

GAHC040013562023

2024:GAU-AP:873-DB



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

CRIMINAL APPEAL NO.29(AP) 2023

Shri Job Modi

... Appellant

-versus-

The State of Arunachal Pradesh &Anr.

... Respondents

:: PRESENT ::

HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA

HON'BLE MR. JUSTICE KARDAK ETE

For the Appellant : Mr. T.T. Tara, Advocate.

For the Respondent
No.1 : Mr. G. Tado,
Addl. Public Prosecutor,
State of Arunachal
Pradesh.

For the Private Respondent
No.2 : Ms. N. Danggen, Advocate.

Date of Hearing : 04.09.2024.

Date of Judgment : 24.09.2024.

JUDGMENT AND ORDER (CAV)

(P.J. Saikia, J)

Heard Mr. T.T. Tara, the learned counsel appearing for the appellant. Also heard Mr. G. Tado, learned Addl. Public Prosecutor representing the State of Arunachal Pradesh/ Respondent No.1. Ms. N. Danggen, the learned counsel appearing for the Respondent No.2 (informant).

2. This is an appeal under Section 374(2) of the Code of Criminal Procedure against the judgment dated 11.08.2023 and the order dated 14.08.2023 passed by the learned Special Judge (POCSO), Siang, East Siang, Upper Siang and Lower Siang district at Pasighat in PSG SC (POCSO) Case No.06/2019 convicting the appellant under Section 6 of the POCSO Act.

PROSECUTION CASE

3. The prosecution case relates to an allegation of sexual assault upon a five year old girl. The appellant is the younger brother of Smti. Dango Modi who was the best friend of the mother of the said girl. The appellant got a job at Yingkiong but he did not have any place to stay. Therefore, his elder sister requested the mother of the girl to allow her brother to stay in her house for the time being. Ultimately, the mother of the girl agreed.

4. The mother of the girl has alleged that the appellant whenever met her daughter kissed her lips. The mother of the girl did not like it. The appellant also started to behave differently. The mother of the girl had noticed that her daughter had started to wet the bed, which she never did before. Thereafter, the appellant left the house of the girl.

5. On 28th January, 2019, the mother of the girl took back her daughter to the hostel of Kiong Kids Foundation Montessori School at Yingkiong. On the same day, the

mother of the girl went to the school to pay school fees. At that time, the teacher of the school told her that her daughter was urinating without control since the last one month. The mother of the girl was surprised to hear the abnormal news. Therefore, the mother took the girl to a doctor and the doctor told her that due to insertion of male organ into the vagina of the child, she was suffering from that problem. The mother of the girl then realised that it was the reason why the appellant left her house without saying anything. The mother has said that she met the appellant on many occasions after leaving her house but every time he would turn away his face and therefore, she could not have any talks with him.

6. The mother of the girl had lodged the FIR before police. The victim girl was examined by doctor. The doctor could not find any visible signs of injury upon the private parts of the victim. Even then the doctor reported that frequent urination by the girl might be the result of injury on the urethra caused by penetration of male organ.

7. On conclusion of investigation, police filed the *charge sheet* against the appellant.

8. The trial court framed the charge under Section 6 of the POCSO Act against the appellant.

9. During the trial, the prosecution examined 6(six) witnesses and the appellant examined 3(three) witnesses. One Court Witness was also examined.

10. Finally, the trial court convicted the appellant under Section 6 of the POCSO Act and sentenced him to undergo rigorous imprisonment of 20(twenty) years. He was also sentenced to pay a fine of ₹10,000/- with default stipulations.

11. We have gone through the evidence.

12. There is no eye witness to the occurrence except the victim girl. Therefore, we will take the evidence of the victim girl first. She has stated in her evidence that some

months back the appellant had inserted his penis into her vagina on two occasions. She further stated that while doing so, he used to close her mouth. She stated that while the appellant did bad act upon her, she used to have burning sensation in her vagina. According to the victim girl, the appellant asked her not to disclose about the matter to anyone else.

13. In her cross-examination, she has stated that she did not remember the dates when the appellant committed those acts upon her. She said that she even did not remember the colour of the clothes worn by her as well as by the appellant.

14. Now, we will take up the evidence of her mother. She is a 36 years old lady. She has stated that on 20th February, 2019, her daughter told her that the appellant had put his penis into her vagina and anus at about 7 A.M. in the bed room. According to the mother, from that day, her daughter was continuously urinating. The mother also noticed that the vagina and anus of the girl were swollen. Therefore, on the same day, she had lodged the FIR before police.

15. The doctor spoke about his report.

16. The fourth prosecution witness is the police investigating officer. He has stated that on 20.02.2019, the mother of the victim girl had lodged the FIR at about 5 P.M. Remaining part of his evidence is about the investigation.

17. There is nothing relevant in his cross-examination.

18. The fifth prosecution witness is Shri Orik Gamnoh. He is the maternal uncle of the young victim girl. He supported the fact that the appellant was temporarily staying in the house of his sister. He has stated that the victim was taken out from the hostel on 20.12.2018 and was readmitted in the hostel on 06.01.2019. According to this witness, on 2nd January, 2019, he visited the house of his sister. According to this witness, at that time, the victim girl was complaining about pain in her vagina and she was crying, looking at the appellant. The witness stated that on that day the girl did

not say anything. The witness further stated that he also noticed that the vagina of the girl was swollen. He thought that on that day, since the girl was eating spicy chips, she must have touched her vagina with her hands and that must be the reason for swelling of the vagina.

19. According to the witness Orik Gamnoh, he went to the police station after the arrest of the appellant and the appellant allegedly admitted his guilt and requested him to bail out and also requested him to settle the matter in an out of court settlement. Mr. Gamnoh had submitted that he recorded the confession of the appellant in his mobile phone and it was later on handed over to the police investigating officer.

20. In his cross-examination, Mr. Gamnoh has stated that while he was recording the confession of the appellant, the later was behind the bars.

21. The sixth witness is Mr. Ajoy Songthing. He is a police officer. After the FIR was filed by the mother of the girl, he was directed to investigate the case. He has stated that Smti. Punam Thapa, a Teacher in the school of the victim girl, told him that the girl was suffering from frequent urination issues and was also suffering from pain in the abdomen.

22. There is nothing relevant in his cross-examination.

23. Shri Karson Libang is the first Defence Witness. He is a childhood friend of the appellant. He has stated in his evidence that the victim girl was suffering from urination problem in her hostel. There is nothing in his cross-examination.

24. The second Defence Witness is the appellant himself. He has stated in his evidence that the mother of the victim girl is his cousin from his mother's side. The remaining part of his evidence contains irrelevant facts.

25. His cross-examination also contains irrelevant facts.

26. Shri Kindi Modi is the third Defence Witness. He is a relative of the mother of the girl. There is nothing relevant in his evidence-in-chief.

27. In his cross-examination, Mr. Modi has stated that after the arrest of the appellant, he met him in the police station.

28. The Court Witness was Mr. Alex Phaomer. He is the Principal of Kiong Kids Foundation Montessori, Yingkiong. He has stated that he did not join the school when the occurrence took place. He said that as per the school record, the victim recorded in his school in the year 2018 to 2020. The witness said that he joined the school on 24th March, 2019.

29. In his cross-examination, he has stated that the date of birth of the girl was recorded as per verbal statement of her mother.

30. We have considered the arguments put forward by the learned counsel of both sides.

31. In *Panchhi & Ors vs. State of U.P : (1998) 7 SCC 177*, the Supreme Court has held –

“The evidence of child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the court looks for adequate corroboration from other evidence to his testimony.”

32. In *State of U.P. v. Ashok Dixit [2000 (3) SCC 70]*, it has been observed in paragraph 9:

"Law is well settled that evidence of a child witness must be evaluated carefully as a child may be swayed by what others tell him and as an easy prey to tutoring. Wisdom requires that evidence of a child witness must find adequate corroboration before it is relied on (see *Panchhi v. State of U.P.*). However it is a question of fact in each case,

and there is no universal rule that the evidence of a child witness, even if it cannot be dislodged on the test of facts and probabilities of a particular case can never be sufficient for convicting an accused without corroboration.”

33. The Supreme Court, in *State of M.P. v. Ramesh and Ani.*, (2011) 4 SCC 786, has examined the law relating to deposition by Child Witnesses. While examining the law on the aspect the Court has observed that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the Court and there is no embellishment or improvement therein, the Court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether the child has been tutored or not, can be drawn from the contents of his deposition.

34. Reverting to the case in hand, the only question that the appellant is to answer is that why the victim girl would accuse him of causing sexual assault? There is no answer to that effect.

35. In this case, the learned trial court has examined the capacity of the young victim to testify in the trial and on being satisfied with her capability, the court has recorded her evidence. There is nothing in the cross-examination of the witness to disbelieve her. Her mother’s evidence is also found to be satisfactory as there is nothing in her cross-examination to hold that she deposed false evidence. The evidence of the doctor supported the prosecution case.

36. We are of the opinion that the learned trial court has correctly appreciated the evidence and arrived at a correct finding. We find that there is no merit in this appeal.

37. The convict was sentenced to undergo 20(twenty) years of rigorous imprisonment. However, since the amended provision enhancing minimum sentence of

20 years rigorous imprisonment in the POCSO Act, 2012 has come into effect from 16th August, 2019, and the incident in the present case has taken place in the month of January, 2019, the said provision shall not apply. But the unamended provision providing minimum sentence of 10 years shall apply.

38. Therefore, the convict/appellant shall undergo rigorous imprisonment of 10(ten) years under Section 6 of the POCSO Act, 2012. He shall also pay a fine of ₹10,000/-, in default, he shall undergo another period of 6(six) months of rigorous imprisonment. The fine if paid, shall be given to the victim.

With the aforesaid modification, the appeal stands dismissed and disposed of.

Send back the LCR.

JUDGE

JUDGE

Comparing Assistant