present case is a case of no evidence inasmuch as none of the witnesses except the I.O., had supported the prosecution case and therefore, in the aforesaid factual backdrop, the accused appellant could not have been convicted relying on the statement of the victim recorded under Section 164 of the Cr.P.C., more particularly, when neither the Magistrate who recorded such statement was examined nor the victim who became hostile was confronted with her statement recorded under Section 161 of Cr.P.C. and Section 164 of Cr.P.C., during cross-examination by the prosecution.
8. Per contra Mr. J. Tsering, the learned Additional Public Prosecutor has argued that though most of the witnesses had become hostile, testimony of such witnesses cannot be discarded altogether and a person can be convicted on the basis of the testimonies of such hostile witnesses inasmuch as the defence

failed to create any doubt about the statement of the witnesses recorded under Section 161 of Cr.P.C., or Section 164 of Cr.P.C., by challenging the same during their cross-examination and therefore, the learned trial Court has rightly convicted the accused person.

9. This Court has given anxious consideration to the submissions advanced by the learned counsel for both the sides along with the materials available on record.
10. Before dealing with the arguments advanced by the learned counsel for the parties, let this Court first appreciate the depositions of the prosecution witnesses.

I. **PW1, Smti. Kasan Osik** is the sister of the victim and she is the daughter-in-law of the accused. In her examination-in-chief, she testified that the case might have been founded on misunderstanding of the victim of the love and affection of the accused. In the aforesaid backdrop, this witness was declared as hostile. Accordingly, she was cross-examined by the Special Public Prosecutor.

During such cross-examination by prosecution, she deposed that she forgot whether she told police that the victim reported her in the night of 03.11.2019 that the accused lied down between the victim and her maternal cousin (PW-4) and while lying he pushed the victim and rested one of his hand over PW-4 and when the PW-4 said to the accused that he disliked it, the accused got up and went away. She denied that she told police that PW-4 reported her that victim revealed PW-4 that accused used to disturb her. However, she deposed that she heard from PW-4 as regard victim massaging the chest of the accused and accused making the victim to sit upon his penis. The other statements recorded under section 161 of Cr.P.C. has been denied by this witness. This witness also examined by the defence.

During cross-examination, she testified that PW-4 never told her that accused showed his private part to the victim and she re-affirmed her statement as deposed during her evidence in chief.

- II. **PW2**, is the victim. She was 11 years at the time of examination. The learned Trial Judge tested the capability of the minor victim to depose and asked certain questions and she rightly answered those questions. However, the victim deposed that she did not remember about the incident. Thereafter, the Court proceeded to record her statement. During her evidence-in-chief, she deposed that she once massaged the accused and she deposed that she did not remember such incident and that the massage was done once during day time. This witness was also declared hostile and was cross-examined by the Public Prosecutor and during such cross-examination, she deposed that she did not remember stating before the Magistrate that the accused used to come in the kitchen in the night and change her sleeping position and often showed his private part. She further deposed that she did not remember, if she told the Magistrate that the accused tried to insert his penis once in her mouth. She was also cross-examined by defence. During her cross-examination, she admitted that the accused once came to their bedroom in night and that she never seen the private part of the accused and that the accused never shown his private part to her and also deposed that while giving massage, she was not asked to see on the private part of the accused.

- III. **PW3 Sri Takep Nonang** is the informant and father of the victim. During his examination-in-chief, he deposed that the vicatim was staying in the house of the accused for education purpose as the accused is the father-in-law of his elder daughter (PW-1). He deposed

that he did not know anything about the incident and he heard the incident from his elder daughter i.e. PW-1. According to this witness, PW-1 told him that she listen the gossiping between the victim daughter and Oyin that the accused is to use to make them massage and sit on the lap of the accused. After receiving the information, he took back the victim to their residence and lodged the FIR. He further deposed that he did not ask the victim about the incident and he suggested his wife to ask for the incident. This witness was also declared hostile and was cross-examined by the Public Prosecutor.

During such cross-examination by defence, he admitted that he told police that the accused inserted his penis in the mouth of the victim which he heard from his wife. He also admitted that he stated before the police that accused asked to sit the victim on his penis during the process of massage, which, he heard from his wife. During cross-examination, he deposed that he need guidance from the Court to solve the matter as he was not interested in the case. During cross-examination by the defence, he deposed that the FIR was drafted by a staff of "One Stop Centre" and that the FIR was not read out to him.

During his cross-examination, he admitted that all the information, he got was from his elder daughter i.e. PW-1 and PW-4. He further deposed that entire allegation against the accused might have been on misunderstanding or mistaken impression of facts.

IV. **PW4 Oyin Panyang** is a minor witness and who happens to be with the victim at the time of the commission of the offence as per the version of the prosecution. As he was the minor witness, the learned Trial Judge tested his capability and competency and being satisfied, proceeded to examine him. This witness testified during his examination-in-chief that one night, when the light went off, the

accused came with a torch to the kitchen for tying mosquito net where the victim and he was sleeping. He deposed that he did not remember anything and that his statement was recorded by one madam in the first floor of the court.

This witness was also declared hostile and cross-examined by the Public Prosecutor. He denied stating before Magistrate that accused shown his penis to victim and made her to sit on the penis of the accused during massage. He further denied that the victim told him that the showed his male organ to the victim. Though he admitted that the police recorded his statement however, he denied stating before the police that the accused used to disturb the victim during mid-night. He further deposed during cross-examination by the prosecution that on mid-night of 03.11.2019, it was raining outside and he heard the sound of opening the door which made him wake from sleep and he saw the accused was tying mosquito net. He denied stating before the police that on the mid-night of 03.11.2019, accused came to the kitchen room and slept with them. He further denied stating before the police that once the accused asked him to purchase Bidi and the victim informed him that the accused asked the victim to do massage of his chest and on this pretext the accused made the victim to sit on his penis. This witness was not cross-examined by the defence.

- V. **PW5 O. Tari**, is the Investigating Officer. He described the facts narrated in the FIR, and proved the Exhibit-2 containing certain photographs of place of occurrence, Exhibit 3, the statement of the witnesses recorded before the Magistrate, Exhibit-4 the statement of the victim recorded before Magistrate, Exhibit-6 Medical examination report of the accused and Exhibit-7 Medical examination report of the victim, Exhibit-8 Birth certificate of the victim etc. This witness denied

the suggestion of the defence that the investigation was not properly done, statement of the witnesses was recorded in the exonerated manner etc.

VI. **One Smti Sonu Nonang**, which was examined as Court witness No. 1. During her examination-in-chief, deposed that she knows the accused and after hearing the incident, she took the victim and she enquired the victim but she could not able to tell the details of the incident. This witness was not cross examined either by prosecution or by defence.

11. From the aforesaid, it is clear that the prosecution case was based on direct evidence of the PW-2 victim and PW-4. The prosecution also proposed to rely on the corroborative evidence of witnesses like PW-1, the sister of the victim, PW-3 the father and informant. However, none of these witnesses support the prosecution version. Thus, the oral evidence in relation to the matters of fact under investigation was not as per the version projected by the prosecution.

12. It is well settled that the foundation of the prosecution case lies on the statements recorded during investigation by the Investigating Officer and / or by the Magistrate under Section 164 of Cr.P.C. Law warrants such witnesses to utter true facts considering the importance of justice required to be deliver in the process of a trial. However, in some cases, like the present one, some witnesses retracts from their previous statement and in such a circumstance, the Court may exercise its discretion and allow the party calling such witness to put question in the manner of cross-examination, which has also been done in the present case.

13. Law is equally well settled that the testimony of a hostile witness can be relied upon and when a witness turns hostile the same will not necessarily make the said witness unreliable witness (**Ref: 2016 10 SCC 506 Raja & Ors. -Vs- State of Karnataka**, and **AIR 2016 SC 298 Krishan Chander -Vs- State of Delhi**).

14. This Court while dealing with the present matter, in the backdrop of all the

vital witnesses becoming hostile would like to record here the settled propositions of law that after cross-examination and contradiction of a witness, a Court is to form a credibility of such witness and if it is the opinion of the Court that such testimony are credible than also the Court is to cautiously rely on such evidence and such testimony cannot be made a sole ground for convicting an accused and when the Court is not satisfied with credibility of such witness and finds it concretely unreliable, the Court is to reject such evidence.

15. Now yet another aspect of the matter is that the portion of evidence which, besides being advantageous to both the parties and helped the Court in arriving at a just decision, may be upheld and made admissible subject to scrutiny and cautious acceptance (**Ref: AIR 1996 SC 2766 State of U.P. -Vs- Ramesh Prasad Misra**).

16. The star witnesses projected by the prosecution in terms of the statement recorded during investigation are the PW-2 victim and the PW-4. During her cross-examination, PW-2 deposed that she forgot what she stated before the Investigating Authority and the Magistrate. In fact, while the Magistrate testing her capacity to depose, she stated before the Magistrate that she forgot everything. The fact also remains that this witness was not confronted and contradicted with the statement recorded either by the Investigating Officer or by the Magistrate under Section 164 of Cr.P.C. The PW-4 during his examination-in-chief projected a version that on 03.11.2019, though the accused came into the room/kitchen, where both the victim and PW-4 were sleeping together but only to tie the mosquito net as the electricity went off. Thus, this witness did not support the prosecution version. During cross by prosecution, he re-affirmed such stand. This witness was also not specifically confronted and contradicted with his statement recorded under Section 161 of Cr.P.C. rather, during cross-examination by the prosecution, this witness denied that he stated before police that the accused used to disturb the victim in the mid night. Thus, even if it is assumed that these two witnesses are trustworthy and reliable, then, their version goes in favour of the defence and if for their conduct of alleged retraction,

they are treated to be not trustworthy, then also it goes against prosecution for want of proper contradiction.

17. Now coming to PW-1, it is the projection of the prosecution that PW-1 was informed about the incident by PW-2 and PW-4, however, she retracted from her stand during examination by the Court. She specifically denied that she stated before the Police that PW-4 reported her that the victim revealed PW-4 that the accused used to disturb her. During cross by the defence, she affirmed that PW-4 never told her that the accused showed his private part to the victim. This witness was also not specifically and properly contradicted and confronted with her statement recorded by police under Section 161 of Cr.P.C. Similar is the case so far the same relates to the PW-3, the father of the victim. According to this witness, he lodged the FIR on the basis of information received from PW-1 and his wife and that he did not talk to the victim. This witness was also not confronted and contradicted with his statement recorded under Section 161 of Cr.P.C. by the prosecution.

18. Thus, at the cost of repetition, it is recorded that the victim PW-2 and the eye witness PW-4 in their cross-examination by prosecution did not admit as regards their statement recorded by the police under Section 161 of Cr.P.C., and by the Magistrate under Section 164 of Cr.P.C. In fact, the relevant portion of the statements which were allegedly made before the Investigating Officer under Section 161 of Cr.P.C. and / or under Section 164 of Cr.P.C., were not even contradicted to these witnesses. The fact also remains that the Investigating Officer also specifically did not cited the relevant portion of the statement which he recorded under Section 161 of Cr.P.C. of the witnesses.

19. From the aforesaid, it is clear that the statements made before the Investigating Officer are not specifically contradicted/confronted with these witnesses as per the procedure laid down under Section 145 of the Evidence Act, 1872 i.e. by drawing attention to the parts intended for contradiction.

20. Section 162 of Cr.P.C., applies the term "if duly proved" and such provision of

law leaves no doubt in the mind of the Court that the statement of witnesses recorded under Section 161 of Cr.P.C. cannot be admitted in evidence straightway nor can be looked into until and unless, the same is duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the examination/cross examination of the Investigating Officer.

21. Therefore, in view of the evidence available on record in the case and settled propositions of law, this Court is of the opinion that the accused could not have been convicted on the basis of the evidence available on record, more particularly, when during the cross-examination the witnesses not only denied their statements recorded under Section 161 of Cr.P.C. and Section 164 of Cr.P.C. but also the prosecution failed to prove such statement by contradicting and by eliciting admission from such witnesses. Accordingly, the said statements made before the Police and Magistrate cannot be used for conviction of the accused. Accordingly, in the given facts of the present case, this Court is of the unhesitant view that the prosecution version is bound to fail for want of evidence.

22. In view of the above discussions, reasons, observations, this Court is of the unhesitant view that the accused is entitled for acquittal for want of evidence.

23. Accordingly, the impugned Judgment and Order dated 22.12.2023 passed by the learned Special Judge (POCSO), Pasighat, East Siang District in PSG SC (POCSO) Case No. 12/2020, whereby, the accused/appellant is convicted under Section 10 and 18 of the POCSO Act and sentenced him to undergo imprisonment for a period of 5 (five) years with a fine of Rs. 5,000/- for offences under Section 10 of the POCSO Act and also sentenced him to undergo imprisonment for a period of 2 (two) years and 6 (six) months with a fine of Rs. 5,000/- for offences under Section 18 of the POCSO Act and further in default to pay the fine, to serve another period of three months, is set aside and quashed. LCR be returned back.

24. The accused/appellant namely, Onik Osik be released forthwith from the custody, if he is not in custody in connection with any other case.

25. Bail bond stands released.
26. Registry to communicate this order forthwith to the learned Special Judge (POCSO), at Pasighat, so that necessary release order can be issued.

JUDGE

Comparing Assistant