

GAHC010117282019



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

Case No. : CRL.A(J)/49/2019

AJIMUDDIN SIKDAR @ AJIM ALI SIKDAR
BARPETA

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR. BIKASH PRASAD, AMICUS CURIAE

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

Date : 05-02-2024

JUDGMENT AND ORDER

(CAV)

(K.R. Surana, J)

Heard Mr. B. Prasad, learned Legal Aid Counsel for the appellant and also

heard Ms. S. Jahan, learned Additional Public Prosecutor appearing for the State of Assam.

2) As per the office note dated 16.08.2021, as well as order of this Court dated 01.10.2021, none appears on call despite service of notice on the respondent no. 2.

3) On receipt of this jail appeal from the appellant, as provided under Section 383 of the Code of Criminal Procedure, 1973 the present appeal has been registered.

4) By this appeal filed under section 374 Cr.P.C., the appellant-accused has assailed the judgment and sentence dated 30.01.2019 passed by the learned Additional Sessions Judge, Bajali, Pathsala in Special (POCSO) Case No. 4/2018. By the said judgment, the appellant was convicted of committing offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act" for short) and he was sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- (Rupees Ten thousand only) and in default to suffer further rigorous imprisonment for 6 (six) months.

5) It may be mentioned that in this judgment and order, the name of the appellant- accused, the victim's mother (complainant), and the minor victim girl have not been disclosed to protect their respective identities. Accordingly, in this judgment and order the appellant- accused, victim's mother and the minor victim are referred to as 'X', 'Y' and 'Z' respectively.

6) The prosecution case was set rolling by 'Y', who had lodged an FIR before the Officer-in-Charge of Sarupeta Police Outpost on 23.04.2018, *inter alia*, alleging that about one year back, 'X', her husband (i.e. appellant),

had driven her out from her matrimonial home and he was staying in his own house along with 'Z' (victim) and that on 22.04.2018, 'Z' (victim) had fled to the house of her maternal uncle situated at Pathsala gaon and from her she had come to know that the appellant had been regularly raping her minor daughter 'Z' aged 11 years for last 6 months and that she had fled away to save herself. Accordingly, Sarupeta O.P. GDE No. 570 dated 23.04.2018 was registered and forwarded to the jurisdictional police station, wherein Patacharkuchi P.S. Case No. 246/2018 under Section 4 of the POCSO Act, 2012 was registered.

7) In course of the investigation, the Investigating Officer (PW-7) recorded the statement of the victim and other witnesses; sent 'Z' (victim) for her medical examination at FAAMCH, Barpeta; had her statement recorded by the learned Sub-Divisional Judicial Magistrate (M), Bajali, Pathsala, under section 164 Cr.P.C.; prepared a sketch-map of the place of occurrence; and had arrested the appellant. On completion of the investigation, charge-sheet was submitted on 31.05.2018, bearing charge-sheet no. 107. On receipt of the charge-sheet, cognizance of the offence was taken. After providing copies, charge against the appellant under Section 4 of the POCSO Act, 2012 was read over and explained to the appellant to which he pleaded not guilty and claimed to be tried.

8) In the course of the trial, the prosecution had examined 7 (seven) witnesses, viz. 'Z', the victim (PW-1), Md. Kurban Ali (PW-2), Md. Rejjak Ali @ Ejjak Ali @ Ejjak (PW-3), Y, mother of the victim (PW-4), Dr. Anima Boro (PW-5), Smti. Karabi Talukdar (PW-6) and Pradip Kr. Choudhury, Investigating Officer (PW-7). Moreover, the following documentary evidence was exhibited, being the statement of the victim under section 164 Cr.P.C (Ext.1), medical examination report of 'Z' (victim) (Ext.2), *ejahar* (Ext.3), sketch map of the

place of occurrence (Ext.4) and charge-sheet (Ext.5).

9) The learned trial Court, by relying on the evidence of 'Y' i.e. the mother of the victim girl (PW-1) had held that there was no material from which it could be held that the appellant could not create any doubt at her evidence against the appellant. Moreover, having regard to the statement of the victim recorded under section 164 Cr.P.C. (Ext.1), the silence with regard to such statement was held to be acceptance of the statement made in Ext.1 and accordingly, the evidence of PW-1 was accepted.

10) The evidence of PW-4 to the effect that she has heard from the victim that the appellant forcefully did sexual intercourse with the victim in his house at Bangti as well as at Jorhat at night but the victim felt shy to disclose the matter to anybody. Hence, it was held that the appellant could not elicit anything to discard her evidence and therefore, it was held that the Court did not find any material to disbelieve the PW-4.

11) The learned trial Court had accepted the evidence of PW-2 to the effect that the victim had told him over phone that the appellant had been harassing her sexually in her house and even at Jorhat and that his sister (PW4) had lodged an *ejahar* of the offence. It was also held that the PW-2 had supported and corroborated the version of the victim. The Court had also accepted the evidence of the PW-3 to the effect that the victim had told him that the appellant had driven out her mother by torturing her and thereafter brought the victim to Jorhat and while staying in the rented house, the appellant had forcefully committed sexual intercourse with her and thereafter, brought her to Bangti in their house where also she was sexually assaulted. Hence, his evidence was found corroborating to the evidence of PW-1 and that the appellant could not create any doubt in the cross-examination of PW-3.

12) The evidence of PW-5, who is the Medical Officer has accepted to hold the age of the victim between above 12 years and below 14 years and that on examination of the victim, her hymen was found torn with history of allegation which support the charge brought by 'Z', the victim girl. Moreover, reliance was placed on the evidence of PW-7 who was the I.O. regarding commission of offence by the appellant and it was held that there was no material in cross examination to be discussed.

13) Accordingly, 'X', the appellant, was found guilty of commission of offence of having sexual intercourse forcefully with 'Z', his minor daughter, which constitutes the offence under Section 4 of the POCSO Act against the appellant. Accordingly, by holding him guilty of charge, the learned Trial Court had convicted the appellant for committing offence punishable under Section 4 of the POCSO Act, 2012 and sentenced him to undergo rigorous punishment for life and to pay a fine of Rs.10,000/- with default stipulation.

14) The learned amicus curiae appearing for the appellant had submitted that the appellant has been convicted on the basis of incorrect appreciation of evidence by the learned Trial Court. In this regard, it was submitted that the evidence of 'Z' (victim/ PW-1) was misread and not correctly appreciated because though in her examination-in-chief, she had stated that after marriage of her sister she was alone in the house with her father (i.e. appellant) and she was sexually assaulted several times at night after removing her panty and ejaculated semen on her body, and in this regard, it was further submitted that the said oral evidence was totally unbelievable and unreliable because of her statement given in her cross-examination. Accordingly, it was submitted that the evidence of 'Z', which had come out during her cross-examination was not at all considered by the learned Trial Court.

15) It was submitted that the learned Trial Court appeared to be influenced by the allegation of sexual assault on 'Z' (victim) by the appellant at Jorhat, which was also rendered unbelievable because of her deposition in her cross-examination, which was again not considered by the learned Trial Court. It was submitted that in this case the I.O. did not investigate the alleged offence committed by the appellant at Jorhat and in the charge-sheet, no charge was laid against the appellant for that particular offence. Thus, the learned Trial Court did not explain charges to the appellant regarding the allegations of rape, if any, committed upon 'Z' at Jorhat. Hence, it was submitted that as the learned Trial Court appeared to be influenced by allegations of rape allegedly committed by the appellant at Jorhat, this was a case where the appellant had suffered prejudice by omission to frame charges, for which he could not take appropriate defence.

16) It was further submitted that in this case, the I.O. had not conducted any investigation whatsoever because he had examined only those witnesses who had voluntarily appeared before him in the police station alongwith the complainant. It was also submitted that the I.O. had admitted that he had not visited the place of occurrence either at Bangti or at Jorhat. Moreover, the I.O. had not seized any record to prove the age of the victim and also did not seize any clothes.

17) That it was submitted that the medical opinion did not disclose any sign of forcible rape or recent sign of rape and moreover, it was also submitted that hymen of a minor girl can get ruptured for many reasons.

18) It was submitted that from the cross-examination of PW nos. 1, 2, 3 and 4, the allegation of sexual assault on the victim by the appellant cannot be believed, because on conjoint reading of their respective depositions, the

falsity of the allegation would become apparent.

19) In support of his submissions, the learned amicus curiae had relied on the case of *Manju Thakur Vs. Raj Kumar*, MANU/HP/0667/2014 (paragraph 33).

20) Per contra, the learned Addl. P.P. had submitted that the victim 'Z' was only 11 years of age when she was examined as PW-1 in Court and therefore, some small omissions cannot make her statement against the appellant unbelievable. It was submitted that the main allegation was that she was raped by 'X', her own father. Thus, it was submitted that even if one such paternal incest was proved, the conviction and sentence awarded to the appellant would be sustainable on facts and in law. It was further submitted that the sexual assault on 'Z' by the appellant at Bangti was proved because even if the picture portrayed by the learned amicus curiae was believed, the victim was alone with the appellant at Bangti.

21) Perused the paper-book and considered the submissions from both sides and also carefully considered the cases cited by both sides.

22) It appears from the nature of submissions and materials available on the record that the following point of determination arises for consideration in this case:

Whether the impugned judgment and sentence awarded by the learned Trial Court is sustainable on facts and in law?

23) It would be appropriate to appreciate the evidence of the prosecution witnesses:-

Evidence of the PW-1:

24) The victim 'Z' was examined as PW-1. As she was 11 years of

age, the learned Trial Court had put to her some questions to check her understanding. In her examination-in-chief, she had stated that the complainant was her mother and the appellant was her father. She had stated that at the time of occurrence, she was studying in Class-V, but suddenly she was admitted in Class-III at Bhauraguri L.P. School and that she had read in Cheki L.P. School at first and thereafter at Bhauraguri. She had stated that her mother had left the house of her father about 2 years back and since then her mother was staying in the house of her maternal grand-mother and that she was also staying with her mother at her maternal grand-mother's house. She had stated that after leaving her father's house, her mother was living with her mother and that she was staying with her father along with her elder sister at Uttar Bangti. She had stated that after 4/5 days of her mother leaving the house of her father, her elder sister got married with a boy and she was living alone with her father and that after marriage of her elder sister, that her father had sexually assaulted her several times at night. She had stated that at night, her father would remove her panty and did sexual intercourse with her and that she felt pain in her private parts and that her father had ejaculated semen on her body. On one day when her father had gone for work, she had called her maternal uncle Kurban Ali over phone and told him that her father had tortured her sexually and physically and also told him to take her to his house but he did not bring her and so she went to the house of her *nani* at Pathsala, where she met her mother, who brought her to Bijni. She had also stated that earlier her father was working at Jorhat and kept her in a rented house and also tortured there sexually and physically. She had stated that her mother then filed a case against her father and the police got her medically examined at FAAMCH, Barpeta and her statement was recorded by the Magistrate, Bajali. She had exhibited her

statement (Ext.1) and she had also exhibited her signatures thereon as Ext.1(i) to Ext.1(iv). She had stated that after recording her statement the Magistrate had handed her over to her mother.

25) In her cross-examination, PW-1 had stated that her uncle's house and grand-mother's was adjacent to her house. She had stated that her sister had love affair with a boy and in that regard, her father had abused her mother and assaulted her. She had submitted that her father had maintained them. She had also stated that at first, they stayed in the house of Fakkaruddin, her paternal uncle and at that time also her father had maintained them. She had stated that her elder sister was staying in the house of her brother Rakibur and thereafter, her elder sister got married. She had also stated that 2 (two) days after the marriage of her elder sister, she along with her father had gone to the house of her *pehi* (father's sister) at Jorhat and stayed there for 30 days and they had stayed in Jorhat for 3 months and thereafter, she was brought by her father to the rented house as quarrel broke out between her and children of her aunt. She did not remember the name of the landlord. She had stated that there were about 15 families in the rented house adjacent to their rented house and also stated that after 2 (two) months in the rented house her father brought her back to their house at Bangti, where she had stayed with her father and while staying there, she intended to go to her mother's house. She had stated that she did not complain before anybody at Jorhat when she was tortured sexually and physically in that rented house. She had also stated that after coming from Jorhat, her father did not assault her sexually but he did not allow her to play with other children. She had denied the suggestions that she had stated against the appellant as per dictation of her mother or that she did not told the police that she told her maternal uncle to bring her to his house or

that her father did not sexually assault her or that she was giving false evidence against her father or that she was giving evidence in the interest of her mother.

Evidence of PW-2:

26) The PW-2 is the maternal uncle of the victim 'Z'. In his examination-in-chief, the PW-2 had stated that complainant (PW-4) was his elder sister and that the victim was his niece and that the appellant- accused was the husband of his elder sister. He had also stated that due to the torture as well as harassment, his sister was compelled to leave the house of the appellant. He had stated that 'A', 'Z' and 'B' (names withheld to protect the identity of the victim) are 3 (three) daughters of the complainant and the appellant and 'A' was already married 6 (six) years back. The victim 'Z' stayed with the appellant and 'B' went with her mother. He had also stated that the appellant was doing his job at Jorhat and at that time he kept the victim with him. He had stated that one day about 4/5 months back when he was in the house of his father-in-law, the victim 'Z' called him over phone and told him that the appellant had been harassing her sexually and after sometime the victim came to the house of her grand-father at Pathsala Gaon and she again told him that her father did sexual intercourse with her at Bangti and at Jorhat, hearing which his sister had lodged an *ejahar* with the police and that the police had recorded his statement.

27) In his cross-examination, the PW-2 had stated that he did not know the date of lodging of the *ejahar*. He did not know who had scribed the *ejahar*. He had stated that the complainant was staying at her paternal house since last 6 years and since then she had no link with the appellant and that he did not know during that period where the appellant was staying. He had also stated that he was not aware if the appellant had lodged a complaint against

one Na...I (illegible, because page is torn) Ali that he had sexual intercourse with 'A' (his elder daughter). He had stated that at that time the complainant and the appellant were living together and since that case they both were living separately. He had forgotten the date when 'A' got married. He had stated that after marriage, he had gone to the house of the appellant only one time. He had also stated that he was not aware of the status of the appellant or that how many houses are present near the house of the appellant. He had also stated that he had met the victim first time in the house of his father-in-law and that on that very day, the victim had called him over phone. He had stated that before meeting the victim, he did not know where she was staying. He did not know the date of birth of the victim. He had denied the suggestion that the victim did not tell him about the occurrence over phone or that he was giving false evidence by implicating the appellant or that in order to harass the appellant, he was giving false evidence. He had also denied that the victim had falsely informed him that the appellant had sexually assaulted her.

Evidence of PW-3:

28) The PW-3 had stated in his examination-in-chief that the complainant was his niece and the victim was his grand-daughter and that the appellant was the husband of the complainant and father of the victim. He had also stated that one day about 5 months back the victim had told him that the appellant had driven out her mother by torturing her and thereafter, brought her to Jorhat and kept her in a rented house as he was doing job at Jorhat and while she was staying with her father, he did sexual intercourse with her forcefully and also sexually assaulted her and she had also told him that she was brought to Bangti to the house of the appellant and therein she was also assaulted sexually and did sexual intercourse with her forcefully. He had also

stated that the victim had told him that she had informed the matter to her other relatives. He had also stated that the police had recorded his statement.

29) In his cross-examination, the PW-3 had stated that he did not know when the complainant had lodged the *ejahar*. He had stated that he was a driver. He had denied the suggestion that the victim had not told her about sexual assault. He had also stated that on that day, the victim had come to the house of her maternal grand-father at about 12 noon. He had stated that he had never visited the house of the appellant and did not know the neighbours of the appellant. He also did not know with whom the mother of the accused was residing. He had also stated that when he came to his house he saw some villagers along with his niece and brother. He had also stated that his grand-daughter 'A' had already got married and that he had never visited the house of 'A'. He had also stated that he did not know where the appellant was living after the complainant had left his house. The PW-3 had denied the suggestion that he had given false evidence against the appellant to harass him or that the appellant had not done any such act as alleged against him.

Evidence of PW-4 (informant):

30) The PW-4 had stated in her examination-in-chief that she was the complainant and the victim was her daughter and that the accused-appellant standing in the dock was her husband. She had stated that she had lodged the *ejahar* where she had put her thumb impression. She had also stated that out of their wedlock, three female children were born and that she had maintained their conjugal life at Bangti village under Patacharkuchi P.S. She had informed that about 1-1¹/₂ year back the appellant had driven her out from his house along with her youngest daughter and that the appellant was staying at

Bangti with 'A' her elder daughter and victim 'Z'. She had stated that 20/25 days after driving her out, her elder daughter 'A' got married and the victim stayed with the appellant. She had stated that after leaving the house of the appellant she never went back there and as such she did not meet the victim. She had also stated that about 4/5 months prior to lodging the *ejahar*, the victim had informed her over phone that the appellant had raped her on different days and that she also told her that the appellant had forced her to sleep with him at night and to have sex with him and that she had also stated that she was unable to bear the sexual torture and was intending to leave the house of the appellant and to stay with her. After getting that information, she went to the house of her *mama*, Md. Ajak Ali at Pathsala Gaon, but in the meantime the victim came to the house of Ajak Ali where she met her. The victim had informed her that the appellant repeatedly did sexual intercourse forcefully in their house at Bangti and thereafter, she was brought to Jorhat and kept in a rented house where she was sexually assaulted forcefully by the appellant each and every night but due to fear and shy, she had not informed anyone. The PW-4 had further stated that she had lodged the *ejahar* against the appellant for committing sexual intercourse with 'Z' and that the police had recorded her statement.

31) In her cross-examination, PW-4 had stated that she had forgotten the date when she was driven out from the appellant's house. She had also stated that while she was in the house of the appellant, then a case was filed against one Nurul Haque for committing sexual assault on her elder daughter 'A' and that she was driven out 6 months after that case. She had stated that she had not filed any case against the appellant for torturing her and for driving her out from his house. She had also stated that she never visited

the house of the appellant after being driven out. She had also stated that after leaving the house of the appellant, she did not know how the accused, 'A' and 'Z' were staying. She had also stated that she did not attend the marriage of 'A' and her relatives were also not present. She had also stated that 'Z' had gone to the matrimonial house of 'A', but she did not know how many days she had stayed there. The PW-4 had also stated that she did not know when the victim had gone to Jorhat with the appellant. However, she had stated that the victim had informed her that she was staying with the appellant in the house of her aunt at Jorhat and that she did not know if the victim was staying with the appellant at any other house at Jorhat. She had further stated that before leaving Bangti for Jorhat, 'Z' had informed her over phone that she was sexually assaulted by the appellant. PW-4 had denied the suggestion that the victim did not inform her about the occurrence over phone. She had also denied that she had not stated before the police that the victim had informed her over phone that the appellant had raped her forcefully several times. In her cross-examination, the PW-4 had also stated that she had come to Pathsala Gaon to the house of Ajak Ali to discuss with him about NRC hearing and after staying two days in his house the victim met her in his house. She had further stated that the victim was reading in Cheki School, Bangti and that at the time of occurrence, she was in Class VI of VII. She denied that at the time of occurrence, the victim was an adult woman.

Evidence of PW-5:

32) The Lady Medical Officer of Fakkaruddin Ali Ahmed Medical College and Hospital, Barpeta was examined as PW-5. She had stated in her examination-in-chief that history of sexual assault by victim's father was 1 week before. As per her report (Ext.2), no spermatozoa were seen on microscopic

examination of vaginal swab slides, and that there was no sign of recent sexual intercourse and there were no marks of violence on her private parts. She had exhibited the medical report as Ext.2 and her signature as Ext.2(i) and that Ext.2(ii) was the signature of Associate Professor of the Department of Forensic Medicine, FAAMCH, Barpeta, which she knows.

33) In her cross-examination, she had stated that on the date of examination, the victim had told her that she was sexually assaulted by her father 1 (one) week before and accordingly, she had mentioned it in the column history of the case. She had also stated that sometimes hymen tears for bicycling.

Evidence of PW-6:

34) The Women Police Constable was examined as PW-6. She had stated in her examination-in-chief that since 2016, she had been discharging duty as Women Police Constable at Sarupeta Police Outpost. She had stated that on 23.04.2018, a minor girl was produced in their police outpost by her mother. Thereafter, Pradip Kr. Choudhury, the then In-Charge of Sarupeta Police Outpost asked and directed her to be present with the victim girl while he would be recording her statement and accordingly, on that day the In-Charge had recorded the statement of the victim girl in the presence of victim's mother and in her presence and thereafter her statement was also recorded. In her cross-examination, the PW-6 had stated that as per the direction of the In-charge of Outpost, she had put questions to the victim girl and her answers were recorded by him. She had also stated that sometimes she was entrusted to be present when statement of minor was recorded. She had stated that she had not brought any document to show that on that very day, she was on duty and she denied the suggestion that the statement of the victim was not recorded in her

presence.

Evidence of PW-7:

35) In his examination-in-chief, the I.O. (PW-7) had stated that on 23.04.2018, he was discharging duty as In-charge of Sarupeta Police Out Post since January, 2017 and on that day, he had received an *ejahar* from the mother of the victim (i.e. PW-4) and accordingly, the same was entered as Sarupeta OP GDE No. 570 dated 23.04.2018 and the same was forwarded to Patacharkuchi P.S. and he had started investigation and thereafter, Patacharkuchi P.S. Case No. 246/18 under section 4 of POCSO Act, 2012 was registered and he was entrusted to complete the investigation. He had also stated that since the victim, informant and other witness were found in the police out post, he had recorded their statement in the outpost and the statement of the victim was recorded in the presence of WPC 689 Karabi Talukdar and as per his instructions, she had asked question to the victim and that he had recorded the same. He had stated that as it became night, the victim could not be produced for medical examination and she was along with her mother and woman constable in their outpost and on the next day the victim was medically examined at FAAMCH, Barpeta and thereafter her statement was recorded by a Magistrate under section 164 Cr.P.C. He had stated that on the same day he had visited the place of occurrence and recorded the statement of other witnesses. He had exhibited sketch map (Ext.4) and his signature as Ext.4(i). He had stated that the appellant was apprehended by the public and handed over to the police and after interrogation he was arrested and produced before the Bajali Court and he was remanded to judicial custody. He had also stated that he had collected the medical report and after completing the investigation, materials were found and case was charge-sheeted. He had exhibited the

charge-sheet (Ext.5) and the *ejahar* (Ext.3) and his signature as Ext.5(i) and Ext.3(i) respectively.

36) In his cross examination, the PW-7 had stated that he had no knowledge that earlier the complainant had filed any criminal case against the appellant. He had also stated that the place of occurrence did not fall under his outpost and that the informant did not lead to the place of occurrence. He had not made any enquiry at the address of the informant, did not seize any voter ID or PAN card of the informant. He had stated that he did not mention the distance between the place of occurrence and their Outpost. He had stated that he did not make the *Gaonbura* or the Panchayat Member as witness. He had also stated that he did not seize birth certificate or any school certificate, etc. of the victim. He had also stated that he had not enquired or investigated by visiting Jorhat in connection with the case and did not seize any article relating to the case. However, he had denied that he had filed charge-sheet against the appellant without investigating the case properly.

Circumstances which discloses lacuna during investigation:

37) The I.O. had admitted that he had examined witnesses who had appeared before him in the police station along with the complainant. Thus, the I.O. (PW-7) had not visited the place of occurrence to investigate the crime, but only visited the place of occurrence to draw a sketch-map of the place of occurrence.

38) The I.O. did not take the trouble of obtaining copy of school register of any of the two schools at Cheki L.P. School and Bhauraguri L.P. School, where she had studied. Thus, the only conclusion would be that the I.O. had omitted to collect documentary evidence and placed reliance on ossification

test to determine the correct age of the victim. It cannot be believed that a school would admit a child without recording the date of birth in their admission register. This omission would mean that best evidence, which was hitherto available, was left out for the reasons best known to the I.O.

39) The victim 'Z' had stated that she was raped at Jorhat, but the I.O. did not carry out his investigation at Jorhat. The I.O. also did not take steps to have a part of investigation carried out at Jorhat.

40) The I.O. did not make any effort to find out the relevant date when 'A' got married and when 'Y' left her matrimonial home.

41) The PW-1, PW-2 and PW-4 had all referred to phone calls made by the victim to her mother (PW-4) and maternal uncle (PW-2). However, the I.O. had not done investigation of collecting the phone numbers of the said PW nos. 1 to 4 or to collect the call data records of their respective phones. Thus, the best evidence in form of call data record, which would have given at least the date and time of calls made by 'Z' (PW-1/ victim) was not investigated at all.

42) The PW-3 had stated in his cross-examination that when he came to his house he saw some villagers along with his niece and brother. However, the I.O. had not examined any villagers.

43) As per the evidence of the PW nos. 1, 2, 3 and 4, as the PW-2 did not go despite being called by the victim, the victim then ran away from her house to the house of her *nani* (maternal grand-mother). However, the maternal grand-mother of the victim 'Z' was not examined as PW.

44) Thus, it appears that during investigation the I.O. had failed to collect evidence of sterling quality against the appellant.

Analysis of evidence of PWs as to its trustworthiness:

45) As per the version of PW-3, he was informed by 'Z', the minor victim that the appellant had drove away her mother from her matrimonial home and that the appellant had raped her. 'However, 'Z' (PW-1) had never stated in her evidence that she had disclosed to PW-3 about alleged sexual assault on her by the appellant. While the PW-1 had stated that after coming from Jorhat the appellant had not sexually assaulted her, but according to PW-3, the victim had told him that after being brought to Bangti, the appellant had been raping her forcefully. Thus, the evidence of PW-3, being contrary to the evidence of PW-1, cannot be said to be trustworthy.

46) It is seen that the PW-1 had stated in her evidence that after leaving the matrimonial home, her mother was living at her mother's place. Yet, 'Y', a different address has been recorded by the learned Trial Court in respect of PW-4, the mother of the victim. The PW-4 had stated in her examination-in-chief that she had met the victim in the house of Md. Azak Ali (*sic.*), her *mama*. Thus, it appears that for some reason best known to the PW-4, she has portrayed a picture as if she is residing separately from her mother and that she had met her daughter, i.e. the victim by chance when she had gone to her *mama's* house for 2 days for NRC purpose. This makes the evidence of PW-4 questionable because the victim had called PW-2, her maternal uncle i.e. *mama* about sexual assault by the appellant.

47) Thus, PW nos. 1 to 4 are all interested and related witnesses and the PW nos. 2 to 4 are all portraying as if they are residing separately and that they had no meeting of mind, which is impossible to accept because as per the evidence of PW-2 and PW-4, the PW-1 had informed them over phone that she was raped by the appellant and it is not believable that the said PW nos. 2 to 4 would not discuss the matter, and the PW-4 would be visiting PW-3 to

discuss NRC issues only.

48) It is seen from the conduct of PW-2 that the allegation of rape by the appellant cannot be believed. The PW-2 had stated that 'Z' had informed him over phone that the appellant had been sexually assaulting her. Yet, he did not go to the place of occurrence. The PW-1 had stated that her mother 'Y' was residing in her mother's home. Therefore, though 'Y' was at the house of PW-2, the PW-2 did not go to the place of occurrence. Therefore, when PW-2 did not go to meet 'Z', she had allegedly ran away from her home to the house of her maternal grand-mother at Pathsala Gaon and allegedly she again told PW-2 about sexual assault on her by the appellant. Yet, he did not inform the police or any other family member. In his cross-examination, PW-2 had stated that for the first time he had met 'Z' in the house of his father-in-law and that on the same day she had called him over phone. It is seen that although PW-3 had stated in his cross-examination that when he came to his house he saw some villagers along with his niece and brother. However, the I.O. had not examined any villagers.

49) The PW-4, in her examination-in-chief had stated that she was informed by the victim over phone about sexual assault by the appellant and that she had gone to the house of PW-3 after getting information when she met her there, but in her cross-examination, she had a changed version that she had gone to the house of PW-3 to discuss about NRC case and that after staying at his house for 2 (two) days, she had met the victim there. However, the victim (PW-1) never stated either in her examination-in-chief or in her cross-examination that she had informed her mother (PW-4) over phone that the appellant had committed sexual assault on her. Thus, PW-4, who is a hearsay witness is found to have being giving exaggerated and/or improved evidence.

50) It is seen that the evidence of PW-4 was recorded on 20.09.2018. As per her statement in her examination-in-chief, the appellant had driven her out of the house about 1-1 $\frac{1}{2}$ years ago. 'A', her elder daughter got married 20/25 days after she left her matrimonial home and the victim 'Z' stayed alone with the appellant. She had further stated that 4/5 months prior to lodging of the *ejahar*, the victim had told her that the appellant had raped her on different dates and the victim had told her that she was unable to bear the sexual torture, she intended to leave the house of the accused and asked to stay with her. Thus, the said evidence is contrary to the evidence of PW-1 who had categorically admitted that after coming from Jorhat, she was not sexually assaulted.

51) As per the evidence of the PW nos. 1, 2, 3 and 4, as the PW-2 did not go despite being called by the victim, the victim then ran away from her house to the house of her *nani* (maternal grand-mother).

52) 'Z' had stated in her examination-in-chief to the effect that 'A', her elder sister was staying in the house of her brother Rakibur. Thereafter, her elder sister got married and after two days of marriage of her elder sister, she was taken by the appellant to Jorhat. Thus, it appears that since the day PW-4 had left the matrimonial home, as 'A' was living with her brother, 'Z', the victim was also staying with her elder sister 'A'. Thus, it cannot be believed that after marriage of 'A', the victim was staying alone with the appellant. In this regard, the relevant statement of the victim is quoted below:

“My elder sister was staying in the house of my brother Rakibur. Thereafter my elder sister got married. I also went to the house of my elder brother with my elder sister.”

53) The victim 'Z' (PW-1), had stated in her cross-examination that after returning to Bangti, the appellant did not commit sexual intercourse with her. But in their evidence, the PW-2, PW-3 and PW-4 had stated that they were told by PW-1 that she was sexually assaulted at Bangti after returning from Jorhat. Thus, the said hearsay witnesses were giving improved evidence than the victim.

54) Thus, the evidence of the PWs does not disclose a particular date when the appellant had committed penetrative sexual assault upon the victim. As per discussions made in the foregoing paragraphs, the PW nos. 1 to 4 had all given different period of time of the commission of the alleged offence.

55) The PW-4 is the mother of the victim. Notwithstanding that the appellant was not charged for committing any offence whatsoever at Jorhat, but the PW-4 had stated in her cross-examination that the victim had informed her that she was staying with the appellant in the house of her aunt at Jorhat and that she did not know if the victim was staying with the appellant at any other house at Jorhat. Thus, as per the version of PW-4, the victim was sexually assaulted by the appellant in the house of his sister, which is contrary to the evidence of the victim.

56) In light of the discussions above, the Court is inclined to hold that the evidence tendered by the PW nos. 1 to 4 were not trustworthy.

Whether the prosecution has been able to establish the place and time of alleged crime:

57) One of the questions which is required to be determined in this case is whether the prosecution has been able to prove the date and time when the appellant had allegedly raped the victim. The said aspect is being examined

hereunder.

58) On a conjoint reading of the evidence of the PWs, it is noted that the prosecution has failed to prove the date and time when the victim was allegedly raped by the appellant, which is one of the vital aspects of the matter. In this regard, having examined the evidence of the PWs carefully, the Court is of the view that the approximate date and time when the appellant had committed penetrative sexual assault upon the victim is not clear because the PW nos. 1 to 4 had all given different dates of the offence. In this case no evidence was led to throw light on the time when the sexual assault upon the minor victim 'Z' had taken place.

59) From the evidence of the PWs, the Court has observed as follows:-

- a. The prosecution had examined the victim 'Z' as PW-1 before the Trial Court on 27.08.2018 and her evidence was recorded on the same date. The PW-1 had stated in her examination-in-chief that her mother left the matrimonial home 2 years back. 'A', her elder sister got married 4/5 days after her mother left home. Thereafter, she was raped by her father at Bangti. Then she left for Jorhat with the appellant, stayed at house of paternal aunt for 30 days. Then for next two months they lived in a rented house in Jorhat where she suffered rape. After three months of staying at Jorhat, they returned at Bangti, where she was not raped. Thus, although the learned Trial Court had not given any finding regarding date and time of sexual assault, but from the evidence of 'Z', the victim/PW-1), it appears that she had suffered sexual assault possibly during the month of August- September, 2016 at Bangti.

As the appellant was not charged for committing any offence whatsoever at Jorhat, we refrain from any discussions thereon, but it can be presumed that the victim had suffered sexual assault at Jorhat sometime between October- November, 2016.

b. The PW-2 was examined on 07.09.2018. Contrary to the evidence of 'Z' (PW-1), her maternal uncle i.e. PW-2 had stated that 'Y', the mother of 'Z' had left her matrimonial home 6 (six) years back. 'A', the elder daughter of 'Y' had got married 6 years back. Thus, as per the evidence of PW-2, 'Y' had left her matrimonial home in August-September, 2012 and during that period 'A' got married. PW-2 had stated in his examination-in-chief that 4/5 months back when he was in the house of his father-in-law, 'Z' had called him and informed that the appellant was harassing her sexually. This would make the period of assault on or about the month of April- May, 2018. Thus, if PW-2 is to be believed, then 'Z' (victim) was being raped by the appellant over a period of 5¹/₂ years since September, 2012 till about April-May, 2018, which is not the case of the prosecution. Moreover, the medical report (Ext.2) does not support the allegations that the 11 year old victim was habitually assaulted sexually. This piece of evidence by PW-2 is also not supported by the victim (PW-1).

c. The informant i.e. PW-4 had stated in her cross-examination that after the marriage of 'A', 'Z' had gone to the matrimonial house of 'A', but she did not know that for how many days she had stayed there. The I.O. did not make any effort to investigate this aspect of

the matter, which is vital because the PW-1 categorically says that she was taken to Jorhat by the appellant 2 (two) days after marriage of 'A'.

- d. The victim 'Z' (PW-1) had stated that 2 (two) days after 'A' her elder sister got married her father had taken her to Jorhat, where she had resided with her *pehi* (father's sister) for 30 days and then she stayed with the appellant in a rental house. She had also stated that they had stayed in Jorhat for 3 months. She had also categorically stated in her cross-examination that the appellant did not sexually assault her after returning from Jorhat. Thus, as per the version of PW-1, assuming that 'Z' remained in the matrimonial home of 'A' only for 1 day, i.e. the possibility of sexual assault by the appellant on the victim could only be on 2 (two) days immediately after the marriage of 'A'.
- e. But if PW-4, the informant is to be believed, then after marriage of 'A', the victim 'Z' went with 'A' to her matrimonial home. But as per PW-1, she had left with appellant for Jorhat after 2 (two) days of marriage of 'A', then the statement of the PW-4 to the effect that before leaving Bangti for Jorhat, 'Z' had informed her over phone that she was sexually assaulted by the appellant cannot be believed at all.
- f. The PW-2 and 3 are hearsay witnesses, who heard from the victim that she was allegedly sexually assaulted by the appellant. Thus, when the version of the complainant and the victim are unreliable in so far as the alleged date when the victim 'Z' was raped, the evidence of hearsay witnesses becomes equally

unreliable.

- g. In the *ejahar* (Ext.1), the complainant i.e. PW-4 had stated that the appellant had been regularly committing rape of her 11 year old daughter regularly since last 6 (six) months. Moreover, from the Medical report (Ext.2), it could not be shown that the victim was habituated to sexual intercourse regularly. Therefore, in light of the evidence of PW-1 that she was not raped after coming from Jorhat, the contents of the FIR is found unreliable.
- h. The Lady Medical Officer of FAAMCH, Barpeta was examined as PW-5 in the Court on 03.10.2018. She had stated in her examination-in-chief that history of sexual assault by victim's father was 1 week before. Though she had not stated where history of sexual assault was recorded, but it can be presumed that she was referring to her medical report (Ext.2) because the same is referred in its contents. As per the entry made in Ext.2, the victim was examined on 24.04.2018 at 11.40 AM at FAAMCH, Barpeta. But then the entry regarding history of sexual assault as made in Ext.2 cannot be believed because the victim (PW-1) had stated that after coming from Jorhat the appellant did not commit sexual assault on her.

60) It is once again reiterated that the appellant was not charged for raping the victim at Jorhat. Therefore, as per charges explained to the appellant, he was accused of allegedly raping the victim at Bangti.

61) Thus, the inevitable conclusion from the discussions above is that the prosecution has miserably failed to establish the place, date and time when

the appellant had allegedly raped his minor daughter.

Whether the discussion made by the learned Trial Court regarding alleged rape committed on his minor daughter by the appellant has prejudiced the appellant:

62) The PW-2 and PW-4 i.e. maternal uncle and mother of the victim had stated that they were informed by the victim 'Z' that she was raped by the appellant at Jorhat. Nonetheless, the PW-4 had not mentioned about it in the FIR (Ext.1). Therefore, the only conclusion that can be inferred is that after lodging of the FIR, the PW-4 and her family members, i.e. PW-2 and PW-3 had added the allegation of rape of 'Z' by the appellant at Jorhat. It has already been reiterated that the learned Trial Court did not explain charges to the appellant of having raped 'Z' at Jorhat.

63) Apparently, when the appellant had expelled the PW-4 from his matrimonial home, there is no material available in the case record to enable the Court to presume that the informant i.e. PW-4 was in good terms with the appellant for which the offence of rape committed at Jorhat was not disclosed in the FIR.

64) It is noted that the learned Trial Court had referred to alleged rape of the victim by the appellant at Jorhat at several paragraphs of the impugned judgment. Thus, it appears that the learned Trial Court was prejudiced with the allegation of the appellant having raped 'Z' at Jorhat for which the appellant was not charged. From question nos. 7, 11, 13, 17, put to the appellant in his examination under section 313 Cr.P.C., it appears that his alleged sexual assault upon the victim at Jorhat was taken as incriminating evidence that was available against the appellant.

65) In this case the learned Trial Court had (i) confronted the

appellant with incriminating materials relating to alleged offence of rape committed at Jorhat in form of question nos. 7, 11, 13, 17, put to the appellant in his examination under section 313 Cr.P.C., and (ii) discussion has been made in several paragraphs of the judgment regarding alleged rape committed by the appellant on 'Z', his minor daughter at Jorhat. However, as the appellant was not charged for such offence, the Court is inclined to hold that that the appellant has been seriously prejudiced for non-framing of charges regarding sexual assault by the appellant on 'Z' at Jorhat.

Decision:

66) From the discussions above, it is seen that none of the PWs examined by the prosecution have supported each other regarding the (i) place, (ii) date and (iii) time when 'Z' was raped by the appellant.

67) As elaborately discussed above, before leaving for Jorhat, the victim and the appellant were together at Bangti for not more than 2 days after marriage of the 'A' because as per PW-4, after marriage of 'A', she had accompanied 'A' to her matrimonial home and as per evidence of PW-1, she had left with the appellant for Jorhat after 2 days of marriage of 'A' and after returning from Jorhat, she was not sexually assaulted. The PW-1 did not specifically depose to the effect that on and from the night of marriage of 'A', her father started raping her till they left for Jorhat.

68) It is known to all that on 15th August every year, Independence day is celebrated. Moreover, generally on 17th September, with some exceptions in some years, Biswakarma Puja is celebrated throughout Assam. Generally during September- October each year Durga Puja is widely celebrated. Therefore, notwithstanding that the victim was a minor or that the PW nos. 1 to

4 are not literate, yet it was not a very difficult task for the I.O. to narrow down the dates on which the victim was sexually assaulted by the appellant. Thus, when the evidence of PWs do not converge on a particular date of commission of offence, and when medical evidence vide Ext.2 does not lead to an only conclusion that the 11 year old minor victim was subjected to regular sexual assault, owing to lack of clinching evidence beyond reasonable doubt, the Court is constrained to hold that the conviction of the appellant for commission of the offence of raping his minor daughter cannot be sustained on the basis of vague allegation that the appellant was regularly raping 'Z' forcefully.

69) Moreover, the Lady Medical Officer (PW-5) had neither stated in her medical report (Ext.2) that even if a minor girl of 11 years was subjected to regular rape, her private parts would bear no evidence of rape, nor she had deposed so in her oral evidence. Thus, medical report (Ext.2) is not found to support allegations of regular rape of the victim by the appellant.

70) Thus, in light of the foregoing discussions, the Court is constrained to hold that the allegation of commission of rape of 'Z' by the appellant is found to be disproved. Accordingly, the point of determination is answered in the negative and in favour of the appellant by holding that the conviction of the appellant is not sustainable on facts and in law. Resultantly, the appellant is entitled to the benefit of doubt and his conviction for commission of offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 is hereby set aside and quashed.

71) Accordingly, the Court is inclined to pass the following order:-

- i. By giving the appellant the benefit of doubt, the judgment and sentence dated 30.01.2019 passed by the learned Additional Sessions

Judge, Bajali, Pathsala in Special (POCSO) Case No. 4/2018, thereby convicting the appellant for commission of offence punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012, is hereby set aside and quashed, and he is acquitted.

ii. The appellant 'X' (name withheld), is liable to be released forthwith, if not required in any other case.

iii. The Court is inclined to impose a condition that the concerned Jail authorities where the appellant is currently lodged shall obtain an undertaking from the appellant that he shall surrender before the authorities of the said jail, if so required by virtue of any judicial order in appeal, if any, preferred against this judgment and order.

72) Accordingly, this appeal is allowed on contest.

73) Let the LCR be returned back.

74) The Registry shall communicate this order to the appellant, through the Superintendent of the concerned jail where he is lodged.

75) We appreciate the strenuous effort made by the learned Amicus Curiae. He shall be entitled to his usual fees from the Gauhati High Court Legal Services Committee.

JUDGE

JUDGE

Comparing Assistant