

GAHC010085192019



2024:GAU-AS:12794

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

Case No. : CRL.A(J)/25/2019

NEHAR DAS
S/O. SHRI NAGENDRA DAS, VILL. GANDHINAGAR, P.S. RAMKRISHNA
NAGAR, DIST. KARIMGANJ.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MS. REETUJA DUTTA, AMICUS CURIAE, MR K P PATHAK
(AMICUS CURIAE)

Advocate for the Respondent : PP, ASSAM, MR. P SAIKIA (LEGAL AID COUNSEL FOR R-2)

BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

JUDGMENT & ORDER (ORAL)

Date : 13-12-2024

- 1.** Heard Mr. K.P.Pathak, learned Amicus Curiae for the accused/appellant and Mr. K.K. Das, learned Additional Public Prosecutor, Assam for the respondent No. 1. Also heard Mr. P. Saikia, learned counsel for the respondent No.2.
- 2.** The present criminal appeal is preferred from jail by the accused/appellant

against the judgment dated 25.08.2017 passed by the learned Sessions Judge, Karimganj in Special Sessions Case No. 14/2014, whereby the appellant was convicted under section 354 IPC and was sentenced to undergo Rigorous Imprisonment (RI) for 3 (three) years and to pay a fine of Rs.10,000/- in default of payment of fine, to undergo further RI for 3 (three) months and for the commission of offence under section 10 of the POCSO Act, 2012, the accused/appellant was further sentenced to undergo RI for 5 (five) years and 6 (six) months and to pay a fine of Rs.20,000/- in default of payment of fine, to undergo further RI for 5 (five) months.

3. The persecution story in nutshell is that an FIR was lodged by the mother of the victim *inter alia* alleging that on the date of incident, i.e., on 29.06.2014 at around 04:00 pm, when she was not at home, the accused/appellant lured her daughter and offered her Rs. 10/- and thereafter, grabbed her and bite on her cheek with ill intention. The victim's age was stated to be 11 years in the FIR. Accordingly, R.K.Nagar.P.S. Case No. 52/2014 under Section 4 of the [Protection of Children from Sexual Offences \(POCSO\) Act, 2012](#) was registered. The victim's statement was recorded under Section 164 CrPC by the concerned jurisdictional Magistrate. After completion of the investigation, charge sheet under Sections 376/511 IPC read with Section 10 of the POCSO Act, 2012 was filed, which the accused pleaded not guilty and claimed to be tried. Accordingly, the trial was proceeded. The committal Court committed the case to the learned Special Court vide order dated 26.11.2014.

4. During the course of trial, the prosecution has examined as many as 7 (seven) witnesses including the victim to bring home charge against the accused/appellant.

5. Mr. Pathak, learned Amicus Curiae for the accused/appellant has submitted that the prosecution has failed even to lay the fundamental fact regarding the age of the victim in terms of the Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. Therefore, the accused/appellant could not have been convicted under Section 10 of the POCSO Act, 2015. He further contends that once the prosecution has failed to lay the fundamental fact of the age of the victim, the presumption under Section 29 of the POCSO Act, 2015 could not have been applied in the present case to convict the accused

person.

6. As regards the conviction of the accused for the commission of offence under Section 354 IPC, Mr. Pathak, learned Amicus Curiae for the accused/appellant, submits that there is material available to convict the accused under Section 354 IPC inasmuch as the evidence of the victim remained unshaken regarding biting on her cheek by the accused inasmuch as such injuries were corroborated by the Doctor, who examined the witnesses, therefore, the accused in that ground has rightly been convicted.

7. Par contra, Mr. Saikia, learned Legal Aid counsel representing the victim submits that the prosecution had relied on the testimony of the doctor to prove the age of the victim and the doctor testified that the victim was below 14 years. Therefore, the learned Trial Court had not committed any error convicting the accused/appellant under Section 10 of the POCSO Act, 2012, more particularly, when the testimony of the victim remains unshaken and has been corroborated by the doctor.

8. PW-1, the victim and PW-7, Dr. Lipi Deb, who are the vital witnesses of the prosecution.

9. From the materials available on record and the statement of the victim, i.e., PW-1 as recorded herein above, it is established that on the fateful day, when the sister of the victim went outside and her mother went out to fetch grass, the accused/appellant came to her house and caught her and also bite on her cheek. According to her, the accused forced her to go to the bed and bite on her cheek with ill intention. The accused/appellant offering her Rs. 10/- requested her not to report about the incident to her mother. Such evidence of the victim remains unshaken during cross-examination.

10. PW-7 is a Doctor, who examined the victim on the date of occurrence itself, i.e., on 01.07.2014. On her examination, the concerned doctor found that:- (i) bruises over left cheek 1" x 1/2", radish in colour, nature simple, (ii) bruises over right arm 1"x1" radish in colour, simple, (iii) bruises over anterior chest (front of the chest) 2" x 1" radish in colour, simple. The said witness also opined that there were some injury marks over the person and her age was less than 14 years at the relevant point of time and there was no sign of sexual intercourse.

11. During cross-examination, the concerned doctor admitted that he did not find teeth bite on the victim's body and face. The evidence of the aforesaid witness as regard the injuries found in the cheek, right arm and in the anterior chest of the victim remained unshaken though it was not stated to be a bite mark. So far relating to the establishment of the age of the victim, the prosecution had solely relied on the evidence of the doctor (PW-7) inasmuch as he opined that the age of the victim was found less than 14 years on the basis of x-ray report. However, neither the x-ray report nor any ossification test report were exhibited. The doctor who conducted the x-ray and submitted report was also not examined. The medical examination report which was exhibited as Exhibit-5 disclosed that x-ray was done by some of the radiologists at Civil Hospital, Karimganj on 03.07.2014. The fact remains that the prosecution had neither exhibited the x-ray report nor examined the concerned radiologist of Civil Hospital, Karimganj.

12. Now coming to the age of the victim, the Hon'ble Apex Court in the case of **Jarnail Singh Vs. State of Haryana** reported in **2013 7 SCC 263** held that the age of alleged **minor** victim of rape should be determined in the manner provided under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 for the reason that here is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is victim of crime.

13. Subsequently, an identical provision to that of Rule 12 in the shape of Section 94 was incorporated in the Juvenile Justice (Care and Protection of Children) Act, 2015.

14. Clause (iii) of Sub –Section 2 of Section 94 and Sub-Section 3 of Section 94 of the JJ Act, 2015, are applicable in the present case in absence of birth certificate. However, it is admitted position that the ossification test though stated to have been conducted, report of such ossification test was neither exhibited nor the person/Doctor who conducted the ossification test was brought to the witness box. As the reports of the ossification test, radiology test and Dental X-ray were not exhibited to give an opportunity to the defence to cross-examine the experts regarding the method used by them while performing such examination, the foundational fact regarding the age of the victim was not laid by the prosecution to take presumption under Section 94(3) of the JJ Act, 2015

and also to convict the accused under Section 10 of the POCSO Act, 2012.

15. Therefore, in the view of the aforesaid determination, this Court is of the opinion that the prosecution has failed to prove that the accused had committed any offence under Section 10 of the POCSO Act, 2012 in absence of any material to ascertain the age of the victim. Accordingly, the conviction and sentence so far the same relating to the POCSO Act, 2012 shall not be sustainable and accordingly, the same stands set aside and quashed and so far relating to the conviction under Section 354 IPC, this Court is of the opinion that through the evidence of PW-1, the victim has been able to establish that the accused used criminal force on her by outraging the modesty of her. Accordingly, the conviction so far relating to offence under Section 354 IPC is upheld. As the accused/appellant is under custody from the date of the judgment and order i.e., 25.08.2017 passed by the learned Sessions Judge, Karimganj, he has already undergone the period of sentence of 3 (three) years as awarded by the learned Trial Court under Section 354 IPC. That being the position, therefore, the accused/appellant be released forthwith. The bail bond stands released. The LCR be returned back.

16. In terms of the decision made hereinabove, this criminal appeal stands disposed of.

17. While parting with the record, this Court puts on record its appreciation as regards able assistance rendered by Mr. K.P.Pathak, learned Amicus Curiae for the accused/appellant. Accordingly, Registry shall ensure that Mr. K.P.Pathak, learned Amicus Curiae be paid the legal fee, as payable to a Legal Aid Counsel as per the existing norms fixed by the Legal Services Authority.

JUDGE