

GAHC010199762021



IN THE GAUHATI HIGH COURT

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

Crl.A.197/2021
With I.A.(Crl.)521/2021

..... **Appellant**

VERSUS

The State of Assam and Anr.
(Notice through The Public Prosecutor, Assam)
2. Smti. Panchami Biswas

W/O Sri Megha Biswas

Vill- Gerimari

P.S.-Mangaldai

Dist-Darrang (Assam)

Pin-784125 (Informant

..... **Respondents**

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocate for the Appellant : Mr. D. Chakrabarty, Advocate

Advocate for the Respondents : Mr. D. Das, Addl. P.P.
Mr. B. Halder, Legal Aid Counsel

Date of Hearing : 16.05.2023
Date of Judgment : 01.09.2023

JUDGMENT & ORDER (CAV)

1. Heard Mr. D. Chakrabarty, learned counsel for the appellant. Also heard Mr. D. Das, learned Addl. P.P. for respondent No. 1 and Mr. B. Halder, learned Legal Aid Counsel for respondent No. 2.

2. This appeal is directed against the Judgment and Order dated 28.09.2021 passed by the learned Additional Sessions Judge, FTC, Darrang, Mangaldai in connection with Special (POCSO) Case No. 67/2019 convicting the appellant Gautam Biswas (Seal) u/s 363 of the Indian Penal Code (IPC for short) to undergo Rigorous Imprisonment for 2 years and to pay a fine of Rs. 2,000/-, with default clause; u/s 366 IPC to undergo Rigorous Imprisonment for 3 years and to pay a fine of Rs. 3,000/- with default clause and u/s 4 of the Protection of Children from Sexual Offences Act (POCSO Act for short) to undergo Rigorous Imprisonment for 7 years and to pay a fine of Rs. 5,000/- with default clause. The sentences were ordered to run concurrently. The FIR was lodged by the victim's mother 'Y' (also referred to as the informant).

3. The prosecution case in brief is that the victim was a 16 year old girl and a

student of Class-X. On 25.07.2018 at about 4 AM the victim was found missing. On the previous day, i.e. on 24.07.2018, the appellant (hereinafter referred to as the accused) visited the informant as a guest in the afternoon and spent a night in the house. The accused-appellant induced the victim to elope with him. The informant along with her father and four or five neighbours went to the accused-person's house and saw her daughter with the accused. The accused-person's family members had driven away the informant. The FIR lodged by the informant was registered as Mangaldoi P.S. Case No. 575/2018 u/s 376 IPC.

4. The Investigating Officer (IO in short) embarked upon the investigation. After completion of investigation charge-sheet was laid against the accused u/s 367/376 IPC read with Section 4 of the POCSO Act and Section 10/11 of Child Marriage Act. The other accused named in the FIR were however not forwarded for trial. On appearance of the accused, this case was committed for trial and on commencement of trial, formal charges u/s 366A/376 IPC read with Section 4 of the POCSO Act was framed and read over and explained to the accused, who adjured his guilt and claimed innocence.

5. To connect the accused to the crime, the prosecution adduced the evidence of seven (7) witnesses including the Medical Officer (MO in short) and

the IO and the defence cross-examined the witnesses to refute the charges.

6. The trial court formulated the following points for determination:-

“a. *Whether on 25.07.2018 in the morning at about 4.00 AM the accused person kidnapped the victim-X, aged about 16 years, by inducing her from her residence at Gerimari under Mangaldai P.S. with intent that the said victim may be or knowing that it is likely that the said victim will be forced or seduced to illicit intercourse with him and thereby committed an offence punishable under Section 366-A of Indian Penal Code?*

b. *Whether the accused person committed rape upon the victim-X, aged about 16 years, after keeping her in his house at No. 2 Batalimari under Bhuragaon P.S., District-Morigaon and thereby committed an offence punishable under Section 376 of the Indian Penal Code?”*

c. *Whether the accused person had committed penetrative sexual assault upon the victim-X, aged about 16 years, in his house at No. 2 Batalimari under Bhuragaon P.S., District-Morigaon and thereby committed an offence punishable under Section 4 of the POCSO Act?*

On the circumstances arising against him the questions under Section 313 Cr.P.C were asked through written memorandum and the accused also gave his reply through his written statement. He denied all the incriminating allegations against him.

7. The informant 'Y' testified as PW-1 that the incident occurred about 2 & 2½ years ago. The accused, who is a relative visited their house and stayed overnight. On the next morning the accused eloped with her daughter. At the time of the incident her daughter was a student of Class-X. Her uncle Radheshyam Biswas, two brothers and other family members went to the accused-person's house and found her daughter in his house, but the family members of the accused refused to hand-over their daughter. This impelled her

to lodge the FIR after two days. The police recovered her daughter from the accused-person's house. This witness has proved her signature on the FIR as Ext.-1(1).

8. The PW-1 has further testified that when her daughter was recovered, her daughter informed her that the accused had forcefully taken her with him. In her cross-examination, the PW-1 has deposed that after her daughter went to the accused person's house, her family members went to bring her back. This is contradictory to the contents of the FIR. The PW-1 herself lodged the FIR, which is *intra-se* contradictory to her testimony in the Court. In the FIR, she has mentioned that she along with her family members went to the accused person's house on the following day of the incident and she saw her daughter in the accused person's house. The accused person's family members accosted them and denied to hand over their daughter to their custody. Thus, the evidence of PW-1 does not inspire confidence, moreso, when the FIR was lodged after a lapse of two days.

9. It is true that the evidence of the other witnesses has corroborated the evidence of PW-2, but the evidence has to be placed on an anvil and the grains have to be separated from the chaff.

10. Radheshyam Biswas is the informant's uncle, and he testified that the

incident occurred about 1½ years ago. On the previous night, the accused came to the informant's residence and stayed overnight, and in the morning at about 04:00 a.m., the accused eloped with the victim. Then he, along with his brothers Suklal Biswas, Sadhan Biswas, Govindra Biswas and Ranjit Biswas, went to the residence of the accused at Batalimari and found the victim in the accused person's house. The accused refused to hand over the victim to their custody. In sync with the evidence of PW-2, Suklal Biswas, has testified as PW-3 that the informant is his daughter and the victim is his grand-daughter. On the previous night of the incident, the accused came to his residence and stayed overnight. On the next morning, the victim was found missing from his residence and from his neighbours, he learnt that the victim was seen with the accused in their premises by the neighbors in the morning. In the evening, the victim called them over phone and requested them to rescue her as the accused had taken her along with him in the bus. He along with Radheshyam Biswas, (PW-2) Sadhan Biswas and Govindra Biswas went to the accused person's house and found the victim, but the accused refused to hand over the victim to their custody.

11. Now this corroborative evidence of PW-1, 2 and 3 is not found to be reliable. At the time of the incident, the victim was allegedly 16 years old. It is not plausible that a person will be able to forcefully kidnap a 16 year old girl against

her will and take her to another location and hold her captive. When her family members went to bring her back, the victim could have easily returned home with her family members. The family members also chose not to take the help of police to recover the victim, despite the fact that they have alleged that the victim was forcefully taken by the accused to his house. It has also emerged from the evidence that the victim is related to the accused.

12. Learned counsel for the accused laid stress in his argument that the victim was a major at the time of the incident and she had eloped with the accused on her own volition. The birth certificate of the victim marked as material Exhibit-1 is a procured document.

13. I have scrutinized the birth certificate, the document does not appear to be a procured document. The victim has deposed as PW-4 that the incident occurred about 2½ years ago. On the previous day of the incident, the accused visited them and stayed overnight in their house. While she was attending some household chores in the morning, the accused suggested a trip. She agreed to his proposal and they proceeded towards Bhebarghat. Then the accused requested her to accompany him to his residence, but she refused. The accused then forcefully took her in a bus towards Guwahati. From Guwahati, they boarded another bus towards Morigaon and thereafter, the accused took her to

his residence. When they reached their residence, the accused told her that he would marry her, but she refused his proposal, as the accused is a distant relative. On the same day, at about 03:00 a.m. her family members came to the accused person's residence.

14. It is pertinent to mention that the victim has stated that prior to the arrival of her family members, the accused had shifted her to the residence of his friend and she stayed in his friend's residence for a day and thereafter, the accused brought her back to his residence. After two days, the police went to the accused person's house and took her along with the accused to Mangaldai P.S. She stayed with the accused in his house as his wife. After being recovered by the police she was forwarded to the court and her statement was recorded. She has proved her statement as Exhibit-2 and her signatures as Exhibit-2(1) to 2(4). She has proved her birth certificate as Material Exhibit-1.

15. This evidence of PW-4 does not inspire confidence. It is submitted by the learned counsel for the accused that the victim was not even aware where her father was residing at that time. Moreover, the evidence of the I/O, PW-7 depicts that the victim was untraceable from 27.07.2018 up to 05.08.2018. Through reliable source, the I/O got information about the whereabouts of the accused and victim and then he apprehended them on 05.08.2018. The victim's,

evidence that she was recovered by the police after two days is not substantiated by the evidence of I/O.

16. The victim has admitted in her cross-examination that she did not know where her father was at that time. The learned counsel for the accused has questioned the birth certificate of the victim. In her cross examination, the victim has stated that she did not know if any school certificate was produced by her family members in connection with this case. She did not know who applied for her birth certificate before the concerned authority.

17. It has already been held in my foregoing discussions that the birth certificate appears to be genuine. It does not appear to be a procured document. The victim's date of birth is 18.09.2002 and the certificate was issued on 30.04.2003 and the date of registration of her birth is 26.04.2003.

18. Although, the victim has testified in her evidence-in-chief that she stayed with the accused as his wife, in her cross examination, she has denied that the accused married her. She has categorically stated in her cross examination that she did not get married to the accused person during the period while she stayed with him at Morigaon. The victim was re-examined and on re-examination, the victim deposed that while she stayed in the accused person's house, he committed sexual intercourse with her without her consent. After re-

examination, the victim was cross examined and she has admitted in her cross examination that she had not stated before the Magistrate that the accused committed sexual assault on her without her consent. The statement of the victim marked as Exhibit-2 clearly reveals that the victim has not stated before the Magistrate that the accused forcefully committed sexual intercourse with her, without her consent. This contradiction casts a shadow of doubt over the veracity of the victim's evidence.

19. The Medical Officer's evidence also clearly reveals that no evidence of recent sexual assault was detected on examination of victim.

20. Dr. Ajanta Bordoloi has testified as PW-6 that on 05.08.2018, she was posted as Sub-Divisional Medical & Health Officer at Mangaldai Civil Hospital and on that day, she examined the victim 'X' and her findings are as follows:-

“Physical Examination: Height - 4% ft, Weight - 45 K.G.,Teeth 14/14, Hair- Present, Axillary hair- Present, Pubic Hair - Present, Breast- Well developed, Hymen- Torn, Valve- Normal, Uterus- NAD, Vagina- NAD, Libia; Mazora- NAD, Libia : Minara- NAD.

Any injury mark in her private parts- No injury found on her body & private parts. Mental condition- Normal Vaginal swab examination for Spermatozoa. No Spermatozoa was seen as per laboratory report No. 137.

Radiological Examination:

1) X-ray for age determination done in Mangaldai Civil Hospital-Approximate age is 17-18 (Seventeen to eighteen) years.

Examination of Urine - Pregnancy test: ve (Negative) **Ultrasonography-**
done in Radhika X-ray Center.

Report-

1) Reveals Normal echo-feature of organs imaged HIV test: - Negative PID No.
1801244.

Remarks-

- (1) No evidence of recent sexual intercourse.
- (2) Approximate age is 17-18 years.
- (3) No pregnancy.
- (4) No injury found on her body and private parts.
- (5) HIV test:-'ve (Negative).
- (6) Foreign particles are not found on her private part."

Ext-3 is the Medical Examination Report and Ext-3(1) is the signature of the M.O."

21. The FIR reveals that the incident occurred on 25.07.2018. The FIR was lodged after two days i.e. on 27.07.2018 and the victim was examined by the Medical Officer on 05.08.2018. The evidence of the Investigating Officer clearly reveals that the victim was recovered on 05.08.2018 at about 12.00 O'clock midnight. On the same day, the victim was examined by the MO, but no injuries or evidence of recent sexual assault were detected on her examination. The victim's claim of sexual assault is not substantiated by the evidence of the Medical Officer. When the evidence of the prosecutrix is not substantiated by the

evidence of the MO and I/O, then doubt slowly infiltrates.

22. The I/O, Sri Rajen Deka deposed as PW-7 that on 27.07.2018, the OC received an FIR and endorsed him to investigate the case based on the FIR registered as Mangaldai P.S. Case No. 575/2018, under Section 367/376, IPC. He recorded the statements of the witnesses and proceeded to the place of occurrence and prepared the sketch map. He could not find the victim as well as the accused and so he sent WT message to the police stations all over Assam. He received information from a reliable source on 05.08.2018 at 12.00 midnight and he went to Morigaon. He informed the matter to Bhuragaon Pachali P.S. and with the assistance of this police station, he proceeded to Batalimara village. He recovered the accused and the victim from the residence of the accused.

23. Thus, it is clear from the evidence of the I/O that the victim was recovered along with the accused on 05.08.2018 and immediately, she, was forwarded for medical examination, but no evidence of recent sexual intercourse could be detected on examination of the victim. No marks of violence or injury marks were detected on her private parts by the Medical Officer who conducted her medical examination.

24. Even the victim's aunt deposed as PW-5 that her younger sister informed her that the accused came to her residence and he enticed the victim to go with

him. This witness has not stated that the accused forcefully took the victim with him. It is true that the victim is a minor and in a case under the POCSO Act presumption operates against the accused, but, at the same time, the prosecution has to prove the foundational facts.

25. In this case, the prosecution has failed to prove the foundational facts. It has already been held in my foregoing discussions that the victim's evidence does not inspire confidence. The Medical Officer has deposed that the age of the victim on radiological examination was found to be between 17 to 18 years. The victim may have been a few months short of 18 years. She has stated that the accused forced her to board the bus to Guwahati and thereafter the accused forced her to board another bus from Guwahati to Morigaon. If the victim was unwilling to proceed with the accused to Morigaon or to Guwahati, she would have easily raised alarm, because she was traveling in a bus and the people would have rescued her from the clutches of the accused. The evidence of the victim appears to be too farfetched and sketchy. The accused cannot be held guilty of such a serious offence under the POSCO Act, on the evidence of an unreliable witness. As the victim's evidence does not inspire confidence, the accused cannot be held guilty of the offence of penetrative sexual assault, on the testimony of the victim. The informant's evidence also does not inspire confidence.

26. The other family members, including the victim's father or siblings, were not examined as witnesses. Due to the contradictions in the evidence of the victim as well the informant, credence cannot be given to their evidence to incarcerate a person in connection with such a serious offence. It is pertinent to note that although the FIR was lodged after two days, there is no allegation of rape in the FIR. The fact that no evidence of recent sexual assault could be detected by M.O, cannot be ignored.

27. The Medical Officer has also stated that no injuries or foreign particles were found on the private parts of the victim. Although the victim was re-examined, she has not stated where the accused forcefully committed rape on her. The evidence of the I/O clearly depicts that, he could not trace out the accused and the victim and on secret information, he recovered the accused and the victim in their house. The victim has also admitted in her deposition that she stayed in a friend's house along with the accused for one day. She has not stated where the accused had committed rape on her. It is not clear, whether the accused had committed rape on her in his friend's house or in his own house. A vague statement made by a victim cannot be taken as Gospel truth to incarcerate a person for an offence as serious as an offence under the POCSO Act, moreso, when the evidence of the victim is fraught with contradictions. Presumption regarding the offence of rape cannot be made on

vague statements. No place of occurrence has been mentioned by the victim. It is discernible that the accused and the victim stayed in two different places. Where was the offence of rape committed?

28. It is true that the consent of the victim is not required in a case under the POCSO Act. In the instant case, it is manifest that the victim was not induced to go with the accused but she went with him on her own volition. No evidence of sexual assault could be detected by the Medical Officer. On the contradictory statements of the victim, the accused is not held guilty of offence under the POCSO Act. The Medical Officer has also given her opinion that the victim's age is around 17 to 18 years.

29. After going through the evidence of the prosecutrix, it is evident that the statement of the prosecutrix at every stage has improved, changed and has contradicted its earlier statement and the testimony of the prosecutrix suffers from material inconsistency and as per the settled law conviction cannot be based on such testimony of the prosecutrix which is not worthy of credence.

30. It has also to be borne in mind that the victim has not alleged sexual assault when her evidence-in-chief was recorded but subsequently, on re-examination, the victim has mentioned about sexual assault but contradiction could be elicited through her cross-examination when it was brought to the

notice of the Court that in her earlier statement under Section 164 Cr.P.C., the victim did not allege forceful sexual assault by the accused. It is apt to reiterate that the victim's evidence is not worthy of credence.

31. It is thereby held the prosecution has failed to prove beyond reasonable doubt that the accused is guilty of offence under sections 363/366 IPC read with Section 4 of the POCSO Act. The Judgment and Order dated 28.09.2021 is hereby set aside. The accused is to be set at liberty forthwith, if he is not wanted in any other case.

32. Surety stands discharged.

33. Send back the LCR.

JUDGE

Comparing Assistant