

GAHC010097272020



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

Crl. Appeal (J)/44/2020

1. Shyamal Barman
Barpeta, Assam.

.....Appellant

-Versus-

1. The State of Assam
Represented by the P.P. Assam
2. Soma Arjya
W/o- Indrajit Arjya
R/o- Kalah Bhanga
W/No. 4
P.S.- Barpeta Road

.....Respondents

For Appellant : Ms. B. Sarma, Amicus Curiae
For Respondent(s) : Mr. K. K. Parasar, Additional Public Prosecutor
Ms. L. Devi, Legal Aid Counsel
(Informant/Respondent No.2)

Date of Judgment : 02.08.2024

**BEFORE
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA
JUDGMENT**

- 1.** Heard Ms. B. Sarma, learned Amicus Curiae for the appellant. Also heard Mr. K. K. Parasar, learned Additional Public Prosecutor for the State of Assam as well as Ms. L. Devi, learned Legal Aid Counsel, representing the informant/respondent No.2.
- 2.** This Jail Appeal was registered on receipt of an appeal petition from the appellant, namely, Shyamal Barman, through the Superintendent District Jail, Barpeta, impugning the judgment dated 08.08.2019 passed by learned Special Judge, Barpeta in Special POCSO Case No. 81/2018, whereby the appellant was convicted under Section 6 of the POCSO Act, 2012 and has been sentenced to undergo rigorous imprisonment for 10 years with a fine of Rs. 1,000/- and in default of payment of fine to undergo further simple imprisonment for 3 months.
- 3.** The facts relevant for consideration of the instant Jail Appeal, in brief, are as follows:
 - i.** On 30.06.2018, the mother of the victim girl lodged an FIR before the Officer-in-Charge of Barpeta Road Police

Station, *inter-alia*, alleging that on that day, at about 11.30 am, during the absence of her husband, when the informant was attending the cloth store of her husband and the minor daughter/victim, aged about 2 years 6 months old, was also with her, while the minor daughter/victim was playing in the shop, the appellant, who was an employee in the nearby shop, under the name and Style of *Gungun Dresses*, took her daughter to his cloth shop, namely, "Gungun Dresses", and committed rape on her. It was also alleged in the FIR, that when the victim cried aloud, the informant and the other people present in the market went there and caught the appellant red-handed, when he was committing the bad acts.

- ii. On receipt of the aforesaid FIR, Barpeta P.S. Case No. 314/2018 was registered under Section 6 of the POCSO Act, 2012 and investigation was initiated.
- iii. The appellant was arrested and the statement of witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973.
- iv. The Investigating Officer also seized the jeans pant of the appellant as well as one sky-coloured half pant of the victim girl containing stains of suspected human semen. The victim girl was also medically examined.

- v.** Ultimately, on completion of the investigation, a charge sheet was laid against the above-named appellant under Section 12 of the POCSO Act, 2012.
- vi.** On 12.10.2018, the appellant was granted bail by the Trial Court and he was released on bail after furnishing of bail bonds and sureties by him. He faced the trial remaining on bail.
- vii.** On 08.11.2018, after hearing both the sides and after perusing the materials available on record, the Trial Court framed the charge under Section 6 of the POCSO Act, 2012, against the appellant. When the said charge was read over and explained to him, he pleaded not guilty to the same and claimed to be tried.
- viii.** To bring home the charge against the appellant, the prosecution side examined as many as twelve (12) prosecution witnesses and exhibited eight (8) documents.
- ix.** The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 during which he denied the truthfulness of the testimony of prosecution witnesses and pleaded his innocence. However, he declined to adduce any evidence in defense.
- x.** The Trial Court framed following point for determination:
 - a.** Whether on 30.06.2018, at about 11.30 am, the accused committed aggravated penetrative sexual

assault on the victim girl aged about two-and-a-half years in the clothes store under the name and style "Gungun Dresses", as alleged?

- xi.** Ultimately, by the judgment which has been impugned in this appeal, the Trial Court convicted and sentenced the appellant in the manner as already described hereinbefore in Paragraph No. 2 of this judgment.
- 4.** Before considering the rival submissions made by the learned counsel for both the sides, let me go through the evidence available on record.
- 5.** PW-1, who is the mother of the victim girl, has deposed before the Trial Court that the incident occurred on 30.06.2018 at about 11.30 am to 12 noon. At that time, she was in her clothes shops at Barpeta Road, however her husband was not there at that time. She has also stated that her daughter (the victim) was also with her in the shop room and it was raining. PW-1 has also deposed that the appellant came to her shop and told her that he can console the daughter of the informant, who was crying at that time, by taking her to some other shop and showing something there. On good faith, the PW-1 allowed the appellant to take her daughter. After some time she heard crying of her daughter from other shop, namely, Gungun Dresses when the PW-1 ran to that shop to inquire about her daughter she noticed that the pant of her

daughter was wet. When she asked the appellant as to how the pant of daughter got wet the appellant showed his ignorance, but the daughter of the informant told her that the appellant made the pant wet. PW-1 has also deposed that on scrutinizing properly, she saw semen inside the pant of the daughter and then she immediately called the husband over phone and other people there. PW-1 has also deposed that the appellant was again called and was shown the pant worn by the daughter having semen, however, the appellant denied doing anything, and thereafter, he ran away. After some time the local people apprehended him from behind the Namghar and the PW-1 lodged the FIR which is exhibited as Exhibit-1. She has also deposed that her daughter was thereafter, taken to Fakhruddin Ali Ahmed Medical College and Hospital at Barpeta for medical examination and police seized the pant of her daughter which she was wearing at that time during cross-examination. PW-1 has deposed that the appellant's clothes shop is beside the shop of the informant and on the day of incident, the daughter of the PW-1 was wearing a three-quarter pant and a top and police seized the same on the day of the incident. She also deposed that the police also seized a black jeans and underwear belonging to the appellant. She has answered in negative to a suggestive question put to her that the appellant had offered water to her daughter out of love

and affection and while taking water it fell on her pants. She has also answered in negative to the suggestive question that she filed case against the appellant only out of suspicion.

- 6.** PW-2, who is the victim girl, who was aged about three years when her testimony was recorded, has deposed that she know the appellant and the appellant took her inside the shop room and made her pant wet inside the shop by doing something. She also deposed that the appellant made her pant wet on her back and thereafter, he took her on his lap.
- 7.** During cross-examination, the victim has deposed that her parents told her to say in the Court whatever is asked to her. She also deposed that her father taught her how to speak in the Court and what to speak.
- 8.** PW-3, Shri Sujit Kumar Saha, has deposed that he has a furniture shop in front of Barpeta Road Police Station and on the day of incident at around 12 noon to 1.00 p.m., he was called to police station where he saw the appellant. He has stated that the appellant confessed before them that he committed mistake against the daughter of the informant. He has also deposed that the police seized one jeans pant of the appellant and one half pant of the girl and prepared one seizure list, wherein he put his signatures, which is exhibited as Exhibit-2(1). He also deposed that there was a video-graph of the scene of occurrence and the video-graph was also seized

and police prepared a seizure list which is exhibited as Exhibit-3 and his signatures thereon as Exhibit-3(1).

- 9.** PW-4, Shri Santosh Saha, has deposed that on the date of incident i.e, on 30.06.2018, he was at his residence and on reaching his shop, he was called to the shop of the informant. He has deposed that in the shop of the informant he saw the appellant along with the Officer-in-Charge of Barpeta Road Police Station and thereafter, they proceeded to Barpeta Road Police Station along with them. A cameraman was present who recorded the videography of the place of occurrence. He deposed that the police seized the clothes of the appellant i.e., a jeans pant and a half pant of the victim girl and prepared one seizure list which is exhibited as Exhibit-2 by the PW-4. His signatures were exhibited as Exhibit-2(2) on the said seizure list. Police also prepared a seizure list after seizing the videography and said seizure list is exhibited as Exhibit-3, wherein the signatures of the PW-4 has been exhibited as Exhibit-3(2).
- 10.** During cross-examination, he deposed that the appellant has been newly employed by his owner Gokul Saha. He has also deposed that he does not know the content of the seizure list over which he has put his signature.

- 11.** PW-4 has also stated that in the police station, the appellant confessed before them that he subjected the minor daughter of the informant to sexual assault.
- 12.** PW-5, who is the father of the victim girl, has deposed that on the date of incident i.e., 30.06.2018, he was working at Sorbhog. At that time, his wife called him over phone and called him back informing him that something has happened to his daughter. When the PW-5 came back and reached his shop, he saw his wife and a gathering of some people along with his daughter and his wife told him that she saw the semen of the appellant on the pants of her daughter. PW-5 also deposed that his wife told her that the appellant took his daughter from the shop of the PW-5 to the shop of Gokul Saha and committed sexual assault and ejected sperm in the pants of her daughter. He has also deposed that the appellant confessed his guilt before him and during the course of his confession, the police recorded the same in videography. He exhibited the seizure list as Exhibit-4.
- 13.** During cross-examination, the PW-5 has deposed that at the time of incident it was raining. He has also deposed that he came to know about the incident from his wife. He has also answered in negative to a suggestive question that the appellant was assaulted by the people who gathered there and due to the assault he confessed his guilt.

- 14.** PW-6, Shridhar Sarma has deposed that he has business establishment at Barpeta Road market in front of Barpeta Road Police Station and on the date of incident, police brought the appellant to the police station and called him to the police station. PW-6 has also deposed that in the police station the appellant confessed that he committed offence against the minor girl. Police video-graphed the entire scene.
- 15.** PW-7, Sri Sujit Kumar Saha has deposed that on the date of incident he was called to the place of occurrence, and when he went there he saw some other persons of locality were grilling the appellant and the appellant confessed his guilt before them. Thereafter, police was informed and accordingly, police reached his shop. He also deposed that the appellant confessed that he committed sexual assault against the girl. The police video-graphed the entire scene and seized the Micro SD Card where the videography was recorded and prepared a seizure list. The PW-7 exhibited his signatures as Exhibit-3(3) on the seizure list.
- 16.** During cross examination, PW-7 has deposed that he did not noticed as to whether videography was done through a camera or by a mobile phone. He answered in negative to a suggestive question that the appellant did not confess his guilt before them.
- 17.** PW-8, Shri Shankar Acharjee has deposed that on the date of

incident, he was called by police of Barpeta Road Police Station to do some videography regarding the incident. Accordingly, he rushed to the Barpeta Road Police Station and took videograph of the appellant, who gave his statement before police in presence of several other persons that he did sexual offence against the minor girl in his clothes shop and then, he was caught by business community. PW-8 has deposed that he had not seen the incident himself but heard about it from the other. He has deposed that on completion of the videography, Police Officer took the memory card from him and seized the same by preparing a seizure list which is exhibited as Exhibit-3. He also exhibited his signatures on the said seizure list as Exhibit-3 (4).

- 18.** During cross-examination, PW-8 has deposed that he did the videography by using his HD camera of Sony company.
- 19.** PW-9, Dr. Anima Boro has deposed that on 02.07.2018, she was working at Fakhruddin Ali Ahmed Medical College and Hospital, Barpeta as Medical and Health Officer. On that day she examined one minor girl (victim), who was aged about two years seven months at that time in connection with Barpeta Road P. S. GD Entry No. 700 dated 30.06.2018. During examination, she found the vulva and hymen of the victim girl intact and no spermatozoa was seen on microscopic examination of the vaginal swab. She also found no sign of recent sexual intercourse and no injury mark over the body of

the victim girl.

- 20.** During cross-examination, no question was asked in respect of the opinion given by the PW-9 in her medical examination report. She has stated that before examining the victim girl she took the consent of the mother of the victim girl.
- 21.** PW-10, Dr. Shankar Chandra Rabha has deposed that on 03.07.2018 he was working as Scientific Officer in the Serology Division Directorate of Forensic Science Assam, Kahilipara, Guwahati. On that day, he received a parcel from the Director of Forensic Laboratory in connection with Barpeta Road P. S. Case No.314/2018. The parcel contained two exhibits namely, one sky and white colour half pant containing stains of suspected semen and one black colour jeans long pant containing stains of suspected semen. On examination, it was found that both the exhibit gave positive test for human semen.
- 22.** During cross-examination, PW-10 has deposed that he had examined the material exhibit after three to four days of the receipt of the same.
- 23.** PW-11, Shri Bidhan Singh Basumatary has deposed that on 30.06.2018, he was working at Barpeta Road Police Station as Sub-Inspector of Police and on that day, he received a phone call from one Prakash Mitra, whereby it was informed that a boy had committed sexual offence against a minor girl and said

boy has been detained by the public. On receipt of the said information, PW-11 made a GD Entry No.700 dated 30.06.2018 and proceeded to the place of occurrence. On reaching the place of occurrence he inspected the place of occurrence, drew the sketch map of the place of occurrence and recorded the statement of witnesses. Thereafter, he brought the appellant and the victim girl to the police station and seized the half pant of the victim girl as well as black colour jeans pant worn by the appellant. He also seized the videography done by Shankar Acharjee during the time of interrogation of the appellant. He has also deposed that he has been and he was entrusted to investigate the case by the Officer-in-Charge of Barpeta Road Police Station and during investigation, he sent the victim girl for medical examination and also sent the victim girl for recording her statement under Section 164 of the Code of Criminal Procedure, 1973. He has deposed that after completion of the investigation having found sufficient evidence against the appellant he laid the charge sheet against the appellant, bearing charge sheet No.160 dated 22.09.2018 under Section 12 of the POCSO Act, 2012. He exhibited the sketch map as Exhibit-7, the FIR as Exhibit-1, Seizure List as Exhibit-2 and Exhibit-4, and the charge sheet as Exhibit-8.

- 24.** During cross-examination, PW-11 was asked some general questions, which does not have much bearing on the testimony

of PW-1 or other witnesses. However, PW-11 has deposed that PW-1, i.e., the mother of the victim, did not state before him that she noticed the pant of her daughter wet and on careful examination found the stains of semen on her pants.

- 25.** PW-12, Shri Utpal Kalita, has deposed that on 02.07.2018, he was serving as the Bench Assistant of the Court of learned Judicial Magistrate, 1st Class, Barpeta. On that day, the learned Judicial Magistrate, 1st Class, Barpeta, had recorded the statement of victim girl, who was at that time aged about two and a half years. The statement was recorded under Section 164 of the Code of Criminal Procedure, 1973. However, PW-12 has deposed that being the Bench Assistant of the said Court, he was familiar with the handwriting and signatures of the concerned Judicial Officer. He exhibited the statement of the victim girl recorded under Section 164 of the Code of Criminal Procedure, 1973 as Exhibit-7 and the signature of the Magistrate as Exhibit-7 (1).
- 26.** During cross-examination, PW-12 has deposed that though, he was serving in the said Court, however, he had not brought along any proof of his identity to show that he was serving in the said Court. He has also submitted that no seal has been put under the signature of the Officer in the document which has been exhibited as Exhibit-7.

- 27.** It is pertinent to mention herein that the marking in this case by the Trial Court of Exhibit of the statement of the victim girl under Section 164 of the Code of Criminal Procedure, 1973 has been erroneous, as it had already marked the sketch map, which was exhibited by the PW-11 as Exhibit-7 and it has again allowed marking of the statement of the victim girl recorded under Section 164 of the Code of Criminal Procedure, 1973 as Exhibit-7.
- 28.** Ms. B. Sharma, learned Amicus Curiae appearing for the appellant has stated that on the date when the statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure, 1973, i.e., on 10.07.2019, his age has been shown as 18 years, whereas, the incident had occurred on 30.06.2018, i.e., about more than a year before the date on which the statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure, 1973. Therefore, the learned Amicus Curiae has submitted that there is every likelihood that the appellant was a juvenile when the incident had occurred.
- 29.** She has also submitted that the evidence of PW-1, who is the mother of the victim girl as well as the informant of the case, cannot be relied upon as she has not seen the alleged incident herself and had only claimed to have seen stains of semen on the half-pant of her daughter. Learned Amicus Curiae,

appearing for the appellant, has also submitted that even the victim girl, in her testimony as PW-2, has not whispered anything about penetrative sexual assault. Rather, she only deposed that the appellant made her pant wet on her back. It is also submitted by learned Amicus Curiae that considering the age of the victim girl as well as considering the fact that she had deposed before the Court after lapse of about six months after the date of the alleged incident, there is every likelihood that she might have been tutored by her parents.

- 30.** Learned Amicus Curiae has also submitted that the victim girl had admitted during her cross-examination that her father taught her as to how to speak in Court and what to speak.
- 31.** Learned Amicus Curiae has also submitted that none of the other witnesses have deposed that they had seen the incident themselves. Rather, all of them have deposed on the basis of hearsay. It is also submitted that though, the remaining witnesses have also stated that the appellant has confessed before them, however, it appears that the appellant had allegedly confessed about his guilt in the police station and what he exactly stated while confessing his guilt as alleged has not been deposed by any of the witnesses. Learned Amicus Curiae has also submitted that any confession made before police is inadmissible.
- 32.** Learned Amicus Curiae has also submitted that the Trial Court

has ignored the testimony of the doctor who examined the victim girl, wherein, the PW-9 (Doctor) had categorically stated in her testimony that no injury mark was found over the victim's body and no recent sign of sexual intercourse was there.

- 33.** Learned Amicus Curiae for the appellant submits that the medical evidence on record negates the possibility of any penetrative sexual assault on the victim girl.
- 34.** On the other hand, learned Additional Public Prosecutor has submitted that the prosecution witnesses have given implicating evidence against the appellant and considering the fact that semen were found on the half pant of the victim girl when her mother recovered her from the shop room of the appellant where the appellant was also found, there remains no doubt regarding the guilt of the appellant. Learned Additional Public Prosecutor has also submitted that there is no infirmity in the findings of the Trial Court and therefore, prays that no interference should be made with the judgment of conviction and sentence imposed on the appellant by the Trial Court.
- 35.** Ms. L. Devi, learned Legal Aid Counsel appearing for the victim girl has deposed that the victim was traumatized at the young age of two and a half years only and all the witnesses have implicated the appellant and therefore, she prays that no

mercy should be shown to the appellant and the Trial Court judgment should not be interfered with in this appeal.

- 36.** Ms. L. Devi, learned Legal Aid Counsel has also cited a ruling of the Supreme Court of India in the case of "**Radha Krishna Nagesh Vs. State of Andhra Pradesh**" reported in **(2013) 11 SCC 688**, where the Apex Court has held that if the hymen of the victim girl was found intact it may not be a conclusive proof of the fact that the victim girl was not subjected to rape as under Section 375 of the Indian Penal Code, the requirement of complete penetration is not there. She also submits that no leniency should be shown to the appellant, considering the fact that a small girl of two and a half years was subjected to the lust of the appellant.
- 37.** I have considered the submissions made by both the sides and also have gone through the materials available on record carefully.
- 38.** There is no dispute to the fact that at the time of occurrence of alleged incident the victim girl was of only two and a half years of age and she deposed before the Court during the trial only after about six months had already passed.
- 39.** She had stated that the appellant made her pant wet on her back and he took her in his lap. She had not stated anything from which it can be inferred that the appellant subjected her to penetrative sexual assault. Though, the evidence on record

would suggest that the appellant did some act with the victim girl, with sexual intent which involves physical contact, however, there is no evidence of penetration by the appellant while doing the said act.

- 40.** None of the witnesses for the prosecution side have stated anything regarding penetrative sexual assault, though, the evidence on record clearly suggests that there was sexual assault of the victim girl within the meaning of Section 7 of the POCSO Act, 2012. Though, there is no dispute that semen was found on the half pant of the victim girl and the appellant was also found with the victim girl, which suggests that the semen was of the appellant and thus, he might have committed some act with the victim girl with sexual intent.
- 41.** However, considering the evidence of the doctor, who examined the victim girl, which suggests no sign of any penetration on the victim girl and as well as the fact that none of the witnesses for the prosecution have stated anything regarding penetrative sexual assault, this Court is of considered opinion that there is no sufficient evidence on record to come to the finding that the victim was subjected to penetrative sexual assault by the appellant.
- 42.** If we peruse the impugned judgment, it appears that the Trial Court assumed that unless the appellant touches his penis to the vagina of the victim, there could not have been any

ejaculation of the semen, which in the considered opinion of this Court does may not be always correct. Though, the evidence on record does suggest that there was sexual assault of the victim girl within the meaning of Section 7 of the POCSO Act, 2012, and as victim girl was only of two and half years of age, when the alleged offence was committed, the sexual assault would be considered as of aggravated nature within the meaning of Section 9 (m) of the POCSO Act, 2012. However, there is no sufficient evidence on record to come to the finding that the appellant committed aggravated penetrative sexual assault on the victim girl within the meaning of Section 5 of the POCSO Act, 2012.

- 43.** Though, it is no longer *res integra* that complete penetration is not necessary for committing penetrative sexual assault, however, there must be some evidence on record to suggest that any of the act as mentioned in Section 3(a), (b), (c) and (d) of the POCSO Act, 2012, have been committed to come to the finding that there was penetrative sexual assault, and in the instant case, none of the witness has deposed anything to bring the offence committed by the appellant within the meaning of Section 3 of the POCSO Act, 2012.
- 44.** Though, there is sufficient evidence to bring the act committed by the appellant within the meaning of Section 7 as well as Section 9 (m) of the POCSO Act, 2012.

- 45.** In view of above, this Court is of opinion that the impugned judgement is required to be interfered with by altering the conviction of the appellant from Section 6 of the POCSO Act, 2012 to Section 10 of the POCSO Act, 2012.
- 46.** Accordingly, the conviction of the appellant is modified to Section 10 of the POCSO Act, 2012.
- 47.** Further, as the Section 10 of the POCSO Act, 2012 prescribes punishment which shall not be less than 5 years, but which may extend to 7 years, the sentence imposed on the appellant is also modified from rigorous imprisonment for 10 years and fine of Rs. 1,000/- with default stipulation as imposed by the Trial Court to rigorous imprisonment of 5 years and a fine of Rs. 1,000/- under Section 10 of the POCSO Act, 2012 and in default of payment of fine to undergo simple imprisonment for 3 months.
- 48.** The appeal is accordingly, partly allowed, by modifying the conviction and sentence imposed on the appellant as indicated hereinbefore.
- 49.** Send back the records of Trial Court to the Court of learned Special Judge, Barpeta along with a copy of this judgment, immediately.

JUDGE

Comparing Assistant