

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

Criminal Appeal 115 (J)/2019

Sri Ramu Tanti

.....**Appellant**

-Vs-

The State of Assam and another

.....**Respondents**

For the Appellant : Mr. R. Sharma, Amicus Curiae.

For the Respondents: Ms. B. Bhuyan, APP, Assam

BEFORE

**THE HON'BLE MR. JUSTICE SUMAN SHYAM
THE HON'BLE MR. JUSTICE ROBIN PHUKAN**

Date of hearing : 27/09/2021.
Date of judgement : 27/09/2021

JUDGEMENT AND ORDER (ORAL)

Suman Shyam, J

1. Heard Mr. R. Sharma, learned Amicus Curiae, appearing for the appellant. We have also heard Ms. B. Bhuyan, learned APP, Assam, appearing for the State/ respondent No.1. None has appeared for the informant/respondent no.2.
2. The judgement and order dated 05/04/2018 passed by the learned Special Judge, Sivasagar, in connection with Special (POCSO) Case No. 18/2016, convicting the sole appellant Sri Ramu Tanti for committing offence under Section 6 of the Protection of Children from Sexual Offences (PCOSO) Act, 2012 and sentencing him to undergo

rigorous imprisonment for life and also to pay fine of Rs. 5000/- with default stipulation, has been assailed in the instant appeal.

3. The prosecution case, in a nutshell, is that the accused/appellant had committed rape on the victim, a 5 years old girl, on 15/05/2016 at around 4 p.m. inside the tea garden belonging to Sri Mohendra Gogoi, causing injury and bleeding in her private parts.

4. On 15/05/2018, at about 8-30 p.m., the father of the victim, viz. Sri Samaru Ghatowar (PW-3) had lodged an ejahar before the Officer-in-Charge of Sonari Police Station, based on which, Sonari Police Station case No. 89/2016 was registered under Section 4 of the POCSO Act, 2012. The accused was apprehended by the Police. The statement of two witnesses, viz. PW-1 and PW-13 were recorded by the Magistrate under Section 164 of the Cr.P.C. During investigation, the I.O. had also collected medical report of the victim and recorded the statement of the witnesses. Thereafter, charge sheet (Ext. 10) was laid against the accused under Section 4 of the POCSO Act, 2012. It appears that the learned trial Court had initially framed charge against the accused u/s. 4 of the POCSO Act but subsequently, the charge was altered to one u/s. 6 of the POCSO Act. The charge on being read over and explained to the accused, he had pleaded innocence and claimed to be tried, as a result of which, the matter went up for trial.

5. The prosecution case is entirely based on circumstantial evidence. In order to bring home the charge, the prosecution had examined as many as 13 witnesses including the doctor (PW-6) who had examined the victim after the occurrence and the IO (PW-12) who had conducted the investigation.

6. The witnesses PWs 1 and 13 are the mother and the cousin, respectively, of the victim, who had evidently reached the place of occurrence soon after the incident took place and had seen the accused and the victim together with the private part of the victim

profusely bleeding. Therefore, these two witnesses are key witnesses examined by the prosecution and their testimonies had been heavily relied upon by the learned trial Court.

7. The statement of the accused was recorded u/s. 313 Cr.P.C. wherein, he had denied all the incriminating circumstances put to him. According to the accused, he has been falsely implicated in the matter out of grudge since he had earlier married the elder daughter of the informant and subsequently, got separated. The defence side, however, did not adduce any evidence.

8. After evaluating the evidence available on record, the learned Special Judge had held that the charge brought against the accused person was established beyond reasonable doubt. Accordingly, the accused was convicted and sentenced, as aforesaid.

9. Mr. R. Sharma, learned Amicus Curiae, appearing for the appellant has argued that the learned trial Court had erroneously placed reliance on the evidence of PWs 1 and 13 by ignoring the contradictions and improvements in their testimonies. It is also the submission of Mr. Sharma that there is no eye witness to the occurrence, the evidence adduced by the prosecution was not sufficient to establish the charge brought against the accused beyond reasonable doubt.

10. Ms. B. Bhuyan, learned APP, Assam, on the other hand, has argued that the prosecution has succeeded in establishing the charge brought against the accused based on cogent evidence. As such, in view of the opinion of the Doctor as well as the testimonies of PWs 1 and 13, there is no scope for this Court to interfere with the conviction of the accused.

11. We have considered the submissions advanced at the bar and have also gone through the materials available on record. Let us now briefly discuss the evidence brought on record by the prosecution.

12. PW-1 Smt. Sarumai Ghatowar is the mother of the victim and she has deposed before the Court that on 15/05/2016, while she was working at the "bagan" (tea garden), her daughter "M" (victim) had come to the work place in search of her but by that time, she had returned from the work place. On the way, the boys playing there had told her that her daughter "M" had come to her work place in search of her and one person, wearing a white shirt, had taken her away. At this, she started the search for her daughter by calling her name aloud and when she went inside the garden area, she saw "M" was lying there and the accused was sitting near her. On seeing her, the accused, whom she could recognize in the Court, had fled the scene and she had seen "M" in a naked condition with her pant removed. She had seen bleeding and injury in the private parts of her daughter and had also seen nail scratch injury on her neck. Taking her daughter on the lap, she immediately came to the residence of the garden owner (PW-9) Mohendra Gogoi. PW-9 had informed the matter to the reporters and student leaders and, thereafter, she was sent to Rajapukhuri hospital, in a 108 Ambulance service along with her daughter, for treatment. Her daughter was admitted in the hospital and received treatment for four days. Although her daughter (victim) was referred to the Assam Medical College Hospital (AMCH) for further treatment, she could not go there due to want of money. PW-1 has also stated that her husband had lodged an FIR on the day of the incident. This witness has also deposed that on asking her daughter, she told her that the accused had committed misdeed with her by opening her pant and the accused had gagged her neck while she was trying to cry. Police had seized the wearing apparel of her daughter and one lollipop chocolate, which was shown to the victim by the accused so as to allure her.

13. During her cross-examination, PW-1 has stated that the occurrence took place near the area where tea leafs are collected. She had also stated that the accused was not known to her prior to the incident but at the same time, she had also deposed that her elder daughter Nomi Ghatowar had eloped with the accused and married him about two years back. After about one year of their conjugal life, her daughter had some quarrel with the accused and returned home. Thereafter, she got married to another person of her choice. PW-1 has also stated that her daughter "M" did not have acquaintance with the accused since they did not have any relationship. She has, however, denied the suggestion made to the effect that she had falsely implicated the accused due to the sour relationship between them. She had also denied that the accused did not commit any misdeed with the victim or that he was not present at the place of occurrence.

14. *PW-13 Ms. Rima Ghatowar was examined as a child witness. After posing some questions so as to ascertain her mental faculty, the learned trial Court was of the view that the witness was competent to depose before the Court and accordingly, went ahead and recorded her testimony after translating the same from Assamese to English. PW-13 has deposed that the accused being a co-villager was known to her. The victim "M" is her cousin. On the day of the incident, having come to know that "M" had gone alone to the garden, she went with the mother of the victim. On meeting the son of Moon, who was playing on the road, he was asked about "M" when he replied that he had seen the girl going with a man wearing white shirt. Hearing that, her Aunty (PW-1) started calling out loudly for the victim. Upon arriving at the "Tea Leaf Storage" room, she saw that the accused was pulling "M" inside the garden. On entering the garden, she heard sounds of gagging and saw that "M" was lying on the ground and the accused was sitting over her. She saw "M" in a naked condition with her pant was removed. Pant of the accused was*

also open. On seeing them, the accused had warned her and tried to chase her, as a result of which, she had to hide herself. Then the accused left the place. On going near "M", she saw injury and bleeding on her private parts and also saw blood stains on her pant. Then her aunty (PW-1) took "M" on her lap and rushed to the hospital. Police had interrogated her and she has also recorded her statement in the Court (Ext. 7). During her cross-examination, this witness had remained firm and had denied the suggestion of the defence counsel that she had deposed on being tutored by the mother of the victim.

15. The victim "M" was called as PW-2. However, it appears that she could only say that accused Ramu had committed rape on her by pointing out at her private parts. Thereafter, her mother took her to the hospital. Blood had also come out from her private parts. In her cross-examination, PW-2 has stated that her mother had said that "Ramu" had committed rape on her.

16. PW-3 Sri Samaru Ghatowar is the informant and the father of the victim. PW-3 has stated that on 15/05/2016, when he returned from work at the tea garden, his son Jintu told him that the condition of his daughter is serious and she had been taken to the hospital by one 108 Ambulance. Immediately, he rushed to Rajapukhuri hospital and saw that his minor daughter was undergoing treatment. She had to stay there for four days. Thereafter, his daughter had told him that Ramu had committed rape on her and gagged her neck. PW-3 has also confirmed that on 15/05/2016, he had lodged an FIR before the Sonari Police Station. The Police took him and his niece to the place of occurrence. The accused was apprehended by the local people and handed over to the Police. Police also seized one Lollypop chocolate from the accused. During his cross-examination, the evidence of this witness could not be shakened.

17. PWs 4, 5, 7, 8 and 9 appears to be persons who had heard from PW-1 that the accused had committed rape on her daughter. All these witnesses have deposed in similar fashion.

18. PW-6 Dr. M. Deb was the Medical & Health Officer-I on duty at the Sonari Sub-divisional Civil Hospital on 15/05/2016 at around 6-20 p.m. when the Police had taken the victim for medical examination. According to the doctor, upon examination of the victim, the following findings were recorded in the Medical Report Ext-2:-

"brief history of the case :

Alleged history of sexual assault.

Menarche- not yet. LMP – nil.

Marital Status – Unmarried

General behaviour – Restless and Irritated.

Mental state – Disturbed.

Cloths – unchanged. Findings – Red coloured stain present.

Built and nutrition – average. Weight 14 Kg.

Height- 3 feet. Teeth 10/10.

Development of hair

Axillary & pubic – absent.

Breast development – not developed. Findings – none.

Marks of violence on the body – Nil.

Examination of genitalia –

Development of genitalia – not developed.

Pubic hair – absent.

Forchette – tear, present, bleeding present.

Clitoris – Present.

Labia, Majora and minora – not developed.

Hymen – torn, Vagina – not developed, injury –tear in the forchette.

Discharge and stains – blood discharge present.

Internal examination was not done.

Laboratory examination :

Vaginal smear – No spermatozoa seen.

Pregnancy test for H.C.G. In urine – not done.

Ultrasonography – Not done.

Radiological examination :

1. Left wrist & elbow A.P. View, 2. Left iliac crist A.P. view

Age of the subject is between 3 to 7 years according to Radiological report.

The name of the Radiologist is Dr. T. Borbora.

Opinion : On examination of Miss Mina Ghatowar, I am of the opinion that – (i) evidence of recent sexual assault present, (ii) No evidence of violence mark on her body, (iii) blood stains present on her private parts, (iv) red coloured stain present on cloth (presence of blood/semen on cloth could not be ascertained as laboratory report not available), and (v) age of the subject in between 3 to 7 years. Ext. 2 is the medical report and Ext. 2(1) is my signature. Ext. 2(2) is the radiological report given Dr. Tapan Borbora, which signature is known to me.”

The defence side had declined cross-examination of PW-6

19. PW-10 Smt. Benu Bhumiz was working as an ANM Nurse at the Rajapukhuri Civil Hospital on 15/05/2016 and she has deposed that on that day, at about 6 p.m., the accused Ramu Tanti was taken there by the Police for medical examination and during search on his person, the Police had found one candypop (Morton) with white colour plastic stick, covered with silky paper, from the shirt pocket of the accused. The same was seized vide Ext. 3 and Ext. 3(i) was her signature.

20. PW-11 Sri Jadumoni Das is another seizure witness to the Candypop (Morton) and he has proved his signature as Ext. 3(ii).

21. PW-12 Sri Naren Rajkhowa was posted as Attached officer at the Sonari Police Station at the time of the incident and he has deposed that on 15/05/2016, the Officer-in-Charge of the Police Station had received information over phone from the VDP Secretary,

Longpatia, viz. Pankaj Dey (PW-8) regarding rape of a minor girl and that the victim had been sent for medical examination to Rajapukhuri hospital. On receipt of such information, GD entry No. 456 dated 15/05/2016 was made and thereafter, he was entrusted with the task of carrying out investigation in the matter. PW-12 has deposed that at around 5-15 p.m., he, along with the Officer-in-Charge of Sonari Police Station and other Police personnel, went to the Rajapukhuri Civil Hospital at Sonari, issued requisition for medical examination of "M", who was aged 4-5 years. While they were in the hospital, the Officer-in-Charge, Sonari Police Station got information that the accused person had been apprehended by the local people of Longpatia Gaon. On receipt of such information, he immediately went to the village and took custody of the accused. Thereafter, the accused was taken to the Rajapukhuri Civil Hospital for his medical examination. PW-12 has further deposed that during search of the accused he had recovered one Lollypop (Morton) from the pocket of the accused and the same was seized vide seizure list Ext. 3. On the same day, he went to the place of occurrence and prepared a sketch map. At about 8-30 p.m., the father of the victim lodged a written FIR, based on which, Sonari P.S. case No. 89/2016 was registered. The IO (PW-12) has further stated that he had sent two witnesses to the Court for recording their statement under Section 164 Cr.P.C. Although, the victim was also brought to the Court for recording her statement, yet, the same could not be done due to her tender age. PW-12 has further stated that during investigation, he had seized the wearing apparels of the victim, vaginal smear of the victim on glass slide, blood of the accused, Penile and urethral smear of the accused vide seizure list Ext. 8 and sent them to DFSL, Khanapara but those samples could not be examined due to non-availability of chemicals for performing DNA analysis.

22. During his cross-examination, the IO has confirmed that witness PW-1 did not state before him that on the way she found boys playing who told her that her daughter "M" had come in search of her and one boy wearing white shirt had taken her away and that after the incident she had taken the victim to the residence of the garden owner. The IO has further stated that the garden owner (Pw-9) did not state before him that he saw injuries in the private parts of "M".

23. On a careful analysis of the evidence brought on record, we find that the place and time of the incident is well established from the evidence led by the prosecution. The fact that the victim was a minor girl aged about 4-5 years and had suffered serious injury in her private parts leading to bleeding, is also firmly established from the medical evidence brought on record i.e. the medical examination report Ext-2 and the testimony of the doctor (PW-6). The only issue raised by the learned Amicus Curiae is pertaining to the reliability of the evidence adduced by PWs 1 and 13 by projecting that the accused had been falsely implicated due to an old enmity with the informant and his wife on account of the failed marriage with their daughter. However, we find from the impugned judgement and order dated 05/04/2018 that the learned Special Judge had categorically ruled out such a possibility by giving proper reasons. Be that as it may, in order to appreciate the contention of the learned Amicus Curiae, we have minutely examined the statements of PWs 1 and 13 recorded in their depositions as well as under Section 164 Cr.P.C.

24. In her statement recorded before the Magistrate after about 9 days from the date of occurrence, the PW-1 had stated that on that day, her daughter "M" went out looking for her but by that time, she had already left her place of work. Later, she went in search of "M" and repeatedly called her alloud and saw that the accused was taking "M" from the "Paat Ghar" (a shed used for storing plucked leafs) to the middle of the garden by lifting

her, lying down on the ground, the accused sat beside her. On seeing them, the accused fled away. Later, the people caught him. When she went there, she found that blood was oozing out from the lower part of the victim and her clothes were also soaked up. Then, she lifted her up, her chador (wearing apparel) also got soaked in blood. She noticed that lower portion of vagina of the victim was torn. She then called 108 Ambulance.

25. The statement of PW-13 was recorded before the Magistrate after about 8 days of the incident and in her statement recorded u/s. 164 Cr.P.C., she had also stated that accused took her sister by enticing her with a toffee. When she, along with her Aunt, went in search of the victim, she saw the accused had kept "M" lying in the middle of the garden. On seeing them, the accused fastened his pant and fled away. When they found "M", her panty was removed and her vagina was in a pool of blood.

26. The evidence of PWs 1 and 13 are generally in consonance with their version given in the statement recorded u/s. 164 Cr.P.C. We do not find any material contradiction in their testimony so as to cause a dent in the prosecution case. The evidence of PW-13 is duly corroborated by the PW-1. It appears from the evidence of PWs 1 and 13 that both of them had reached the place of occurrence together and that too, soon after the incident and saw the victim in an injured condition lying with the accused person sitting beside her without his pant. Immediately thereafter, the accused fled the scene and the PW-1 had pick up the victim on her lap and rushed to the house of PW-9 and thereafter, to the hospital. We do not find any good reason to disbelieve PWs 1 and 13. If their testimonies are relied upon, then there can be no manner of doubt that it was none other than the accused/appellant who had committed rape on the minor girl "M".

27. It is also to be noted herein that the version of PWs 1 and 13 finds further support from the evidence adduced by PWs – 4, 5, 7, 8 and 9. Although, Mr. Sharma has argued

that these are all hearsay evidence and, therefore, inadmissible in the eye of law, we are unable to agree with such submission of the learned Amicus Curiae. PWs-4, 5, 7, 8 and 9 had categorically deposed that they heard from the mother of the victim i.e. the PW-1 that the accused had raped her daughter. It has come out from the evidence available on record that having found her daughter in an injured condition soon after the incident, the PW-1 had spontaneously picked the victim on her lap and rushed to the house of PW-9 to inform the matter. It was at that stage that the witnesses PWs- 4, 5, 7, 8 and 9 had heard from the PW-1 that the accused had committed rape on her daughter.

28. The General Rule of Evidence provides that hearsay evidence is not admissible. It is no doubt correct that PWs- 4, 5, 7, 8 and 9 had heard about the incident from the PW-1. Notwithstanding the same, in view of the provision of Section 6 of the Evidence Act, the evidence adduced by the aforesaid witnesses, in our view, would amount to *res gestae* evidence since what they had seen and heard from the PW-1, was a part of the contemporaneous act, which took place immediately after the incident.

29. While dealing with the principle underlying Section 6 of the Evidence Act, the Hon'ble Supreme Court had held in the case of *Dhal Singh Dewangan Vs. State of Chattishgarh* reported in (2016) 16 SCC 701 that the evidence of *res gestae* witnesses would be admissible in law. The observations made in para 21 of the said decision is reproduced herein below for ready reference :-

"21. The general rule of evidence is that hearsay evidence is not admissible. However, Section 6 of the Evidence Act embodies a principle, usually known as the rule of res gestae in English Law, as an exception to hearsay rule. The rationale behind this Section is the spontaneity and immediacy of the statement in question which rules out any time for concoction. For a statement to be admissible under Section 6, it must be contemporaneous with the acts which constitute the offence or at least immediately thereafter. The key expressions in the Section are "...so

connected... as to form part of the same transaction". The statements must be almost contemporaneous as ruled in the case of Krishan Kumar Malik (Supra) and there must be no interval between the criminal act and the recording or making of the statement in question as found in Gentela Vijayvardhan Rao's case (Supra). In the latter case, it was accepted that the words sought to be proved by hearsay, if not absolutely contemporary with the action or event, at least should be so clearly associated with it that they are part of such action or event. This requirement is apparent from the first illustration below Section 6 which states "whatever was said or done.... at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."

30. Having regard to the facts and circumstances of the case as well as the ratio laid down in the case of *Dhal Singh Dewangan* (Supra), we are convinced that PWs 4, 5, 7, 8 and 9 were *res gestae* witnesses and therefore, their testimonies could be relied upon so as to convict the appellant.

31. In so far as the plea raised by the accused regarding grudge of the victim's family, we do not find any merit in such plea. It has come out from the materials on record that the elder daughter of PWs 1 and 3 viz. Nomi Ghatowar, who had eloped with the accused and got married to him, had later return back, got separated from him and thereafter, remarried. Therefore, there is no reason why the PWs 1 and 13 would have any grudge against the accused at that point of time. Moreover, we find absolutely no basis to presume that a child aged about 9 years, (PW-13) would come out with a fabricated story only to implicate the accused out of a personal grudge. It is also to be noted herein that the victim was immediately rushed to the hospital, wherein, she was examined by Doctor and injuries were found in her private parts. Even the FIR was lodged by the informant within hours of the incident. Under the above circumstances, the plea taken by the

accused that he has been falsely implicated in this case, is found to be devoid of any merit and, therefore, stands rejected.

32. It would also be significant to note herein that not to speak of leading evidence to prove his innocence, the accused had even failed to furnish any plausible explanation as regards his presence at the place of occurrence. The failure to do so would, in our view, constitute a strong link in the chain of circumstances proved against the accused.

33. After a threadbare analysis of the evidence brought on record and due to the reasons stated above, we find ourselves in agreement with the judgement and order dated 05/04/2018 passed by the learned Special Judge convicting the appellant and sentencing him to undergo imprisonment for life and also to pay fine. As such, we do not find any merit in the appeal. The appeal is accordingly dismissed. The conviction of the appellant stands affirmed.

34. Before parting with the case record, we intend to put on record our appreciation for the valuable services rendered by Mr. R. Sharma, learned Amicus Curiae and direct the Registry to ensure that just remuneration, as per the notified fee, be paid to him.

Send back the LCR.

JUDGE

JUDGE

Sukhamay