

GAHC040004702022



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

CRIMINAL APP.(J) NO. 06 OF 2022

Shri Arjun Sonar (Convict),
S/O late Heman Sonar,
Aged about 29 years,
Permanent Resident of Village-
Sadia, P.O. & P.S. Chapakhowa,
District Tinsukia (Assam),
presently lodging at District Jail, Tezu,
Lohit District (Arunachal Pradesh).

--- Appellant.

Versus

1. The State of Arunachal Pradesh
to be represented by Public Prosecutor
Gauhati High Court,
Itanagar Permanent Bench.

--- Respondent.

:::BEFORE:::

HON'BLE MR. JUSTICE KARDAK ETE
HON'BLE MR. JUSTICE BUDI HABUNG

For the appellant : Mr. Pritam Taffo, Amicus Curiea.

For the respondents : Mr. G. Tado, Additional PP, AP,
Mr. L. Perme, Advocate, R-2

Date of hearing : 04th April, 2024

Date of Judgment : 01st July, 2024.

:: JUDGMENT AND ORDER ::

[CAV]

(Budi Habung, J)

Heard Mr. P. Taffo, learned Amicus Curiae appearing for the appellant. Also heard Mr. G. Tado, learned Additional Public Prosecutor for the State of Arunachal Pradesh and Mr. L. Perme, learned counsel representing the respondent No. 2 (victim).

2. This criminal jail appeal is preferred by the appellant/convict namely, **Shri Arjun Sonar**. He has been convicted by the Court of Special Judge, POCSO, East-Session Division, Tezu, District Lohit, Arunachal Pradesh in POCSO Case No. 02/(LDV)/2019 arising out Roing P.S. Case No. 55/2018, u/s 376/506 IPC read with Section 6 of the POCSO Act 2012, and sentenced to undergo rigorous imprisonment for 20(twenty) years and to pay a fine of Rs. 1,000/- (Rupees One thousand) only with default stipulation.

FACTS OF THE CASE

3. The brief fact of the case is that on 28.11.2018 Smti Nirmala Sonar (PW-2) lodged a written FIR before the Officer In charge, Roing inter alia alleging therein that on 23.11.2018, when they all were in ginger garden for harvesting, her victim daughter aged about 11 years was alone in the house after returned from school. The accused Shri Arjun Sonar, paternal uncle of the victim came to know that her said victim daughter was alone at home. So, on the pretext of taking tobacco and lime; the accused went their house, asked the victim to fetch tobacco and lime for him. While the victim was going inside, the accused followed her. He then caught hold of the victim, forced her to lay on the bed and committed rape on her. After commission of offence, the accused threatened the victim not to disclose the incident and left the place. After coming to know about the incident, they tried to settled the matter within the family members as the accused happened to be their relative. But since the accused was absconding, the above written FIR was lodged on 28.11.2018.

4. Basing on the above written FIR, a case was registered being Roing P.S. Case No. 55/2018 U/Ss. 376/506 IPC read with Sec. 12 of POCSO Act and investigated into.

5. During the course of investigation, the victim and all the relevant witnesses were examined. Victim was forwarded before the court of the Chief Judicial Magistrate who had recorded her statement under Section 164(5) Cr.P.C

and obtained the medical examination report of the victim. The medical examination of the victim gave a positive report of sexual offence. The Investigating Officer also seized the age proof certificate of the victim from the school authority which shows that the victim was a minor child at the time of incident on 23.11.2018 being born on 14.09.2007. The accused was then arrested. And after completion of investigation, the IO laid charge-sheet against the accused for commission of offence U/Ss 376/506 IPC read with Section 12 of POCSO Act. And thereafter, a charge was framed against the accused for offence U/Ss 376 (2) (i)/506 read with sec. 6 of POCSO Act,2012 to which the accused pleaded not guilty and claim trial.

6. In order to establish their case, the prosecution side has examined altogether 7 (seven) witnesses. After completion of evidence of the prosecution witnesses, the accused was examined and his statement recorded under Section 313 of Cr.P.C where he denied commission of any offence. The accused did not produce any witnesses in his defense.

7. On conclusion of trial, the learned Special Judge, POSCO found the accused guilty of commission of the charged offences. Hence, convicted the accused for offences under Section 6 of the POCSO Act,2012 and sentenced him to undergo rigorous imprisonment for 20(twenty) years and to pay a fine of Rs. 1,000/- (Rupees One thousand) only with default stipulation on 07.03.2022.

8. It is the said conviction and sentenced order dated 07.03.2022 which is under challenged in the instant criminal jail appeal amongst other on the

grounds that there are some contradictory and improvement in the statements of the prosecution witnesses more particularly the victim and her mother (PW-2). The victim gave different statements under section 161 Cr.P.C, 164(5) Cr.P.C and in her deposition before the trial Court. Further, the medical officer fails to mention the age of the injuries in his report and did not comply with the provision under section 164 (4) and (7) of Criminal Procedure Code,1973 while conducting medical examination of a rape victim. Based on the arguments put forwarded on the above stated grounds, the appellant made 2(two) prayers. They are:

- (i) To set aside the conviction; and or
- (ii) To reduce the quantum of sentence from 20 years rigorous imprisonment to sentence undergone.

SUBMISSION OF THE LEARNED COUNSEL FOR THE APPELLANT

9. For setting aside the conviction and sentence order the learned Amicus Curiae for the appellant made the following submissions:

- i. That although the prosecution witnesses were cross-examined during trial but none of the prosecution witnesses were properly cross-examined by the learned defense counsel for the accused. Not only that the record reveals that the learned engaged defense counsel for the accused had even declined to cross-examine the vital witness i.e., the victim. And because of the failure on the part of the defense counsel to cross-examine

the victim and not cross examining the other prosecution witnesses properly, the case of the accused/appellant have adversely been affected on merit resulting his conviction. Hence, prayed for allowing the convict to afford an opportunity to re-cross-examine the prosecution witnesses including the victim for proper adjudication of the case on merit and for ends of justice. However, Mr. Taffo, learned Amicus Curiae fairly submits that other than the above contention that the prosecution witnesses were not properly cross-examined by the learned defense counsel for the accused, he admits that there is no other infirmity in the impugned judgment and conviction order.

- ii. That the learned trial Court has convicted the accused/appellant under Section 6 of POCSO Act merely by relying on the evidence of the victim. However, the victim being minor child is not a competent witness to give evidence and as such her statement and evidence cannot be relied upon for conviction of the accused.
- iii. He further submits that none of the other prosecution witnesses are ocular witness, as such their evidences cannot be relied on for conviction of the accused for the charged offences.
- iv. That although there is an allegation of sexual assault against the victim; however, as per the MLC report, there is no any sign of sexual assault against the victim on the incident day. Hence, the sexual assault not being found committed against the victim, the conviction order is perverse and

without any substance.

10. With regards to the second prayer, it is submitted that since the accused has spent a considerable period of time during investigation as well as trial period and in execution of the sentence against him, the learned counsel prays for reduction of the sentence of 20 (twenty) years to already undergone. The learned Amicus Curiae for the appellant further submitted that since the convict/appellant is the uncle of the victim in relation and except for this case, he has a cordial relationship with the family of the victim; hence, prays for taking lenient view against the convict by reducing the sentence from 20(twenty) years to the period already undergone.

11. The mitigating factor for consideration according to the learned counsel is that the convict/appellant is the relative of the victim and he was in his prime youth at the time of committing the offence aged about 27 years only; and by now the convict has already spent more than 3 years inside the jail custody during the trial period and on execution of the sentence order against him.

12. In support of his submission, the learned Amicus Curiae has relied on the decision of the Hon'ble Supreme Court decided in ***Mohammad Giasuddin vs. State of Andhra Pradesh***, reported in ***AIR 1977 SC 1926***, whereby, the Hon'ble Supreme Court while explaining the rehabilitative and reformatory aspects in sentencing which has been observed by the Hon'ble Supreme Court that "crime is a pathological aberration, that the criminal can ordinarily be redeemed, rather than avenge". It also held that, "*if you are to punish a man*

*retributively, you must injure him. If you are to reform him, you must improve him and, men are not imposed by injuries". Further, in the case of **Kokaiyabai Yadav vs. State of Chhattisgarh** reported in **2017 13 SC 449** the Hon'ble Supreme Court had observed that "reforming criminals who understand their wrongdoing, are able to comprehend their acts, have grown and nurtured into citizens with a desire to live a fruitful life in the outside world have the capacity of humanizing the world."*

13. Further, the learned counsel for the appellant submitted that considering the above mitigating factors, lenient view may be taken against the convict/appellant and the conviction and sentence of 20(twenty) years may be reduced to the sentence already undergone by the convict.

THE LEARNED ADDITIONAL PUBLIC PROSECUTOR MADE THE FOLLOWING SUBMISSIONS:

14. Mr. G. Tado, learned Additional Public Prosecutor, on the other hand submits that since the learned Amicus for the appellant could not point out any infirmity in the conviction and the sentence order passed by the learned Special Judge POCSO against the convict; and as the convict had been found guilty of the charged offences and therefore he was convicted and sentenced to undergoing 20(twenty) years rigorous imprisonment for offence under Section 6 of POCSO Act, there is no need to interfere with the impugned judgment and order.

15. He further submits that if the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities factor' does not render it unworthy of credence, the same may be upheld in support of his submission. In support of his submission, the learned Additional Public Prosecutor placed reliance upon the decision of Hon'ble Supreme Court in the case of ***Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat*** report ***in (1983) 3 SCC 217***, whereby it is held that no corroborating evidence required, if the victim's testimony is otherwise believable.

16. Mr. L. Perme, learned legal aid counsel for the informant while supporting the submission of the learned Additional Public Prosecutor further submitted that the victim is a minor child and she is still to come out of the trauma of sexual assault. Under the circumstances, if the convict is released, he being the relatives would be around the victim in which case, it would not be possible for the victim to have a peaceful life. He further submitted that the victim deserves congenial atmosphere to live a peaceful life; hence, prays for dismissal of the appeal.

POINTS FOR DETERMINATION

17. In view of the rival submission made by the learned counsel for the parties, two points emerged for decision in the present appeal, they are:

- (i) *Whether the learned Special Judge POCSO is justified in convicting the accused/applicant for the offence punishable under Section 6 of*

POCSO Act and sentencing him to undergo rigorous imprisonment for 20(twenty) years and a fine of Rs. 1,000/- (Rupees One thousand) only with default stipulation?

(ii) Whether the sentence passed against the accused person to undergo rigorous imprisonment for 20(twenty) years with fine for offence under Section 6 of POCSO Act can be reduced to a sentence already undergone?

FINDING AND REASON

18. Heard both the learned Amicus Curiae for the appellant as well as the learned Additional Public Prosecutor for the State respondent and learned legal aid counsel for the informant respondent No.2.

19. We have also given our thoughts and consideration to the submission advanced by the learned counsel for the parties, and perused the entire material on record including the LCR.

20. Since this Court being the first appellate Court and it is a fact-finding Court, in order to find out the truth it has to appreciate the evidences. For the proper appreciation, let us now briefly examine the evidences adduced by the prosecution witnesses in the case. However, as the learned counsel for the convict/appellant fairly submitted at bar that he is not pressing against the conviction on merit as there is no any infirmity in the trial of the case; thus, he

is not challenging the conviction for offence under Section 6 of POCSO Act and the evidences of the prosecution witnesses recorded by the trial Court. The learned amicus for the appellant is also not disputing the age of the victim as apparently the certificate exhibited shows that she was minor child at the time of incident. However, his prayer is confined only to the extent that since the prosecution witnesses were not properly cross examined by the then defense counsel during trial, he may be allowed to cross examine the victim and re-cross-examine the prosecution witnesses.

21. In this regard, the record reveals that on the day of evidence, the accused and his learned defense counsel were present in the court. They were given an opportunity to cross examine the victim. But the learned defense counsel declined to cross examine the victim. Moreover, it is seen that the victim has clearly stated before the police and in her statement before the Magistrate under 164(5) Cr.P.C that the convict who is her uncle had committed a penetrative sexual assault against her in absence of her family in their house. These were reiteration of her disclosure made to her mother (PW-2) about the incident basing on which the PW-2 had lodged a written FIR. We have also seen that the victim has reiterated the same statement in her deposition (examination in chief) before the trial Court. Thus, the victim has been firm and consistent in her statement of fact although, and there was no reason to disbelieve her statement and evidence adduced by her. And basing on her evidence and the evidences of other prosecution witnesses corroborated by the medical evidences, the accused was convicted. Under the circumstances, calling the victim over and again in the Court would only amount to a repetition of

harassment to the minor child. Further, in view of her consistency and firm in her statement of the fact of the incident, it is most unlikely to yield any positive result even if she is being recalled. Moreover, such recalling and re-appreciation of the evidences over and again by calling the victim again after evidence is already recorded would only mean to facilitate the convict an opportunity to improve his case which otherwise in the present case is not possible without manipulation on the existing evidence. Hence, we are not inclined to grant such opportunity to the person convicted of committing penetrative sexual assault against the minor child which has a potential to prejudice the prosecution case.

22. And insofar as prayer for allowing the convict/appellant to re-cross-examine the prosecution witnesses, it is seen that all the prosecution witnesses were duly cross examined by the learned defense counsel for the accused/appellant. Under the circumstances, if, they all are to be recalled, the same would amount to re-trial of the entire case thereby giving an opportunity to the accused/appellant to improve his case. The same, in our opinion, cannot be allowed at this stage, in as much as, in the event of such opportunity given to the accused person there is every possibility that the accused would manage the witnesses to give evidence in his favor. Moreover, in the instant case, the conviction is not based only on the evidence of the other prosecution witnesses. It is the conjoint of all the evidences coupled with the presumption in absence of any contrary evidence that the accused has been convicted and sentenced to imprisonment.

23. Now coming to the point No.(ii), the punishment prescribed for offence of aggravated penetrative sexual assault under section 6 of POCSO Act is with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine. The accused/appellant has been convicted and sentenced to undergo rigorous imprisonment for 20 years and a fine of Rs.1000 with default clause for offence under section 6 of POCSO Act. Upon careful consideration, we find that the accused/appellant by taking advantage of his being a relative (paternal Uncle) of the minor victim child had committed the heinous offence of penetrative sexual assault on the minor victim. Considering the nature of offence committed by the convict against the minor child who is his own relatives and also considering the tender age of the victim who is still under trauma, we are not inclined to interfere with the said conviction and sentenced order against the accused/appellant. Accordingly, the second prayer of the appellant for reduction of the sentence from 20 years RI to conviction for the sentence already undergone is also rejected.

24. This criminal appeal being devoid of merit is dismissed and disposed of.

Return the record.

JUDGE

JUDGE

Comparing Assistant