

GAHC010104752021



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

Case No. : CRL.A(J)/24/2021

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR Z HUSSAIN, AMICUS CURIAE

Advocate for the Respondent : MS. S H BORA(ADDL.PP, ASSAM)

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGEMENT AND ORDER (CAV)

Date : 08-08-2023

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Heard Mr. Z. Hussain, learned *Amicus Curiae*. Also heard Ms. S.H. Bora, learned Additional Public Prosecutor for the State/respondent.

2. This appeal has been preferred by the sole appellant challenging the judgment and order dated 05.12.2020 passed by the learned Special Judge, Udalguri in POCSO Case No. 22/2017, whereby the accused/appellant was convicted under Section 6 of the Protection of

Children from Sexual Offences Act, 2012 (herein after referred as POCSO Act) and sentenced him to undergo rigorous imprisonment for 10(ten) years and instead of imposing the fine amount directed him to pay compensation of Rs.50,000/- to the victim girl and her male child as provided under Section 357(3) Cr.P.C. and in default of payment of compensation, the appellant will be liable to under further simple imprisonment of 3(three) months.

3. The case of the prosecution is that the informant lodged an FIR on 31.03.2017 before the O/C, Mazbat P.S. stating *inter alia* that since her parents passed away in her childhood, she grew up in the house of her grandfather Sri Mikhel Rajowar in the same village. She was about 13 years old at that time. The appellant on the pretext of marrying her, developed a love affair with her and impregnated her after having sexual intercourse with her on multiple occasions. It is further stated in the FIR that though the victim requested the appellant repeatedly to take her to his house but he did not pay heed to her request. Subsequently, he was eloped with another girl.

4. On receipt of the complaint, a case was registered vide Mazbat P.S. Case No. 20/17 under Section 6 of POCSO Act and investigation was initiated. During investigation, the investigating officer visited the place of occurrence, recorded the statement of the witnesses under Section 161 Cr.P.C. Subsequently, the victim was forwarded to the Magistrate for recording her statement under Section 164 Cr.P.C. and thereafter, she was sent for medical examination. After completion of investigation, charge-sheet was submitted against the accused/appellant under Section 6 of POCSO Act. Charge was framed accordingly under section 6 of POCSO which was read over and explained to the accused/appellant to which he pleaded not guilty and claimed to be tried.

5. During course of trial, 9(nine) witnesses were examined by the prosecution and exhibited five documents but the appellant did not adduce any evidence in support of his defence. After completion of trial, the statement of the appellant was recorded under Section 313 Cr.P.C. wherein incriminating materials found in the evidence of the witnesses were put to him to which he denied the same and pleaded his innocence. After hearing the arguments

advanced by the learned counsel for the parties, the learned Special Judge, Udalguri convicted the accused/appellant as aforesaid. Hence, the appellant has preferred this appeal.

6. Mr. Z. Hussain, learned *Amicus Curiae* has argued that to bring home the charge under the POCSO Act, the age determination of the victim is the prime factor which the prosecution has failed to do so during trial. The prosecution only proved the age of the victim through medical evidence as there is no birth certificate or any document to prove the actual age of the victim. It is also submitted by the learned *Amicus Curiae* that it is the established principle of law that there is a margin of error of two years of either side and the benefit of doubt always goes in favour of the accused. The radiological report states that the age of the victim was 16 to 17 years at the relevant time of the incident. As held by the Hon'ble Supreme Court that ossification test is no doubt a surer test but the margin of error is two years on either side. Therefore, the victim was not a minor at the relevant of the incident. Being major at the relevant time of the occurrence, the case does not fall under the purview of POCSO Act and in view of the evidence on record, Section 376 IPC is also not attracted here in this case.

7. It is further submitted that save and except the oral testimony of the victim, there is no evidence to substantiate that the accused has committed sexual intercourse with the victim and was responsible for her pregnancy. Despite the child being born and alive, no DNA or any sort of medical examination was conducted to prove the paternity of the child of the victim. Under such circumstances, the involvement of third person cannot be ruled out. In view of the infirmities available in the record, the impugned judgment deserves to be interfered by this Court. It is also submitted that the accused/appellant has been detained more than three years in jail *hajot*.

8. In support of his submissions, learned *Amicus Curiae* has placed reliance on the following case laws-

(I) AIR 2013 SC 3467 (Jarnail Singh vs. State of Haryana).

(ii) AIR 2010 SC 392 (Sunil vs. State of Haryana).

(iii) 2021(3)GLT128 (Manirul Islam vs. The State of Assam & Ors.).

(iv) 2005(3) GLT 105 (Samsul Hoque vs. State of Assam).

(v) 2016(2) GLT 1016 (Abdul Matin Pradhani & Ors. vs. State of Assam).

9. *Per Contra*, Ms. S.H. Bora, learned Additional Public Prosecutor for the State submits that the accused/appellant was well aware that the victim was below 18 years of age despite which he has subjected to victim the penetrative sexual assault. It is further stated that when the victim was pregnant, she approached before the appellant to take her in his house but in spite of that he refused to take her in his house and eloped with another girl. The conduct of the appellant shows that his intention was not to marry the girl though he committed sexual intercourse with her. Under the facts and circumstances of the case, the learned trial court has rightly passed the judgment convicting the accused/appellant which needs no interference by this Court.

10. I have considered the submissions of both sides.

11. The victim was examined in the case as P.W. 7. From her deposition, it reveals that she stated her age before the learned trial court as 14 years. She deposed in her evidence that after the death of her parents, she used to stay with her grandmother **Arti Rajowar**. The accused **Shiva Chautal** used to reside about 50 mtr. away from her grandparents house. During the time of Durga Puja, in the year 2016, the accused with a promise to marry her started to commit sexual intercourse with her without her consent. Ultimately, she became pregnant. Then, she asked the accused to take her to his house but he did not respond. When she asked the accused to solemnize marriage with her then the accused refused to marry her, instead the accused married another girl. Subsequently, she gave birth to a male child. Thereafter, she lodged the FIR. She was medically examined and her statement was

recorded by the learned Magistrate under Section 164 Cr.P.C.

12. In her cross-examination, P.W.7 replied that she is still unmarried. She was born on 15.08.2004 but she had not submitted any birth certificate in this case.

13. P.W.1 is the grandfather of the victim. He deposed before the learned trial court that when he was released from Mangaldai jail, he could learn that the victim was pregnant. On being asked, the victim told him that the accused made her pregnant. At the time of incident, the age of his granddaughter was thirteen years. A male child was born. One mel was held in their village but the matter was not resolved. His granddaughter then lodged the FIR.

14. In his cross-examination, P.W.1 replied that before asking the victim, she did not earlier disclose about her pregnancy. He did not see the accused coming to the house of the victim. They did not lodge any ejahar prior to holding of mel in their village.

15. P.W.2 is the grandmother of the victim girl. From her deposition, it reveals that in the year 2016/2017 having seen the body of the victim, she asked her what had happened. Then she told her that the accused committed rape on her as a result of which, she became pregnant. A mel was held in their village but the accused did not confess. Thereafter, finding no alternative, the victim lodged the FIR. Later on, a male child was born to her granddaughter. At the time of incident, the age of the victim was 13 years.

16. In her cross-examination P.W.2 replied that she did not know the date of birth of the victim. She did not file any document to prove her age. she did not say about the incident before five months of her pregnancy. Her house is adjacent to the house of the victim and she used to meet her.

17. P.W.3 is the Magistrate who recorded the statement of the victim under Section 164 Cr.P.C.

18. P.W.4 and P.W.5 stated that the occurrence took place in the year 2017. The elder brother of the victim submitted a petition before AATSA to make an enquiry on the pregnancy of his sister. Accordingly, a meeting was held. In the said meeting, the victim girl stated that she was impregnated by the accused but the accused denied the fact. Since the accused has his wife, so the matter was not settled. Subsequently, the FIR was lodged.

19. P.W.6 is the medical officer. He deposed before the learned trial court that on 03.04.2017, he was working as senior medical officer at Udalguri Civil Hospital. On that day at 2 p.m., he examined the victim girl on police requisition. On the basis of radiological report, vide Ext. 2, the age of the victim was 16 to 17 years. Ultrasonography of abdomen reveals single live fetus of 25+ 1 of gestation age. Doctor opined that the victim was pregnant of 25 + 1 weeks of pregnancy. She was approximately 16/17 years old.

20. In his cross-examination, P.W.6 replied that he did not find any external violence marks on the body of the victim.

21. P.W.8 is the neighbor who deposed in his evidence that she did not have any personal knowledge as to how the victim became pregnant and who caused her pregnancy.

22. P.W.9 is the investigating officer. He deposed in his evidence that on 31.03.2017, he was posted as 2nd officer at Mazbat police station. On that day, the victim filed an ejarah which was registered as Mazbat P.S. Case No. 20/17 under Section 6 of POCSO Act and he was entrusted to investigate the said case. During investigation, he recorded the statement of the victim and other witnesses and prepared the sketch map vide Ext.4. The victim was sent for medical examination. The statement of the victim was also got recorded by the Magistrate under Section 164 Cr.P.C. The accused was also taken to the custody. After collecting all the relevant documents and perusal of the case diary and having found prima facie materials, he submitted charge-sheet vide Ext.5 against the accused/appellant under Section 6 of POCSO Act. P.W.9 also proved the FIR vide Ext. 3 as the informant put her thumb impression therein.

23. In the case in hand, the evidence of the victim indicates that the relationship was consensual. Hence, the core question for consideration is whether the victim was a child within the meaning of Section 2(d) of the POCSO Act.

24. The learned Special Judge after considering the evidence on record and hearing the respective parties, held that the appellant had sexual relationship with the victim who was below 18 years of age and a child within the meaning of Section 2(d) of POCSO Act. The learned Special Judge further observed that the victim had informed the appellant about her pregnancy and asked him to get her married but he refused to marry the victim girl and instead he was eloped with another girl. Learned Special Judge also held that the appellant was subjected the victim girl to penetrative sexual assault and committed rape on her as a result of which, she became pregnant and a child was born to her and found the accused/appellant guilty under Section 6 of POCSO Act and convicted him as aforesaid.

25. Admittedly, the appellant has been held guilty of offence under Section 6 of POCSO Act which has been enacted to protect the children from offences of sexual assault, sexual harassment and contains stringent provisions as to safeguard the interest and the well being of the children. 'Child' within the meaning of Section 2(d) of the POCSO Act means any person below the age of 18 years. Hence, in order to attract the provisions of the POCSO Act, the onus is on the prosecution to prove that the victim was a 'child' within the meaning of section 2(d) of the POCSO Act.

26. It is pertinent of mention that Section 34 of the POCSO Act prescribes the procedure to be followed in case of Commission of offence by child and determination of age by a Special Court under the POCSO Act. Section 34 reads as follows:-

- (1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the [the Juvenile Justice(Care and Protection of Children) Act, 2015].

- (2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.
- (3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.

27. In the case of Jarnail Singh vs. State of Haryana(supra), the Hon'ble Supreme Court, while considering the issue of determination of age of a minor victim, has analysed the scope of Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as J.J. Rules 2007). The Supreme Court has held that though Rule 12 is strictly applicable only to determine the age of the child in conflict with law, the said statutory provision should also be the basis for determining age, even of a child, who is a victim of crime.

28. It may be mentioned that J.J. Rules 2007 were framed in terms of Section 68 of Juvenile Justice Act, 2000, which has been repealed by the Juvenile Justice (Care and Protection of Children) Act, 2015 and corresponding amendment has been made in Section 34(1) of the POCSO Act by substituting the words 'Juvenile Justice (Care and Protection of Children) Act 2000' with 'Juvenile Justice (Care and Protection of Children) Act, 2015'. Hence, the age of the victim has to be determined as per Section 94(1) of 2015 Act, which enables the Committee to determine the age of the person based on the appearance of the said person brought before it. It is only in case of reasonable doubt that the Committee or Board has to follow the prescribed procedure for determination of age as provided under Section 94(2) of 2015 Act, which reads thus:-

" Section 94 Presumption and determination of age:-

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

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

29. The procedure prescribed under section 94, to determine the age of a person, is not materially different from the procedure prescribed under Rule 12(3) of 2007 Rules, except for some minor variations. A plain reading of section 94 indicates that when there is doubt about the age of the person, the age has to be determined first on the basis of the date of birth certificate from the school or the matriculation or equivalent certificate from the concerned examination board and if no such material is available then on the basis of birth certificate given by a Corporation or a Municipal Authority or Panchayat and in the absence of such evidence on the basis of ossification test or any other medical age determination test. Section 94 does not contain provision regarding benefit of margin of error to be given to the child or juvenile as provided in Rule 12(3)(b) of 2007 Rules, which provided for benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

30. Reverting to the facts, it is the case of the prosecution that the victim was below 18 years of age. The evidence on record reveals that there is no documents like birth certificate or school certificate to prove the age of the victim. The prosecution has proved her age

through radiological report. Though the victim stated that she was born on 15.08.2004 but she has failed to produce her birth certificate during trial. P.W.1 and P.W.2 who are the grandparents of the victim stated that at the time of the incident, the age of the victim girl was 13 years but to substantiate their oral evidence, no any document has been submitted before the trial court. It transpires that the age of the victim has been proved through the radiological report.

31. It appears from the record that Dr. A. Deka examined the victim for determination of her age. According to radiological report, the age of the victim was 16 to 17 years. The evidence of P.W. 6 reveals that the investigating officer had sent a requisition for ossification test of the victim. The ossification test report is not available in the record. Only the P.W.6, the medical officer has proved the observation of radiologist while examining before the court. According to P.W.6, X-Ray shows (1) right wrist joint- Epiphyseal union not completed in lower end of radius and ulna; (2) Right elbow joints- Epiphyseal union is completed in upper end of radius ulna and lower end of humerus; (3) Right iliac crest- Epiphyseal union not completed. According to radiologist, the victim was approximately 16 to 17 years old at the time of examination.

32. The evidence of medical officer P.W.6 clearly indicates that the radiologist has assessed the age of the victim as 16 to 17 years. The radiologist who examined the victim to determine her age was not examined before the learned trial court to prove the radiological report. P.W.6, the medical officer is not the author of the report conducting determination of the age of the victim. P.W.6 while testified in the trial court stated that as per report of radiologist, the age of the victim was 16 to 17 years at the relevant time. As the prosecution has not examined the said doctor(radiologist) who could explain the basis of such opinion, the report has no evidentiary value in the eye of law.

33. It is well settled that ossification test or other medical test though is a guiding factor for determining the age but it is not conclusive or incontrovertible and leaves a margin of error of two years on either side. It is also a settled position that the benefit of doubt with regard to

the age of the victim always goes in favour of the accused. In the instant case, the radiologist has assessed the age of the victim 16 to 17 years. Considering the margin of error in age even as one year, the victim would be 18 years of age and would not be a child within the meaning of Section 2(d) of the POCSO Act.

34. The prosecution has also not adduced any evidence regarding the victim's physical growth and development and secondary sexual character. This discrepancy also leaves room for ample doubt with regard to the correct age of the victim, the benefit of which must necessarily go in favour of the appellant. The prosecution has, therefore, failed to prove beyond reasonable doubt that the victim was below 18 years of age. This was relevant as the evidence on record indicates that the physical relationship between the appellant and the victim was consensual. In the absence of evidence to prove that the victim was below 18 years of age, the provisions of the POCSO Act cannot be invoked and consensual relationship would not constitute the offence of rape within the meaning of Section 375 of the IPC.

35. Under the facts and circumstances of the case, this Court is of the opinion that the prosecution has failed to prove age of the victim below 18 years as on the date of incident for which the accused/appellant cannot be held guilty of offence under Section 6 of POCSO Act.

36. In the light of the above, the instant appeal is allowed. The appellant is acquitted and set at liberty forthwith. The conviction and sentence recorded by the learned Special Judge, Udalguri against the accused/appellant in POCSO Case No. 22/2017 under Section 6 of POCSO Act is hereby set aside. Consequently, the appellant shall be released from custody forthwith, if not required in any other case.

37. Send back the LCR.

JUDGE

Comparing Assistant