

GAHC010161302022



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

Case No. : Crl.A./197/2022

MD. NOOR HUSSAIN @ KARENG @ NUR HUSSAIN
S/O LATE MOHAR ALI, R/O MAKRIBORI, P.S.-KRISHANI, DIST-GOALPARA,
ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:Mainuddin Ahmed
MAINUDDIN AHMED
SO LT MONSER ALI
VILLAGE MAKRIBORI
PO - PS KRISHNAI
DIST GOALPARA
ASSAM 78312

Appearance:-

For the Appellant	:-	Mr. N. Uddin.
For the Respondent No. 1	:-	Mr. B. Sarma, Addl. P.P.
For the Respondent No. 2	:-	Ms. D. Saikia, Amicus Curie.
Date of Hearing	:-	05.03.2024.
Date of Judgment & Order	:-	14.05.2024.

**BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN**

JUDGMENT & ORDER (CAV)

Heard Mr. N. Uddin, learned counsel for the appellant; Mr. D. Sarma, learned Additional Public Prosecutor for the State respondent No. 1; and Ms. D. Saikia, learned Amicus Curie for the respondent No. 2.

2. In this appeal, under Section 374 of the Cr.P.C., the appellant has put to challenge the correctness or otherwise of the judgment and order dated 28.06.2022 & 29.06.2022, passed by the learned Special Judge, POCSO, Goalpara, in Special Case No. 13/2019.

3. It to be noted here that vide impugned judgment and order, dated 28.06.2022 & 29.06.2022, the learned trial court has convicted the appellant under Section 6 read with Section 18 of the POCSO Act and sentenced him to suffer rigorous imprisonment for 5 years and to pay a fine of Rs. 10,000/- with default stipulation and further convicted him under Section 10 of the POCSO Act and sentenced him to suffer rigorous imprisonment for 5 years and to pay a fine of Rs. 10,000/- with default stipulation and also convicted him under Section 341 of the IPC and to pay a fine of Rs. 500/- with default stipulation.

4. The background fact leading to filing of this appeal is adumbrated herein below:-

“On 05.09.2018, at about 4:00 pm, while the victim namely Shri ‘X’ (name withheld), aged 8 years, was enjoying football match in the field of Makribari L.P. School, one Noor Hussain, aged 20 years, forcefully took him near the

water tank situated behind the school and tied his hand and leg and subjected him to sexual harassment. Then the grandmother of the victim had witnessed the said occurrence and raised alarm and then the accused fled away from the scene. Thereafter, the victim reported the matter to his father and then his father lodged the FIR with the Officer In-Charge (O.C.) of Krishnai Police Station. Upon the said FIR, the O.C. had registered a case, being Krishnai P.S. Case No. 244/2018, under Section 341 of the IPC read with Sections 4/8 of the POCSO Act and endorsed Sub-Inspector (S.I.) Tugal Boro to the investigate the same. Thereafter, the Investigating Officer (I.O.) had visited the place of occurrence and examined the witnesses, prepared the sketch map (Exhibit-4) of the place of occurrence and got the victim examined by the Doctor and collected the report and also got his statement, under section 164 Cr.P.C., recorded in the court and thereafter, on completion of the investigation, he laid charge sheet, being charge sheet No. 07/2019, against the appellant, to stand trial in the court under Section 4/8 of the POCSO Act read with Section 341 of the IPC, by showing the appellant as absconder. Upon the said charge sheet, the learned trial court had taken cognizance of the offences i.e. under Section 4/8 of the POCSO Act with Section 341 of the IPC and issued summon to the accused/appellant. Upon his appearance, the learned trial court had complied with the provision of Section 207 Cr.P.C. Thereafter, hearing both the parties, had framed charges against the appellant under Section 341 of the IPC read with Sections 4/8 of the POCSO Act and on being read and explained over the same to the appellant, he pleaded not guilty and claimed to be tried.

The prosecution side, thereafter, had examined as many as 6 witnesses and also exhibited 5 documents, in order to establish the charges against the appellant and after closing the prosecution evidence the learned trial court

below had examined the appellant under Section 313 of the Cr.P.C. The appellant declined to adduce evidence in his defence. Thereafter, on 08.06.2022, the learned court below has altered the charges against the accused/appellant and framed charges under Section 6 read with Section 18 of the POCSO Act and also under Section 10 of the POCSO Act. Then on being read and explained over the same to the accused/appellant, he had pleaded not guilty. Though opportunity to recall the witnesses to examine and cross-examine them was afforded to the parties, they have denied the same. Thereafter, hearing arguments of both the parties, the learned trial court had convicted and sentenced the appellant as aforesaid.”

5. Being aggrieved, the appellants have approached this Court by filing the present appeal for setting aside and quash the impugned judgment and order on the following grounds:-

- (i) That, the learned trial court had ignored the serious contradictions and inconsistencies in the deposition of the prosecution witnesses and erroneously arrived at the finding of guilt of the appellant;
- (ii) That, the prosecution side has failed to establish the charges against the appellant beyond all reasonable doubt;
- (iii) That, the finding of the learned trial court is not based on the evidence on record rather it is based on surmise and conjecture, which resulted in miscarriage of justice;
- (iv) That, the learned trial court had failed to consider that the victim (PW2) is an interested witness and the evidence of rest of the witnesses are hearsay and as such, no conviction can be recorded upon the said evidence;
- (v) That, the prosecution side has failed to establish the age of the victim

boy by adducing any proof or evidence;

- (vi) That, the learned trial court had also failed to consider that the medical evidence had not supported the version of the victim (PW2), despite the learned trial court has convicted the appellant;
- (vii) That, as the age of the victim boy could not be established and as such it cannot be said that the charge of sexual assault upon the victim is established;
- (viii) That, despite several contradictions in the version of the PW3, the learned trial court had believed her evidence; and
- (ix) That, the learned court below had also failed to consider the statement of the accused appellant, recorded under Section 313 of the Cr.P.C.

6. Mr. Uddin, learned counsel for the appellant at the time of hearing, has canvassed following issues for consideration of this Court. *Firstly*, Mr. Uddin submits that the learned court below has not made any effort to determine the age of the victim boy, which is necessary to establish a charge under the POCSO Act. And as no birth certificate or no school certificate was produced and no ossification test was conducted, the age of the victim boy could not be said to have been established and as such, it cannot be said that he is a '*child*', as defined under Section 2(d) of the POCSO Act. *Secondly*, Mr. Uddin submits that there are material contradictions in the version of the prosecution witnesses and as such, their evidence cannot be relied upon to record conviction. *Thirdly*, Mr. Uddin submits that PW3 is claimed to be an eye witness of the occurrence, yet, in the cross-examination she had admitted having not seen the occurrence and as such, no reliance can be placed on the evidence of the PW3. *Fourthly*, Mr. Uddin submits that the medical evidence also not supporting the version of the victim boy. Under

the aforesaid facts and circumstances, Mr. Uddin submits that the prosecution side has failed to establish the charge beyond reasonable doubt and therefore, it is contended to allow the appeal, by setting aside the judgment & order dated 28.06.2022 & 29.06.2022. Mr. Uddin has referred the following case laws in support of his submission :-

- (i) **P. Yuvaprakash vs. State** Represented by the Inspector of Police, reported in **(2023) LiveLaw (SC) 538**;
- (ii) **Sujithkumar @ Sonaimuthu vs. State**, Represented by the Inspector of Police, **Criminal Appeal No. 394/2022** of Madras High Court; and
- (iii) **Gautam Biswas vs. State of Assam, Criminal Appeal No. 197/2021** of Gauhati High Court.

7. Per-contra, Mr. Sarma, learned Additional Public Prosecutor, has supported the impugned judgment & order dated 28.06.2022 & 29.06.2022, and submits that the evidence of the victim is throughout consistent and the same establishes the case beyond reasonable doubt and as such, no interference of the impugned judgment and order is warranted.

8. On the other hand, Ms. Saikia, learned Amicus Curie for the respondent No. 2 submits that the age of the victim is not disputed by the defence side and as such, the learned court below has arrived at the finding that the age of the victim boy was 8 years, at the relevant point of time. Ms. Saikia further submits that there is no contradiction in the version of the prosecution witnesses and the evidence of the victim is consistent throughout and PW-3 is the eye witness and she is the grandmother of the victim boy and she also corroborated the version of the victim and from the materials on record it is clearly established that there was an attempt

to commit the offence and as such, the learned court below had rightly invoked Section 18 of the POCSO Act. Ms. Saikia also submits that as the foundational fact of the case has already been established by cogent evidence, the statutory presumption, under Section 29 of the POCSO Act, is available here in this case and as such, the impugned judgements and orders require no interference of this court and therefore, it is contended to dismiss the appeal.

9. Having heard the submissions of learned counsel for both the parties, I have carefully gone through the petition as well as the documents placed on record and also perused the impugned judgment & order dated 28.06.2022 & 29.06.2022.

10. Here in this case, the prosecution side has examined the victim boy as PW-2. His evidence reveals that about a year back, on 05.09.2018, at about 4:00 pm, he went to enjoy the football match at Makribari L.P. School field and there he met one boy, namely, Kareng, who had asked him to accompany him by saying that he will give him a sum of Rs. 500/- and while he refused, the said boy had fastened his hands and legs by means of a shirt and then lifted and taken him near the water tank, situated behind the school and there he unfastened his pant and attempted to commit bad act with him and then his grandmother had witnessed the same and then the accused fled away leaving him there and then he reported the matter to his father and his father had lodged the FIR and thereafter, police got him examined by the Doctor and also got his statement- Exhibit – 2 recorded in the court.

11. Nothing tangible could be elicited in cross-examination of the victim by the appellant side so as to discredit his version. He also categorically denied the defence suggestion that no bad act was committed upon him. But, it appears that his statement, recorded under Section 164 of the Cr.P.C. (Exhibit-2) is not

consistent with his evidence, where he had stated that the accused had committed bad act with him. And what this bad act means was neither clarified by the prosecution side nor by the appellant side.

12. Besides, the medical evidence also has not supported the version of the victim. The prosecution side has examined Dr. Rezza Sofiur Rahman as PW-5 who had examined the victim. His evidence reveals that on 06.09.2018, he examined the victim boy aged 8 years, on police requisition and he found no injury on his person and also noticed no abnormality, and accordingly, he submitted the report, Exhibit – 3, which also appears to be consistent with his version.

13. PW-1 is the father of the victim, who had lodged the FIR, Exhibit – 1, with the O.C. of Krishnai P.S. Admittedly, he is not an eye witnesses to the occurrence and he came to know about the occurrence only from his son, PW-2. His evidence also reveals that on 05.09.2018, his son went to enjoy a football match at Makribari L.P. School, then one boy namely, Kareng, had lift his son from the school field, near to the water tank and there he subjected his son to sexual harassment and committed anal sex and when the grandmother of the victim had witnessed the occurrence, then the accused immediately fled away from the scene. Thereafter, the victim reported the matter to him. Though the appellant side cross-examined this witness also, nothing tangible could be elicited from his cross-examination. The FIR-Exhibit-1 is also consistent with his evidence.

14. But, PW-3, Smti. Saimona Bibi, who is the grandmother of the victim boy, also not supported the version of the P.W.1. Her evidence reveals that about 1 year back, in the evening, she went to fetch the cows and then she noticed the accused removing his cloths and getting on the person of the victim and then she raised

alarm and thereafter, he fled way from the scene. Her evidence also reveals that the accused, while getting on the body of the victim, had unzipped the chain of his pant. In cross-examination of this witness by the appellant side had elicited that she had not witnessed doing any bad act, but, as she had seen the accused atop the person of the victim, she perceived that the accused wanted to commit the bad act.

15. PW-4, Smti. Morzina Khatoon @ Bibi is the mother of the victim boy. She is not the eye witness to the occurrence. Her evidence reveals that her son reported her that he went to enjoy a football match at Makribari L.P. School on 05.09.2018, and there the accused had lifted and taken him near to the water tank, situated behind the school and there he had fastened her son's mouth and hand by his shirt and thereafter, he committed the bad act upon the victim and when his grandmother witnessed the same, the accused fled away from the scene and then the victim reported her about the incident.

16. PW-6, is the I.O. namely, Tugal Boro, who had investigated the case. His evidence reveals that during the course of the investigation, he visited the place of occurrence and examined the witnesses and drawn up the sketch map of the place of occurrence and after completion of the investigation he had submitted charge sheet, Exhibit -5, against the accused. It is elicited in his cross-examination that during investigation, he did not seize the cloths of the victim, by which he was gagged and kidnapped.

17. Thus, from the evidence of the prosecution witnesses, as discussed herein above, reveals that the prosecution side has not produced any documentary evidence to establish the age of the victim boy. But, the PW-1, the father of the

victim boy, testified that at the time of the occurrence, his son was 8 years old and admittedly, this fact has not been disputed by the appellant side. The victim boy also in his evidence, before the court, testified that his age was 9 years at the time of deposition. In the FIR-Exhibit -1 and also in his evidence the complainant (PW1) has stated that at the time of the occurrence his son was 8 years old. The Doctor (PW5) has also testified that at the time of the occurrence, the age of the victim was 8 years. But, admittedly no ossification test was conducted here in this case, to ascertain the age of the victim. Mr. Uddin, learned counsel for the appellant has rightly pointed this out at the time of hearing and the decision of Hon'ble Supreme Court in **P. Yuvaprakash** (supra) and **Sujithkumar @ Sonaimuthu** (supra) also fortified the same. It is to be noted here that in the said decision age of the victims were not proved as per section 94(2) of the Juvenile Justice Act. Similar view is adopted in the case of **Gautam Biswas** (supra) also by a co-ordinate bench of this court.

18. Section 34(2) of the POCSO Act provides that - If any question arises in any proceeding before the Special Court, whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination. As indicated in sub section (1) of Section 34 of the POSCO Act, the age of the victim could be determined by following the procedure contemplated in Section 94 of JJ Act, 2015.

19. In the case of **Jarnail Singh vs. State of Haryana**, reported in **(2013) 7 SCC 263**, Hon'ble Supreme Court, while dealing with the issue of determination of age of a minor, has held that one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. Even though Rule 12 is strictly applicable only to determine the age

of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a 'child' who is a victim of crime for, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime.

20. Again in the case of **State of MP v. Anoop Singh** reported in **2015 7 SCC 773**, it has been held by Hon'ble Supreme Court that Rule 12(3) of the Juvenile Justice (Care & Protection of Children) Rules, 2007 is applicable to determination of age of rape victim.

21. It is to be noted here that Rule 12(3) (b) of the 2007 Rules, which reads as:

“12. Procedure to be followed in determination of age.—

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining:-

- (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
- (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
- (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) And only in the absence of either (i), (ii) or (iii) of clause (a)

above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

And, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

22. Whereas, Section 94 of Juvenile Justice Act, 2015 provides for presumption and determination of age.-

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age.”

2) In case, the Committee or the Board has reasonable grounds for

doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining-

- (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
- (ii) the birth certificate given by a corporation or a municipal authority or a panchayat;
- (iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

23. In the case in hand, admittedly the I.O. has not seized any of the documents mentioned in Sub-section 2(i) and (ii) of Section 94 of the Juvenile Justice Act, 2015. Of course, he got the victim examined by Doctor and collected the report. But, no ossification test was conducted to determine his age by the Doctor. However, the Doctor also stated that age of the victim was 8 years. But, on what basis he had arrived at such a finding is not placed on record. And no such attempt was also being made either by the prosecution side or by the appellant side. That being so, the basis of the Doctor in arriving at the finding that the age of the victim boy was 8 years, is based on assumption and

the same cannot take the place of proof.

24. But, the learned trial court had arrived at the finding that the victim is a '*child*' on the basis of the evidence of the P.W.1, the father of the victim and also upon the evidence of the victim and also upon P.W.5 and 6, which was not disputed by the defence side. However, the question remains, whether by not taking recourse to Sub-section 2(i) and (ii) of Section 94 of the Juvenile Justice Act, 2015, to establish the age of the victim, the prosecution can be said to have discharged its burden.

25. The answer is got to be emphatic no. It is trite that in criminal cases the burden of establishing the charge against the accused beyond all reasonable doubt is always upon the prosecution. In the instant case, having not produced any documentary evidence as well as medical evidence, such as ossification test report, as required under the law discussed herein above, merely, on the basis of the oral evidence of the victim and his father and P.W.5 and 6, arriving at a conclusion that the victim is a '*child*' appears to be fallacious and as such the finding of the learned trial court in this regard failed to withstand the legal scrutiny.

26. Further, it appears that there are contradictions in the versions of the prosecution witnesses and the same has already been discussed herein above. And the contradictions appear to be on material point and the same goes a long way to cast a reasonable doubt about the very foundation of the prosecution case and it demonstrated that the prosecution case is not at all reliable.

27. This court is not oblivious of the fact that a statutory presumption, under section 29 of the POCSO Act is available in favour of the prosecution. But, while there is material contradictions in the versions of the prosecution witnesses and the same cast reasonable doubt about establishing the very foundational fact, in respect of the charges framed against the appellant, this court is of the view that

said presumption is not available here in this case.

28. In the given facts and circumstances on the record, this court is of the considered opinion that the prosecution side has failed to bring home the charge under Section 6 read with Section 18 of the POCSO Act and under Section 10 of the POCSO Act and Section 341 of the IPC against the accused/appellant beyond all reasonable doubt and accordingly he is entitled to be acquitted of the said charges on benefit of doubt.

29. In the result, the appeal stands **allowed**. The impugned judgment and order dated 28.06.2022 & 29.06.2022, passed by the learned Special Judge, POCSO, Goalpara, in Special Case No. 13/2019 stands set aside and quashed, as the same failed to withstand the legal scrutiny. The appellant is acquitted on benefit of doubt. He shall be released from the jail hazoot, forthwith, if not warranted in any other case. Send down the record of the learned court below with a copy of this judgment and order. The parties have to bear their own costs.

30. The Registry shall pay to Ms. D. Saikia just remuneration, as per the notified fee structure, applicable to the Amicus Curiae.

JUDGE

Comparing Assistant