

GAHC010174052022



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

Case No. : CrI.A./14/2023

MANTU KUMAR
S/O RAMCHANDRA SAW,
R/O WARD NO. 6,
P.O.- TEKOBAR,
P.S.- KODERMA, CHANDEDIH, KODERMA, JHARKHAND- 825409.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY P.P., ASSAM.

2:NAMITA BORO
W/O GOBIND BORO
VILL.- NATUN BATABARI
P.O.- RANI
P.S.- PALASHBARI
DIST.- KAMRUP
ASSAM

Advocate for the Petitioner : MR H BETALA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT

03.04.2024

Heard Mr. P. Garodia, learned counsel for the appellant and Mr. B. Sarma,

learned Additional Public Prosecutor for the respondent State of Assam.

2. In this appeal, under Section 374(2) of the C.P.C., the appellant namely, Mantu Kumar, has challenged the correctness or otherwise of the judgment and order dated 01.07.2022, passed by the learned Additional Sessions Judge cum Special Judge (POCSO), Amingaon, Kamrup, in Special (P) Case No. 48/2019.

3. It is to be noted here that vide impugned judgment and order dated 01.07.2022, the learned Additional Sessions Judge cum Special Judge (POCSO), Amingaon, Kamrup, in Special (P) Case No. 48/2019, has convicted the appellant under Section 8 of the POCSO Act and sentenced him to suffer rigorous imprisonment for 5 years with a fine of Rs. 30,000/- with default stipulation.

4. The background fact leading to filing of this appeal is briefly stated as under:-

“On 20.07.2019, at about 11 am, the victim, Smti 'X' (name withheld), aged 16 years was alone in her house. Then the appellant entered into her house, situated at Natun Batabari, under Palashbari P.S., and touched her breast and gave her obscene gestures. But, the victim girl, somehow, manages to escape from there. Thereafter, the victim girl has reported the matter to her mother Namita Boro and then her mother had lodged the FIR with the In-Charge (I.C.) of Rani Outpost under Palashbari Police Station (P.S.). Upon the said FIR the Officer In-Charge (O/C) of Rani Police Out Post had recorded a GD Entry and forwarded the FIR to the O/C of Palashbari P.S. and upon the same, the O/C of Palashbari P.S. registered a case, being Palashbari P.S. Case No. 313/2019, under Section 448 of the IPC read with Section 8 of the POCSO Act and thereafter, carried out the investigation, which culminated in submission of Charge Sheet, against the appellant, to stand trial in the court, under Section 448 of the IPC read with Section 8 of the POCSO Act.

Thereafter, the learned court below had taken cognizance of the offences, under Section 448 of the IPC read with Section 8 of the POCSO Act. Then after hearing learned counsel for both the parties, the learned court below had framed charges, under Section 448 of the IPC read with Section 8 of the POCSO Act against the appellant and on being read and explained over the same to the appellant, he pleaded not guilty and claimed to be tried. The prosecution side, then, examined as many as 7 witnesses and exhibited 5 documents in support of the charges. After closing the prosecution evidence, the learned court below had examined the accused under Section 313 of the Cr.P.C. Thereafter, hearing arguments of learned counsel for both the parties, the learned court below, while acquitting the appellant of the charge under section 448 IPC, had convicted and sentenced him as aforesaid."

5. Being aggrieved, the petitioner has approached this Court by filing the present appeal for setting aside the impugned judgment and order dated 01.07.2022, on the following grounds :-

- (i) That, the learned court below has passed the impugned judgment and order on surmises, assumption and conjectures and the materials on record do not establish the guilty of the appellant, beyond all reasonable doubt;
- (ii) That, the learned court below has misread and misinterpreted the evidence on record and arrived at an erroneous decision;
- (iii) That, there is no credible as well as reliable evidence on record so as to sustain the conviction, under Section 8 of the POCSO Act;
- (iv) That, there is material contradiction in the version of the victim girl under Section 164 of the Cr.P.C. and her evidence before the court;
- (v) That, the victim girl was medically examined, but the medical report of

the victim girl was not produced and exhibited before the court, which raised doubt about the veracity of the prosecution version;

(vi) That, the learned court below has failed to appreciate the difference between chest and breast;

(vii) That, the prosecution side has failed to prove any motive or guilt intention on the part of the appellant; and

(viii) That, the learned court below has failed to appreciate the statement of the accused under Section 313 of the Cr.P.C., in its proper perspective.

6. Mr. Garodia, learned counsel for the appellant submits that the victim girl was examined by the learned court below as PW1, but there is material contradiction in her version under Section 164 of the Cr.P.C. and her evidence before the court. While in her statement under Section 164 of the Cr.P.C. she has stated that the appellant had touched her chest, in her evidence before the court the appellant has touched her breast. And according to him 'chest' and 'breast' is not the same thing. Mr. Garodia further submits that the prosecution side had failed to prove the guilt intention of the appellant and that there is material contradiction in the version of the prosecution witnesses and that the learned court below would not have taken resort to Section 29 of the POCSO Act, as the prosecution side has failed to discharge its burden. Lastly, Mr. Garodia submits that the learned court below ought to have imposed only minimum sentence, as the appellant has no criminal antecedents and there is no good ground to impose the maximum punishment. Therefore, it is contended to allow the petition.

7. Whereas, Mr. Sarma, learned Additional Public Prosecutor has supported the impugned judgment and order, and submits that the learned court below has rightly convicted the appellant and sentenced him. Mr. Sarma further submits that the 'chest' and the 'breast' of the victim are same and there is no material

contradiction in her evidence and she is all along consistent in her statement before the I.O. under section 161 Cr.P.C. and that in her statement under section 164 Cr.P.C. before the Magistrate and in her evidence before the learned court below. Mr. Sarma also submits that the evidence of the victim girl is sufficient to establish the prosecution case, in view of the judgment of Hon'ble Supreme Court, in the case of **State of Punjab vs. Gurmit Singh**, reported in **1996(2) SCC 384**, and therefore, Mr. Sharma has contended to dismiss the petition.

8. Having heard the submissions of learned counsel for both the parties, I have carefully gone through the memo of appeal as well as the documents placed on record and also perused the impugned judgment and order dated 01.07.2022, passed by the learned Additional Sessions Judge cum Special Judge (POCSO), Amingaon, Kamrup, and the record of Special (P) Case No. 48/2019.

9. That the evidence of the prosecution witnesses and the record of the learned court below, reveals that the occurrence took place on 20.07.2019, at about 11 am, in the house of the informant, situated at Natun Batabari, under Palashbari P.S. These facts are not disputed by the appellant. Further, it appears that while the occurrence took place on 20.07.2019, the FIR was lodged on the same day, at about 7 pm, by the informant, i.e. the mother of the victim girl, with the I/C of Rani Police Out Post, under Palashbari P.S. and upon the said FIR the O.C. of Rani Police Out Post had recorded a GD Entry and forwarded the same to the O/C of Palashbari P.S. and upon the same, the O/C of Palashbari P.S. registered a case, being Palashbari P.S. Case No. 313/2019, under Section 448 of the IPC read with Section 8 of the POCSO Act and as such, there seems to be no inordinate delay in lodging the FIR, so as to spell inveracity to the prosecution version.

10. It also appears that the prosecution side had examined the victim girl as PW-1. Her evidence reveals that the occurrence took place in the month of July, 2019,

at about 11 pm and at the relevant point of time she was alone in her house as her mother went to her neighbor's house and her father was in his working place at Arunachal Pradesh. Her evidence also reveals that then one '*ferriwala*' came to her house for selling some articles, but, she had sent him away. After five minutes the '*ferriwala*' came again and introduced himself as a student of Big Bazaar and told her that her father had own some gifts on some offer made at Big Bazar. Upon hearing the same she had opened the door and then the '*ferriwala*' was showing her the utensils which her father has own as gifts. While she was looking at the utensils, the '*ferriwala*' suddenly touched her 'breast', but, somehow she managed to escape. After 15 minutes, while her mother came back home, she reported the matter to her mother and her mother reported the same to victim's maternal uncles and other villagers. Thereafter, the villagers caught the '*ferriwala*' in a tempo stand and brought him back to the village field, where the victim identified him and there they came to know that his name is Mantu Kumar and thereafter, the mother of the victim girl has lodged the FIR with the P.S. and the police recorded her statement under Section 164 of the Cr.P.C.

11. The prosecution side has exhibited the statement of the victim girl recorded under Section 164 of the Cr.P.C. as Exhibit -1, and it appears that she has stated the same facts which she had deposed in the court, except that the accused had touched her 'chest'. The appellant has cross-examined the victim, but failed to elicit anything tangible to discredit her version and no material contradiction could be brought on record and proved.

12. The evidence of the victim – PW1, finds corroboration from the evidence of her mother namely, Nanita Boro (P.W.-2). Her evidence also reveals that while the victim was looking at the articles, the accused suddenly touched her breast. This witness also confirmed that the I.O. had seized the birth certificate of her daughter, material Exhibit - 'A' vide seizure list Exhibit-3. She also confirmed the ejahar,

Exhibit - 2. Nothing tangible could be elicited in her cross-examination by the appellant to discredit her version.

13. PW-3, Shri Paresh Deka, and PW-4, Sanatan Banikya, are the informant's neighbor. They have not seen the occurrence. But, they heard about the occurrence from the mother of the victim girl (PW2), who was in the house of P.W.3 at the relevant point of time. Then having heard the occurrence from the PW2, they went in search of the accused and caught him near the tempo stand and brought back to the village field, where the victim girl identified him.

14. PW-5- Munindra Kachari, and PW-6 - Ranjit Kachari are the maternal uncle of the victim, who have also accompanied PW3 and PW4, in search of the accused and caught him near the tempo stand and brought him back to the village field, where the victim girl identified him. Cross-examination of P.W. 3, 4, 5 and 6 also could elicit nothing tangible to discredit their version.

15. PW-7- S.I. Vikram Basumatary is the Investigating Officer, who had investigated the case and submitted charge sheet, Exhibit-5, against the appellant. His evidence reveals that during investigation he had visited the place of occurrence, examined the witnesses and drawn sketch map, Exhibit - 4, of the place of occurrence and seized the birth certificate of the victim girl, material Exhibit-'A' and got the statement of the victim girl in the court and got her examined by the Doctor and collected the report-Exhibit -6, and also arrested the accused and forwarded him to the court. He also confirmed that the accused was identified by the victim and his name is Mantu Kumar, as mentioned in the FIR. It is, however, elicited that the victim girl did not specifically mention about the place where the accused had touched.

16. Thus, from the evidence discussed above, it becomes apparent that at the relevant point of time, the age of the victim was 12 years, as per her birth

certificate, Material Exhibit – 3, as her date of birth is 23.10.2007, and as such, she was a 'child' at the relevant point of time, as defined under Section 2(d) of the POCSO Act. Notably, the appellant side has not disputed the age of the victim.

17. It is to be noted here that the appellant side has not disputed the age of the victim girl. It is also to be noted here that the evidence of all the prosecution witnesses are consistent and they have corroborated the version of the victim girl. It is a fact that there is no eye witness to the occurrence, except the victim girl. But, PW-2; PW-3; PW-4; PW-5; and PW-6, have heard about the occurrence from the informant and PW-3; PW-4; PW-5; and PW-6, after knowing about the occurrence went in search of the accused and in the meantime PW-3 and PW-4 caught him near the tempo stand and brought him back to the village field, where the victim girl had identified him. It is also to be noted here that the victim girl in her evidence categorically stated that the accused has touched her 'breast', though she has stated in her statement, under Section 164 Cr.P.C. that the accused touched her 'chest'. On such count, an attempt was made by the learned counsel for the appellant that 'chest' and 'breast' is not same thing. However, such submission left this court unimpressed in as much as these two words 'chest' and 'breast' are gender specific so far their etymological meaning are concerned and in case of women it (the breast) always denotes the breast. And as such, touching the chest of the victim amounts to touching her breast.

18. Thus, the evidence brought on record, especially the evidence of the victim girl, goes a long way to establish beyond reasonable doubt that the appellant had touched the 'breast' of the victim girl, while she was alone in her house. His culpable intention is apparent from his conduct that he had come back again after five minutes of sending him away by the victim and introducing himself as a student of Big Bazaar and telling her that her father had own some gifts on some offer made at Big Bazaar.

19. It is to be noted here that in **State of Maharashtra vs. Chandraprakash Kewalchand Jain** reported in **(1990) 1 SCC 550** in para 16, while dealing with the evidentiary value of the victim of sexual assault, Hon'ble Supreme Court has held as under:-

“A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.”

20. Thereafter, recording agreement with the above exposition of law in a subsequent case i.e. in the case of **Gurmit Singh** (supra)

“8.

..... In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are

factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for *corroboration* of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some *assurance* of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

21. In the case in hand, having examined the evidence of the victim in the light of the principle laid down in the cases discussed herein above, this court is unable to record concurrence with the submissions so advanced by Mr. Garodia, learned counsel for the appellant. I find the evidence of the victim worth believing and I find no ground to disbelieve the same. Besides, her evidence stands corroborated from the evidence of her mother- P.W.2.

22. ‘Sexual Assault’ is defined in section 7 of the POCSO Act as under:-

“Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

23. In the case in hand, it is established beyond doubt that the accused had touched the breast of the victim, who is a ‘child’ as defined in section 2(d) of the POCSO Act. Even if the submission of Mr. Garodia is accepted for the sake of argument, that chest is not breast, yet, the act of the appellant in touching the chest of the victim girl, involves physical contact, and existence of his culpable mental state has to be presumed, in view of section 30 of the POCSO Act. Mention may be made here that no endeavor has been made by the appellant to establish that he had no such mental state. Thus, to the considered opinion of this court, touching of chest of the victim also constitutes the offence of ‘sexual assault as defined in section 7 of the POSCO Act punishable under section 8 of the said Act.

24. Thus, all the ingredients of the offence under Section 8 of the POCSO Act, appears to be established here in this case and as such the prosecution side has succeeded in discharging its burden of establishing the charge under said section, beyond all reasonable doubt. Besides, the presumption under Section 29 of the POCSO Act is also available here in this case and the learned court below has rightly applied the same in the impugned judgment and order dated 01.07.2022.

25. It also appears that having convicted the appellant under section 8 of the POCSO Act the learned court below had sentenced him to suffer rigorous imprisonment for 5 years with a fine of Rs. 30,000/- with default stipulation. The

learned counsel for the appellant submits that 5 years is the maximum punishment prescribed under section 8 of the POCSO Act and the fine amount is also in higher side. And that the appellant is behind the bar for about two years. And on such count the learned counsel for the appellant submits that some amount of leniency may be shown to the appellant.

26. There appears to be substance in the submission of learned counsel for the appellant. There is no doubt that given the object sought to be achieved by the legislature in enacting the stringent provisions, no leniency is warranted for the perpetrator of such a crime. Even then imposing of the maximum punishment prescribed under section 8 of the Act, appears to be in higher side and given the magnitude of the offence this court is of the view that maximum sentence provided in the section is not warranted herein this case. And having considered the aggravating as well as the mitigating circumstances, this court is of the view that end of justice will be sub-served if the period of five years is reduced to three years.

27. Further, it appears that the fine amount, so imposed, also appears to be in higher side. While dealing with the relevant considerations for determining the quantum of fine, Hon'ble Supreme Court in the case of **Shahejad Khan Maheeb Khan Pathan vs. State of Gujarat** reported in **(2013) 1 SCC 570**, has held that *the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused persons as to the character and magnitude of the offence must be kept in view before sentencing fine.*

28. In the case in hand, none of the above conditions appears to be taken into account by the learned court below while fixing the quantum of fine. Indisputably, no criminal antecedent of the appellant is established by the prosecution side. And

so far his pecuniary position is concerned there is no dispute that he was a '*ferriwala*' by profession. Having regards to above, this court is inclined to reduced the fine amount so imposed by the learned court below to Rs.10,000/ in default to undergo S.I. for two months.

29. In the result, I find no merit in this appeal and accordingly, the same stands **dismissed**. However, the sentence of five years stands modified to **three years** and the fine amount also stands modified from Rs. 30,000/ to **Rs. 10,000/-**, in default to undergo S.I. for **two months**. The parties have to bear their own cost. Send down the record of the learned court below forthwith.

Comparing Assistant

JUDGE