



GAHC010164562023



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

CrI.A./277/2023

1. Sariful Islam
S/O Jalal Uddin
R/O Jarabari
P.S.- Howly
Dist.- Barpeta, Assam.

.....Appellant

-Versus-

1. The State of Assam
Rep. by the P.P. Assam
2. Kohinur Ahmed
W/O Makibur Khan
Vill.- Bhulukabari
P.O.- Jarabari P.S.- Barpeta
Dist.- Barpeta Assam
Pin- 781314.

.....Respondent

For Appellant : Mr. A. Ahmed, Advocate
For Respondent(s) : Mr. B.B. Gogoi, Additional Public Prosecutor
Ms. Meghali Barman, Amicus Curie

Date of Judgment : 29.07.2024



**BEFORE
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA
JUDGMENT**

(Mridul Kumar Kalita, J)

1. Heard Mr. A. Ahmed, learned counsel for the appellant. Also heard Mr. B. B. Gogoi, learned Additional Public Prosecutor as well as Ms. Meghali Barman, learned Amicus Curie, representing the victim girl.
2. This appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 has been filed by the appellant, namely, Shariful Islam, impugning the judgment and order dated 30.06.2023 passed by learned Additional Sessions Judge-cum-Special Judge, POCSO, Barpeta in Special POCSO Case No. 105/2019, whereby the appellant was convicted under Section 376 of the Indian Penal Code read with Section 4 of the POCSO Act, 2012, and was sentenced to undergo rigorous imprisonment for 7 years, and to pay a fine of Rs. 10,000/- and in default of payment of fine, to undergo further simple imprisonment for one year.
3. The facts relevant for adjudication of the instant Criminal Appeal, in brief, are as follows:
 - i. That on 30.03.2018, the victim girl (*name withheld for the sake of non-disclosure of identity of the victim girl*) had lodged an FIR before the Officer-in-Charge of



Barpeta Police Station, *inter-alia*, alleging that the victim/informant was in relationship with the above-named appellant and in course of their romantic relationship, they had physical relationship on several occasions, on the pretext that the appellant would marry the victim/informant. It is also alleged, in the FIR, that the victim also became pregnant, as a result of such relationship. It is further alleged in the FIR that on 28.03.2018, at about 11.00 pm, the appellant, Shariful Islam and one of the co-accused named in the FIR, namely Rashidul Islam, took her from her house to the field near the pond of Razak and there the appellant had physical relationship with her. Thereafter, the appellant assured that he will marry her and accordingly, took her to his house. But the parents of the appellant who were also named in the FIR assaulted the informant/victim and threw her out of their residence.

- ii. On receipt of the FIR, Barpeta P.S. Case No. 650/2018 was registered under Section 120B/376/416/294/325 of the Indian Penal Code and investigation was initiated. During the course of investigation, the statement of the victim girl was recorded under Section 164 of the Code of Criminal Procedure, 1973. Thereafter, Section 4 of



the POCSO Act, 2012 was also added to the case.

- iii.** Ultimately, after completion of the investigation, charge-sheet was laid against the present appellant under Section 4 of the POCSO Act, 2012. Regarding the other co-accused named in the FIR, as sufficient evidence was not available, they were not sent up for trial. However, their names were also not shown in Column No. 3 or 4 of the charge-sheet, where the names of accused persons, who are not sent up for trial ought to have been shown.
- iv.** The appellant faced the trial remaining on bail. On 14.08.2019, the Court of Special Judge, Barpeta, after considering the materials available on record and after hearing both the sides, framed the charges under Sections 417/376/420 of the Indian Penal Code and Section 4 of the POCSO Act, 2012 against the above-named appellant. When the said charges were read over and explained to him, the appellant pleaded not guilty to the said charges and claimed to be tried. To bring home the charges against the appellant, the prosecution side examined as many as six prosecution witnesses.
- v.** The appellant was also examined under Section 313 of the Code of Criminal Procedure, 1973, during which he

denied the truthfulness of the testimony of prosecution witnesses and pleaded his innocence. The appellant also adduced defence evidence by examining himself as DW-1. However, after completion of the trial the Court of learned Special Judge, Barpeta convicted the appellant and sentenced him by the impugned judgment and order in the manner as already described herein before in Paragraph No. 2 of this judgment.

4. Before considering the rival submissions made by learned counsel for the parties, let us go through the evidence adduced by the prosecution side as well as by the defence side during the trial.
5. PW-1, who is the victim/informant of this case, has deposed that the incident took place about two years prior to her deposing before the Court in the Trial. PW-1 has deposed that on the relevant night at about 10.00 p.m., she went outside her house to attend the call of nature, at that time the appellant along with one Rashidul Islam dragged her to the field and closed her mouth so that she could not scream or raise hue and cry. Thereafter, the appellant did bad things with her forcefully and Rashidul Islam caught her hands and legs and closed her mouth with his hands.
6. PW-1 had also deposed that thereafter, the appellant took her to his house and assured her that he would marry her.



However, the family members of the appellant assaulted her. She had deposed that she was thrown out of the house of the appellant by the family members of the appellant. She has further deposed that in the meantime, her family members and villagers came to the spot and took her to the village headman, Omar Gaonbora. The Gaonbura told the parent of the appellant to take the victim back and get her married, but they refused to do so.

- 7.** PW-1 has further deposed that, later on the appellant married a different girl and she lodged the FIR which has been exhibited as Exhibit-1. PW-1 has also deposed that the police took her to doctor for her medical examination and her statement was also recorded under Section 164 of the Code of Criminal Procedure, 1973 by the Magistrate. She exhibited the said statement as Exhibit-2 and her signatures thereon, as Exhibit-2 (1) and Exhibit-2 (2). She has also deposed that presently she has been married to one Mokibul Khan and at the time when she deposed before the Court, she was pregnant. She has also deposed that the police seized school certificate from her and Exhibit-3 is the seizure list. She has also deposed that at the time of the incident she was studying in class 10 and was less than 18 years of age.
- 8.** During cross-examination, PW-1 has deposed that she had lodged the FIR in the instant case as the appellant had married



another girl and she also stated that if the appellant had married her, she would not have lodged the FIR. She has also deposed that she had lodged the FIR about 2-3 days after the incident. However, she has not explained the cause of delay in lodging the FIR. She has also stated that though, she gave statement before police as well as the Magistrate that she was two months pregnant at that time, however at the time of examination by the doctor, she was not found to be pregnant after the incident. She has also deposed that she could not get chance to raise hue and cry at the time of alleged offence as the accused had closed her mouth at that time. She has answered in negative to a suggestion put to her that she did not state before the police that *"she went outside the house to attend the call of nature. At that time, accused along with one Rashidul Islam dragged her to the field. They closed her mouth so that she could not scream or raise hue and cry. The accused did bad work with me forcefully and Rashidul caught her hands and legs and also closed her mouth with his hand"*. Some other suggestive questions were put to the PW-1 by the defence counsel which were all answered in negative by her.

9. PW-2 Dr. Anima Boro has deposed that, on 31.03.2018, she was working as Medical Officer at Fakharuddin Ali Ahmed Medical College and Hospital, Barpeta. On that day, she examined the victim girl in connection with Barpeta P.S. Case



No. 650/2018. She has deposed that during examination, victim gave a history of alleged love affairs of the victim girl with one Shariful Islam (present appellant) since two and a half years, and alleged sexual assault on 28.03.2018. After examination of the victim girl, PW-2 had opined that she did not find any sign of recent sexual intercourse but the victim is accustomed to sexual intercourse. She also did not find any injury on the body of the victim. She also found that the victim is not pregnant. She exhibited the medical examination report of the victim as Exhibit-4 and her signatures thereon, as Exhibit-4 (1). The cross-examination of PW-2 was declined by victim girl.

- 10.** PW-3 Salimuddin, has deposed that the appellant is his nephew and victim went to the house of the accused forcibly to get married with him and he told the victim to go back as she had not attained the marriageable age. Then the victim left the house of the accused and lodged the FIR.
- 11.** During cross-examination, PW-3 has deposed that the victim and her father wanted to get the victim married with the appellant, but she was driven out from the house of the appellant as she was underage. He has also deposed that apart from that he had not heard anything about the incident.
- 12.** PW-4 Lal Mamud Sikdar, has deposed that the incident took place about two years ago and the victim wanted to get married to the accused and she came to his house. He also

deposed that there was no love affair between the victim and the accused and the victim was sent back from the house of the accused.

- 13.** During cross-examination, PW-4 has deposed that the victim did not attain the age of 18 years at the time of incident and the father of the accused protested against the marriage and thereafter, the FIR was lodged. He also deposed that he had heard nothing apart from this.
- 14.** PW-5, namely, Asma Khatun, has deposed that she knows the appellant as well as the informant. She has also deposed that on the date of incident at about 8.00 to 9.00 pm she heard commotion in the house of the appellant and when PW-5 went there she found the informant shouting there. The appellant was not present at that time. The informant was shouting loudly and was insisting the father of the appellant to perform her marriage with his son. She has also deposed that now the informant has been married to someone else.
- 15.** During her cross-examination, PW-5 has deposed that the appellant was not present at his house prior to 6 months of the incident as he was in Kerala and she is unaware about any relationship between the appellant and the victim girl.
- 16.** PW-6 Sri Binoy Kalita, has deposed that on 30.03.2018, he was working as Officer-in-Charge of Barpeta Police Station and on that day the victim girl lodged an FIR and accordingly, Barpeta

P. S. Case No. 650/2018 was registered and the SI Nibha Phukan was entrusted to investigate the case. During investigation, the Investigating Officer recorded the statement of witnesses including the victim girl, prepared the sketch map of the place of occurrence and after completion of the investigation submitted the charge-sheet against the appellant under Section 4 of the POCSO Act, 2012 showing him as an absconder. PW-6 has also deposed that in the meanwhile the Investigating Officer Nibha Phukan had passed away. He has exhibited the seizure list of the school certificate of the victim girl as Exhibit-3, the sketch map as Exhibit-5 and the charge sheet as Exhibit-6.

- 17.** During cross-examination, PW-6 has deposed that the victim did not state before the Investigating Officer specifically that the accused along with one Rashidul Islam dragged her to field, but stated that she was taken to the bank of the pond. She however, did not state that accused along with the Rashidul closed her mouth so that she could not scream or raise hue and cry. PW-6 has also deposed that the victim did not state before the Investigating Officer that Rashidul caught her hands and legs when the accused did bad work with her and she only stated that the accused did bad work with her.
- 18.** During his examination under Section 313 of the Code of Criminal Procedure, 1973, the appellant had denied the

truthfulness of the testimony of the prosecution witnesses and pleaded his innocence.

- 19.** The appellant adduced the defence evidence by examining himself as DW-1. He has deposed that the instant case has been lodged by the victim girl against him falsely. It is deposed by DW-1, that at that time he was in Kerala and the parents of the victim girl along with the victim forcibly came to his house and demanded the victim girl to be married to him. When the father of the appellant said that marriage cannot be solemnized with the victim as she was a minor at that time, the victim girl refused to accept the same and lodge the FIR. DW-1 has also deposed that there was never any romantic relationship between him and the victim girl. He has also denied the allegation of sexual intercourse with the victim girl. He has deposed that after coming to know that the victim was married to one Makibur Khan, the father of the appellant had lodged an FIR against them under the Prohibition of Child Marriage Act, 2006 on 16.09.2018. The certified copy of the FIR lodged by the father of the appellant has been exhibited as Exhibit D-1.
- 20.** During cross-examination, the DW-1 has answered in negative to a suggestive question that he had romantic relationship with the victim girl and in the course of said relationship he had sexual intercourse with her. He has also answered in negative to another suggestive question put to him by the prosecution



side.

- 21.** Mr. A. Ahmed, learned counsel for the appellant, has submitted that the Trial Court had failed to consider that apart from the testimony of the victim girl, there was no other incriminating material against the appellant in this case and the testimony of the victim girl was also not of a sterling quality, so as to inspire confidence of the Court.
- 22.** It is submitted by the learned counsel for the appellant that the victim girl who deposed as PW-1 has given contradictory statement and which is apparent from her testimony.
- 23.** It is also submitted by learned counsel for the appellant that the testimony of victim girl cannot be regarded as trustworthy, as she herself stated that she was pregnant at the time of the incident by two months. However, the doctor on examination, found no pregnancy, which falsifies her testimony.
- 24.** Learned counsel for the appellant has also submitted that in an offence under POCSO Act, 2012, one of the main ingredients is that the victim must be a child within the definition given in POCSO Act, 2012, which means any person below the age of 18 years. It is submitted by learned counsel for the appellant that though, the school certificate of the victim has been shown to be seized during investigation, however, no such school certificate was exhibited or proved by the prosecution side during the trial.



- 25.** It is submitted by learned counsel for the appellant that the Trial Court relied on the oral testimony of the victim girl and other witnesses to come to the conclusion that the victim girl is a minor. However, it is submitted by learned counsel for the appellant that the testimony of victim girl is not reliable as she has mentioned different age at different stages of the proceedings. It is submitted by learned counsel for the appellant that when the statement of the victim was recorded under Section 164 of the Code of Criminal Procedure, 1973, before the Magistrate, she mentioned her age as 16 years. However, when she was examined by the doctor on 31.03.2018, she mentioned her age as 17 years. Whereas, when she deposed before the Trial Court as PW-1, she has stated that she was less than 18 years on the date of incident.
- 26.** Learned counsel for the appellant has submitted that when no conclusive proof of age is there on record, the accused is entitled to get the benefit of doubt as regards the age of the victim girl under such circumstances, which was not given to the accused/appellant by the Trial Court.
- 27.** It is also submitted by the learned counsel for the appellant that the testimony of the victim she had stated that she had romantic relationship with the appellant since two and a half years and had physical relationship with him which shows that even if there was any physical relationship between the victim



and the appellant it was consensual in nature and as the age of the victim could not be conclusively proved, hence, the appellant is entitled to get benefit of doubt in this case.

- 28.** Learned counsel for the appellant has also submitted that in this case, the Trial Court erroneously applied the provision of Section 29 and 30 of the POCSO Act, 2012 without ascertaining first as to whether the prosecution side has been able to prove the foundational fact in this case.
- 29.** It is also submitted by learned counsel for the appellant that the victim had stated that one co-accused Rashidul Islam held her legs and hand and her mouth was closed by said Rashidul Islam while the appellant performed the sexual act forcefully with her. However, she had not stated the said facts before the Investigating Officer when her statement was recorded under Section 161 of the Code of Criminal Procedure, 1973. This material omission which amounted to contradiction has not been considered by the Trial Court.
- 30.** Learned counsel for the appellant has also submitted that the Trial Court also failed to take into consideration the testimony of PW-5 and other prosecution witnesses who had deposed that the appellant was not present at the time when the incident has been alleged and he was in Kerala at that time and it was the victim herself who forcefully entered into the house of the appellant and was urging on the father of the appellant

to get her married to the appellant.

- 31.** Learned counsel for the appellant has also submitted that the Trial Court also failed to take into consideration that the FIR was lodged after a delay of two days on 30.03.2018. It is also submitted that from the statement of the victim herself, it is clear that she lodged the FIR as because the appellant married one another girl and the victim, out of jealousy and revengefulness, filed the FIR against the present appellant.
- 32.** Learned counsel for the appellant has also submitted that the Trial Court also failed to take into consideration that the medical evidence does not corroborate the testimony of the victim girl and as such her testimony was not reliable and ought not to have been the sole basis of coming to the finding of guilt by the Trial Court.
- 33.** Learned counsel for the appellant has cited following rulings in support of submissions made by him.
 - i.** Rajaram Vs. State of Rajasthan reported in AIR Online 2000 SC 474;
 - ii.** Monirul Islam Vs. State of Assam, reported in AIR Online 2021 GAU 173;
 - iii.** Narendra Kumar Vs. State within NCT of Delhi reported in AIR 2012 SC 2281;
 - iv.** Bhupen Kalita Vs. State of Assam reported in (2020) 3 GLT 403.

- 34.** On the other hand, Mr. B. B. Gogoi, learned Additional Public Prosecutor has submitted that the apart from some minor discrepancies in the testimony of PW-1, nothing is there in her testimony, which would make her evidence unreliable. He also submits that in case involving sexual offences, uncorroborated testimony of the prosecutrix may be relied upon, therefore, he submits that the finding of the Trial Court does not warrant any interference by this Court.
- 35.** Ms. M. Barman Amicus Curie representing the victim girl has submitted that though the school certificate of the victim girl could not be exhibited by the prosecution side, however, Exhibit-3, i.e., the seizure list shows that same was seized by police during the course of investigation. It is also submitted by her that the oral testimony of the victim girl and other prosecution witnesses clearly shows that the victim was a minor when the incident occurred and she had not completed the age of 18 years at that time.
- 36.** She has also submitted that the uncorroborated testimony of the victim girl may be relied upon in the cases involving sexual offences, and insistence on corroboration may not be a correct approach in such cases.
- 37.** She has also submitted that the Trial Court has correctly arrived at the finding of guilt of the appellant on the basis of the testimony of the PW-1 (victim/informant), and as such, she has

submitted that the finding of the Trial Court does not warrant any interference by this Court.

38. I have considered the submissions made by the rival parties and have perused the materials available on record, including the case record of Special POCSO Case No. 105/2019, which was requisitioned from the Trial Court in connection with this case. I have also gone through the rulings cited by the learned counsel.
39. It appears that out of the six prosecution witnesses examined by the prosecution side, no one except the PW-1 has deposed regarding the commission of sexual offenses by the appellant on the victim girl. All other witnesses have only deposed that the victim girl came to the residence of the appellant on the date of alleged incident and was demanding forcefully from the parent of the appellant to get her married to the appellant, which was refused by the parents of the appellant.
40. It also appears on perusal of the impugned judgment that the Trial Court has mainly relied on the testimony of PW-1/victim to come to the finding of the guilt of the appellant in this case.
41. It also appears that the Trial Court took aid of the presumption provided in Section 29 of the POCSO Act, 2012 to come to the finding of guilt against the present appellant.
42. In the case of "***Bhupen Kalita Vs. State of Assam***" (Supra), this Court had observed that before invoking Section 29 or 30 of

the POCSO Act, 2012, the prosecution has to establish the foundational facts in a case involving offence under POCSO Act, 2012. As regards the question as to what would be the foundational facts in such cases, it has observed as follows

"73. As the Court proceeds to examine whether the foundational facts have been proved on the basis of preponderance of probability, the Court has to first ascertain as to what are the foundational facts which are required to be established by the prosecution. For example, in a case of offence of rape punishable under Section 376 of the Indian Penal Code, the foundational fact would be the actual sexual act perpetrated by the offender, as described in the section. The other foundational fact would be that such a sexual act was committed against her will or consent, and even if it was with her consent, her consent had been fraudulently obtained under the circumstances mentioned in the section."

- 43.** Let us now examine, whether in the instant case, the prosecution side has been able to establish the foundational facts of the case or not.
- 44.** In the instant case, it appears that apart from the testimony of the victim girl, there is no other evidence which suggests that she was subjected to forcible sexual intercourse by the appellant. The evidence of the PW-2, i.e., the doctor who examined the victim girl on 31.03.2018, also negates any

recent sexual intercourse on the victim girl. Though, it mentions that the victim girl was accustomed to sexual intercourse.

- 45.** The testimony of PW-1 makes specific allegation of forceful sexual intercourse against the appellant on 28.03.2018 only and as regards earlier instances, she only made a general statement that there was physical relationship between her and the victim girl during the romantic relationship between them without mentioning any details about the same so that the veracity of same could not be examined either during the investigation or during the trial.
- 46.** None of the other independent witnesses examined by the prosecution side, namely, PW-3, PW-4 and PW-5, has mentioned anything regarding the sexual intercourse by the present appellant as alleged by the victim girl.
- 47.** Rather, PW-5, who is also one of the prosecution witnesses, has categorically stated that the victim was not present in his house prior to six months of the incident as he was in Kerala, which corroborates the testimony of the DW-1, wherein the DW-1 has also categorically stated that at the time of lodging of the FIR, he was in Kerala.
- 48.** It also appears that the Trial Court has not given any reason for not considering the testimony of PW-5, when her testimony otherwise remains uncontroverted. Neither the said witness for

the prosecution side was declared as hostile by the prosecution side. No reason has been shown by the Trial Court for sidelining this evidence of PW-5. This court is of considered opinion that the Trial Court was not right in not considering the uncontroverted evidence of PW-5, without giving any reason for doing so.

- 49.** It also appears that the victim girl had falsely stated that she was pregnant by two months, as during her medical examination no such pregnancy was found, which has been admitted by the victim girl in her testimony.
- 50.** Hence, it appears that the testimony of the victim girl cannot be regarded as of sterling quality, so as to inspire confidence to come to the finding of the guilt of the appellant on the basis of uncorroborated evidence of such a witness. There is no explanation by the prosecution side as to why none of the other prosecution witnesses made any whisper about the allegation of sexual intercourse by the appellant with the victim girl, and as to why there was a delay in lodging of the FIR by the victim girl. As the victim girl has stated that she was having romantic relationship with the appellant, and as the appellant had married another girl, the filing of the instant case due to jealousy and grudge by the victim girl may not be totally ruled out.

- 51.** Though, it is not disputable that in a case involving sexual offences, the conviction may be based solely on the basis of uncorroborated testimony of the victim girl. However, for that, the testimony of the victim girl should be of sterling quality and should inspire the confidence of the court.
- 52.** In the instant case, as the victim girl has taken recourse to falsity, which is apparent from the fact that she made false claim of pregnancy, which was belied by the medical evidence. Hence, her testimony may not be considered to be of sterling quality.
- 53.** Hence, for the reasons discussed in the foregoing paragraphs, this Court is constrained to hold that the prosecution side has failed to prove the foundational facts in this case that the victim was subjected to forcible sexual intercourse, and hence, the presumption as provided under Section 29 of the POCSO Act, 2012 would be of no use to the prosecution side in this case.
- 54.** For the reasons stated herein before, this Court is constrained to hold that the Trial Court was wrong in coming to the finding of the guilt of the appellant solely on the basis of uncorroborated testimony of the victim girl and under the facts and circumstances of the case, the appellant is entitled to get benefit of doubt, which this Court gives to him.
- 55.** In view of the foregoing discussions, this Court hereby holds that the impugned judgment and order dated 30.06.2023



passed by the learned Additional Sessions Judge-cum-Special Judge POCSO, Barpeta in Special POCSO Case No. 105/2019 is unsustainable in law, so the same is accordingly set aside.

- 56.** The appeal preferred by the appellant stands allowed.
- 57.** The appellant is hereby acquitted of charges under section 376 of the Indian Penal Code read with Section 4 of the POCSO Act, 2012 on getting benefit of doubt for the reasons stated herein before in this judgment.
- 58.** The appellant shall be forthwith released from the jail, if he is not wanted in connection with any other case.
- 59.** The Registry shall send back the Trial Court record of Special POCSO Case No. 105/2019 along with a copy of this judgment to the Trial Court forthwith.

JUDGE

Comparing Assistant