



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

Principal Seat

Criminal Appeal No. 244/2023.

Sarbat Ali,
S/o Inchan Ali,
Village – Katala Pathar,
P.O. – Chapla Pathar, P.S. – Bhabanipur,
District – Barpeta, Assam. PIN – 781352,

.....Appellant.

VERSUS

1. The State of Assam,
Represented by the Public Prosecutor, Assam.
2. Innas Ali,
S/o Late Alim Uddin,
Village – Rajakhat, P.S. – Barpeta,
District – Barpeta, Assam.

.....Respondents.

BEFORE

HON'BLE MR. JUSTICE ROBIN PHUKAN

Appearance:-

For the Appellant	:-	Mr. S.S.S. Rahman.
For the State Respondent	:-	Mr. R.J. Barua, Addl. P.P.
For the Respondent No. 2	:-	Mr. R.S. Sadial.

Date of Hearing :- 12.03.2024.
Date of Judgment & Order :- 17.05.2024.

JUDGMENT & ORDER (CAV)

Heard Mr. S.S.S. Rahman, learned counsel for the appellant; Mr. R.J. Barua, learned Additional Public Prosecutor for the State respondent No. 1; and Mr. R.S. Sadial, learned counsel for the respondent No. 2.

2. In this appeal, under Section 374(2) of the Criminal Procedure Code ('Cr.P.C.', for short), the appellant has put to challenge the correctness or otherwise of the judgment and order, dated 14.06.2023, passed by the learned Special Judge (POCSO), Bajali Pathsala ('learned trial court', for short), in Special (P) Case No. 12/2019, under Sections 342/366 of the Indian Penal Code ('IPC', for short) and read with Section 4 of the Protection of Children from Sexual Offences Act ('POCSO Act', for short).

3. It is to be noted here that vide judgment and order dated 14.06.2023, the learned trial court has convicted the appellant under Section 4 of the POCSO Act and sentenced him to suffer rigorous imprisonment for 7 (seven) years and to pay a fine of Rs. 5,000/- with default stipulation and further convicted him under Section 342 of the IPC and sentenced him to undergo simple imprisonment for 1 (one) year and to pay a fine of Rs. 1,000/- with default stipulation and also convicted him under Section 366 of the IPC to undergo imprisonment for 7 (seven) years and to pay a fine of Rs. 5,000/- with default stipulation.

4. The background facts, leading to filing of this appeal, are adumbrated herein below:-

“On 18.05.2019, Smti ‘X’ (name withheld), aged 14 years, went to house of her uncle, namely, Jamser Ali and when she was returning home, at about 6:30 pm, one Sarbat Ali, son of Inchan Ali of Katala Pathar, kidnapped her and confined her in an unknown place. On 19.05.2019, on receipt of an ejahar to that effect from one Innas Ali, the father of the victim, the Officer In-Charge (‘O.C.’, for short) of Barpeta Police Station (‘P.S.’, for short) registered a case, being Barpeta P.S. Case No. 1071/2019, under Section 365 of the IPC and entrusted Sub-Inspector Dibya Borgiyari, the In-Charge of Bhawanipur Police Out Post to investigate the case. Then the Investigating Officer (‘I.O.’, for short) visited the place of occurrence, examined the witnesses and drawn up sketch map of the place of occurrence. He had also recovered the victim girl from the house of the accused and got her examined by Doctor and collected the report and also got her statement under Section 164 of the Cr.P.C. recorded in the court and then arrested the accused and forwarded him to the court. He had also seized one School Certificate of the victim girl, preparing seizure list. Then on completion of the investigation, he laid Charge Sheet (‘C.S.’, for short), being C.S. No. 971/2019, against the appellant to stand trial in the court, under Section 365 of the IPC read with Section 4 of the POCSO Act. Thereafter, the appellant entered appearance before the learned trial court and then the learned trial court, having complied with the provision of Section 207 of the Cr.P.C. and after hearing both the sides, had framed charge against the appellant, under Sections 342/366 of the IPC read with Section 4 of the POCSO Act and on being read over and

explained the same to the appellant, he pleaded not guilty and claimed to be tried. Then in order to bring home the charges, against the appellant, the prosecution side has examined as many as 7 witnesses, including the I.O and the Medical Officer ('M.O.', for short) and also exhibited as many as 6 documents and one School Certificate as Material Exhibit-1 and thereafter, the learned trial court had examined the appellant under Section 313 of the Cr.P.C. Then hearing argument of learned counsel for both the sides, the learned trial court had convicted the appellant under Sections 342/366 of the IPC read with Section 4 of the POCSO Act and sentenced him as aforesaid."

5. Being aggrieved, the appellant has approached this Court by filing the present appeal for setting aside the impugned judgment and order dated 14.06.2023, passed by the learned Special Judge (POCSO), Bajali Pathsala, in Special (P) Case No. 12/2019, under Sections 342/366 of the IPC read with Section 4 of the POCSO Act on the following grounds:-

- (i) That, the learned trial court has misread the evidence on record and arrived at an erroneous finding that offence under Section 4 of the POCSO Act is made out;
- (ii) That, the learned trial court has failed to apply its judicial mind as there is material contradiction in the evidence of the victim with other witnesses;
- (iii) That, the medical evidence has not supported the prosecution version, as the Forensic Science Laboratory, FSL for short, report reveals that no sperm was found in the

sample and also the medical evidence reveals no sign of sexual intercourse and no injury was found on the body of the victim and on her private parts; and

- (iv) That, the learned trial court did not take into account that evidence of most of the witnesses, is hearsay and nobody has seen the occurrence and as such, conviction and sentence of the appellant under Section 4 of the POCSO Act is not sustainable.

6. Mr. Rahman, learned counsel for the appellant, submits that there is no eye witness to the occurrence and that the version of the victim girl is not at all believable as the medical evidence has not supported her version and that the evidence of other prosecution witnesses are hearsay. Mr. Rahman further submits that there was quarrel between the informant and the appellant and that the appellant is the son-in-law, who got married with the elder sister of the victim and the elder sister of the victim returned to her parental house and as such the informant had deposed inimically towards the accused. Therefore, Mr. Rahman has contention to allow this appeal. Mr. Rahman also referred following case law in support of his submission:-

- (i) **Gautam Chandrakant Khairnar v. State of Maharashtra & Anr. [Criminal Appeal No.508 of 2015, decided on 06.05.2022].**
- (ii) **Sri Ranjit Hazarika v. State of Assam & Anr. [Crl.A. No.55/2015, decided on 08.01.2018].**

(iii) **Umesh Baraik v. State of Assam [Crl.A.(J) No.2/2020, decided on 07.11.2023].**

7. On the other hand, Mr. Barua, learned Additional Public Prosecutor has supported the impugned judgment and order and submits that the prosecution side has succeeded in establishing the case against the appellant beyond all reasonable doubt. Mr. Barua further submits that the evidence of the victim girl is throughout consistent and she is found to be trustworthy and that at the relevant point of time the victim girl has not completed 18 years and to establish her age, her School Certificate was produced and exhibited in the court and that there is no infirmity in the impugned judgment and order and therefore, it is contended to dismiss the appeal.

8. Whereas, Mr. Sadial, learned counsel for the respondent No. 2 also subscribe the submission of Mr. Barua, learned Additional Public Prosecutor and submits that the learned trial court has rightly convicted the appellant under Sections 342/366 of the IPC read with Section 4 of the POCSO Act and therefore, contended to affirm the impugned judgment and order.

9. Having heard the submissions of learned counsel for the parties, I have carefully gone through the petition as well as the documents placed on record and also perused the record received from the learned trial court.

10. In order to establish the charge under any penal provision of the POCSO Act, it is the duty of the prosecution side, first, to establish beyond reasonable doubt that the victim is a 'child' as defined in Section

2(d) of the POCSO Act. It is to be noted here that Section 2(d) of the POCSO Act defined 'child' as a person, who has not completed 18 years. Here in this case to establish the age of the victim, the I.O. has seized one School Transfer/Leaving Certificate issued by the Headmaster of Dhumarkur Anchalik Girl's M.E. School (Rajakhat), which is exhibited by the father of the victim girl (PW1) as Material Exhibit-1.

11. The evidence of the I.O. (PW6) reveals that he has seized one School Certificate-Material Exhibit-1, of the victim girl, vide seizure list - Exhibit-4. And from a cursory perusal of the same, it appears that the date of birth of the victim, as per School Admission Register is 16.02.2005. The evidence of the father of the victim girl (PW1), who is also the informant of this case, reveals that at the material point of time the age of his daughter was 14 years and she was studying in school and said evidence has not been disputed by the appellant side. However, it is elicited in his cross-examination that in the Material Exhibit-1 that there is not counter signature of the authority, but, the same bears the seal and signature of the Headmaster of the school, dated 17.05.2019. The victim girl (PW2) also in her evidence has categorically stated that she was 14 years old and her date of birth is 16.02.2005, and the said piece of evidence has also not been disputed by the appellant side, in the cross-examination. PW3 is Md. Saiful Ali, the brother of the victim girl and he also testified that at the time of occurrence the age of his sister was about 15/16 years.

12. It is also to be noted here that the prosecution side has examined the Doctor, namely, Mamata Devi as PW-7, who had examined the victim girl on 20.05.2019, at Fakhruddin Ali Ahmed Medical College

and Hospital, Barpeta ('FAAMCH', for short) and on examination she found the following :-

"Physical Examination :- Identification mark (1) A pin head size black mole at left angle of mouth, (2) A pin head size black mole 2 c.m. below right ear,

Height - 152 cm,

Weight - 43 kg,

Chest girth at nipple level - 73 cm, abdominal girth at navel level - 62 cm, General built & appearance - average, Total teeth - 28, permanent - 28, temporary - Nil, Hairs : Axillary/ body/ : 0.5-1 c.m in length, black in colour.

Breast - Hemispherical spherical in shape, soft in consistency, nipple and areola brown in colour. On gentle squeezing discharge absent.

Puberty (as told by the individual) - 11 years.

Menstruation (as told by the individual) - Regular, 30 days cycle.

L.M.P. (as told by the individual) - 10/05/2019

Mental condition - No abnormality detected.

Gait - Normal

Intelligence - Average

Wearing garments & any suspected stains present:- Intact, Stain absent.

Bodily Injuries :- Not detected at the time of examination.

Genital Examination :-

Pubic hairs :- 0.5-1 c.m in length, black in colour.

Vulva (Labia majora & minora) :- Labia majora Exposed in lithotomy position.

Hymen :- Old tear at 4 'o' clock position.

Vagina :- Healthy

Cervix & Uterus :- Healthy, uterus not Palpable per abdominally.

Fourchette & Perineum :- Healthy.

Vaginal Swab collected/ not collected from posterior fornix.

Result of vaginal swab smear examination :- Microscopic examination of vaginal Smears reveal no spermatozoa.

X-Ray Investigation advised :- Wrist Jt./Elbow Jt. /Shoulder Jt./Pelvis/other.

Result of X-Investigation :- Plate No. MLC-82, dated 21/05/19.

Wrist Joint :- Epiphyseal union not completed.

Elbow joint :- Epiphyseal union completed.

Shoulder joint :- Epiphyseal union not completed.

Pelvis - Epiphyseal around iliac crest and ischial tuberosity not completed."

13. On the basis of physical and dental examination, laboratory and radiological investigation done on the victim girl, PW7 has opined that the age of the victim girl is above 14 years and below 16 years and her report is also consistent with her version. It is also to be noted here that the Doctor has found 28 numbers of teeth of the victim girl and all of them were permanent.

14. While dealing with the issue of determination of age of the victim in the case of **Vijay vs. State of M.P.** reported in **(2010) 8 SCC 191**, Hon'ble Supreme Court has held as under:-

Determination of age

27. As per *Modi's Medical Jurisprudence and Toxicology*, 23rd Edn., the age of a person can be determined by examining the teeth (dental age), height, weight, general appearance (minor signs) i.e. secondary sex characters, ossification of bones and producing the birth and death/school registers, etc. However, for determining the controversy involved in the present case, only a few of them are relevant.

Teeth (dental age)

28. So far as permanent teeth are concerned, eruption generally takes place between 6-8 years. The following table shows the average age of eruption of the permanent teeth:

Central incisors	—	6th to 8th year
Lateral incisors	—	7th to 9th year
Canines	—	11th to 12th year
Second molars	—	12th to 14th year
Third molars or wisdom teeth	—	17th to 25th year

In total, there are 32 teeth on full eruption of permanent teeth.

Secondary sex characters

29. The growth of hair appears first on the pubis and then in the axillae (armpits). In the adolescent stage, the development of the pubic hair in both sexes follows the following stages:

(a) One of the first signs of the beginning of puberty is chiefly on the base of penis or along labia, when there are few long slightly pigmented and curled or straight downy hair;

(b) The hair is coarser, darker and more curled, and spread sparsely over the junction of pubis;

(c) More or less like an adult, but only a smaller area is covered, no hair on the medial surface of thighs.

30. The development of the breasts in girls commences from 13 to 14 years of age; however, it is liable to be affected by loose habits and social environments. During adolescence, the hormone flux acts and the breasts develop through the following stages:

(i) Breasts and papilla are elevated as a small mound, and there is enlargement of areolar diameter.

(ii) More elevation and enlargement of breast and areola, but their contours are not separate.

(iii) Areola and papilla project over the level of the breast.

(iv) Adult stage — only the papilla projects and the areola merges with the general contour of the breast.

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34. The trial court as well as the High Court examined the issue involved herein very minutely. Dr. Rupa Lalwani (PW 3), who had examined the prosecutrix on 7-12-1988, has stated that in the examination she found that there were in all 28 teeth in both the jaws; her breast had developed a little; the armpit hair was in its initial stage; but there were pubic hair present around her vagina. On the basis of this, she opined that at the relevant time, the prosecutrix was aged between 12 and 14 years. As the statement of Dr. Rupa Lalwani (PW 3) makes it clear that the prosecutrix Asha @ Gopi had very little developed breast and the growth of her armpit hair was at its initial/first stage, the Court believed that she was below 16 years of age.

15. Now, adverting to the facts herein this case, I find that not only the evidence of PW1; PW2; & PW3, but also the School Certificate and the medical evidence, along with the medical report (Exhibit-6) goes a long way to establish beyond reasonable doubt that at the relevant point of time the victim girl has not completed 18 years. Her age was above 14 years and below 16 years. It is a fact that the School Certificate-Material Exhibit-1 was not proved by examining the issuing authority. Even discarding the said piece of evidence, the evidence of the Doctor and the Exhibit-6 also found to be sufficient to establish that the age of the victim, at the material time of occurrence was above 14 years and below 16 years, on the basis of physical and dental examination, laboratory and radiological investigation done on the victim girl. And such finding is acceptable in view of the decision of Hon'ble Supreme Court in **Vijay** (supra).

16. That, the evidence of the victim girl also reveals that the occurrence took place at about 6 pm on one day about 9 months back and at the relevant point of time she was returning home along with her niece, from her uncle's house, situated at 5-6 houses away from her house and then one Sarbat Ali forcefully taken her away in his bike and

took her to Belana, Maina Patti and kept her confined in his rented house, by locking the door from outside and at that time it was about 9 pm and thereafter, he went away to his house and again he returned to his rented house at about 2 am and committed rape upon her for three times. Her evidence also reveals that except her and the accused, no one was present in that room. Thereafter, on the next day, the accused took her to his house, situated at Katala Pathar and then her father and brother along with police recovered her and police sent her for medical examination to FAAMCH and also got her statement recorded by the Magistrate and Exhibit-1 is the said statement given by her before the Magistrate.

17. The statement of the victim, recorded under Section 164 of the Cr.P.C. (Exhibit-1) is also consistent with her version and lend support to her evidence, wherein she has categorically stated that on 18.05.2019, at about 6:30 pm, while she was returning home, then the accused, who happens to be her brother-in-law, forcefully picked her in his motor cycle and taken her to Belana and kept confined in his rented house for one night and during that time, he committed forceful sexual intercourse with her on three occasions and on the next day he took her to his own house from where police recovered her.

18. The appellant side has cross-examined her at length, but probative value could not be demolished in her cross-examination. It is, however, elicited that she did not raise hue and cry while accused committed rape upon her. It is also elicited that as her father and mother are illiterate person, her brother took her to the school for admission.

19. PW1, who is the father of the victim girl and the informant of this case and PW3, the brother of the victim girl, namely, Md. Saiful Ali, also lend corroboration to the version of the victim that about 8 months ago, at about 6 pm, the appellant had kidnapped the victim by lifting her in a motor cycle while she was returning home from the house of her uncle and the victim girl was recovered from the house of the accused with the help of police. From the cross-examination of these 2 witnesses also, the appellant side could not elicit anything tangible to discredit their evidence.

20. PW4, Md. Rafikul Ali, is a friend of the brother of the victim girl. His evidence reveals that about 2 years back, Md. Saiful Ali informed him over phone that his younger sister is taken away by the accused in his motor cycle and then they searched the accused, but could not trace him out and on the next day, police recovered her from the house of the accused. Nothing tangible could be elicited in cross-examination of this witness also.

21. The PW5, Safiya Khatun, is a neighbour of the informant and her evidence reveals that about 1 year back, at about 7 pm, she saw the accused lifting the victim in his motor cycle and thereafter, the mother of the victim girl came to her house in search of the victim, and later on, she came to know that victim was recovered from the house of the accused. She denied that she has deposed falsely in her deposition.

22. PW6 is the I.O., who has investigated the case and his evidence reveals that having received the FIR from the informant on 19.05.2019, at Bhawanipur Police Outpost, he forwarded the same to the O.C. of Barpeta P.S. for registering a case and upon the said FIR, Barpeta P.S.

Case No. 1071/2019, under Section 365 of the IPC has been registered and he was entrusted to carry out the investigation. Thereafter, he visited the place of occurrence, examined the witnesses, prepared sketch map and thereafter, on 19.05.2019, he had recovered the victim girl and released her in the custody of her guardian. But, he could not found out the accused. Thereafter, on 20.05.2019, he got the statement of the victim girl recorded and sent her for medical examination and thereafter, on 21.05.2019, got her statement recorded under Section 164 of the Cr.P.C., in the court. Then he had seized one School Certificate of the victim girl, who stated to him that her age is 14 years and thereafter, he had apprehended the accused on 21.05.2019, from a rice mill at Belana and forwarded him to the court and thereafter, he made a prayer to the court for adding Section 4 of the POCSO Act and then he collected the medical examination report of the victim girl and after completion of the investigation, he submitted charge sheet (exhibit-5) against the accused to stand trial in the court, under Section 365 of the IPC read with Section 4 of the POCSO Act. Nothing tangible could be elicited in the cross-examination of this witness also.

23. Thus, the evidence of the victim goes a long way to establish beyond all reasonable doubt that she was raped by the accused in his rented house at Belana on the night of 19.05.2019 on three occasions. It is a fact that the Doctor, who has examined the victim, did not find any evidence of recent sexual intercourse and mark of violence on her person, yet, the same would not cast any doubt about the veracity of her version, as held by Hon'ble Supreme Court, in the case of **Gurcharan**

Singh v. State of Haryana reported in **(1972) 2 SCC 749**, wherein it has been held as under:-

"The absence of injury or mark of violence on the private part on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on the part of the prosecutrix. Further absence of violence or stiff resistance in the present case may as well suggest helpless surrender to the inevitable due to sheer timidity. In any event, her consent would not take the case out of the definition of rape."

24. Again in the case of **Devinder Singh v. State of H.P. reported in (2003) 11 SCC 488**, Hon'ble Supreme Court took into consideration the relevant evidence wherein rape was alleged to have been committed by five persons. No injury was found on the body of the prosecutrix. There was no matting on the pubic hair with discharge and no injury was found on the genital areas. However, it was found that the prosecutrix was used to sexual intercourse. Hon'ble Supreme Court further held that the fact that no injury was found on her body only goes to show that she did not put up resistance.

25. It is also a fact that here in this case there is no eye witness to the occurrence. But, the fact remains that the occurrence took place at mid night in the rented house of the accused and it is nobody's case that there was eye witness to the occurrence. But, the informant (PW1), the brother of the victim (PW3) and the friend of the brother of the victim (PW4) have categorically stated that the victim girl was recovered from the house of the accused and the neighbour (PW5) has also seen the

accused lifting the victim in his motor cycle. Thus, the evidence of the prosecution witnesses goes a long way to establish beyond all reasonable doubt that on 19.05.2019, the accused picked the victim girl from the road, and thereafter, confined her in his rented house at Belana and committed rape upon her.

26. Thus, all the ingredients of the offence under Section 4 of the POCSO Act and also under Sections 342/366 of the IPC stands established here in this case. Though Mr. Rahman, learned counsel for the appellant submits that the prosecution witnesses are not believable as the appellant is the son-in-law of the informant and the relationship between his elder daughter and the accused was not cordial and out of grudges the informant had lodged the case falsely against the appellant, yet, in view of the clear and cogent evidence, so brought on record by the prosecution side, and discussed herein above, this Court is unable to record concurrence with Mr. Rahman, learned counsel for the appellant. I have carefully gone through the case laws – (i) **Gautam Chandrakant Khairnar** (supra), (ii) **Sri Ranjit Hazarika** (supra) and (iii) **Umesh Baraik** (supra) and I find that the proposition of law laid down in the said cases are not applicable in all force to the facts and circumstances here in this case and as such, it would be of no assistance to the appellant.

27. The learned trial court, having convicted the appellant under Sections 342/366 of the IPC read with Section 4 of the POCSO Act and sentenced him as aforesaid, which appears to be justified and reasonable while the aggravating as well as mitigating circumstances are considered in the light of the given facts and circumstances on the record.

28. In the result, I find no merit in this petition and accordingly, the same stands **dismissed**. The parties have to bear their own cost.

29. Send down the record to the learned trial court immediately, along with a copy of the judgment and order.

JUDGE

Comparing Assistant