

GAHC010097362020



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

Case No. : CRL.A(J)/51/2020



VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR. B PRASAD, AMICUS CURIAE

Advocate for the Respondent : PP, ASSAM

:: PRESENT ::

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA

For the Appellant : Mr. B. Prasad,
Amicus Curiae.

For the Respondent No.1: Ms. S. Jahan,
Addl. Public Prosecutor,
Assam.

For the Respondent No.2: Mr. A. Dhar,
Amicus Curiae.

Date of Hearing : 14.02.2023.
Date of Judgment : 23.02.2023.

JUDGMENT AND ORDER (CAV)

(Parthivjyoti Saikia, J)

Heard Mr. B. Prasad, the learned Amicus Curiae representing the appellant and Ms. S. Jahan, the learned Addl. Public Prosecutor, Assam. Also heard Mr. A. Dhar, the learned Amicus Curiae representing the respondent no.2.

2. Challenge in this appeal is to the judgment and order dated 14.11.2019 passed by the learned Sessions Judge, Dibrugarh in POCSO Case No.12 of 2019 (G.R. Case No.2809/2018) whereby the appellant was convicted under Section 4 of the POCSO Act, 2012.

3. The prosecution case, in a nutshell, is that about 10 days prior to filing of the FIR, the appellant allegedly committed penetrative sexual assault upon his own daughter who was about 13 years old at the time of occurrence.

4. On 06.08.2018, the FIR was lodged by the mother of the victim girl narrating the aforesaid fact.

5. On 07.08.2018, the victim girl was examined by the doctor. The doctor's report goes like this-

On genital examination:

a. Genital organs developed;

b. Vulva: Labia majora covered labia minora and clitoris on

- abduction of both thighs;
- c. Hymen intact and elastic;
- d. Uterus not palpable per abdomen;
- e. Vagina and cervix healthy;
- f. Evidence of venereal diseases not detected clinically;
- g. Evidence of injury on her body or private parts not detected;
- h. Vaginal smears taken on glass slides for laboratory investigation from around hymenal orifice and lateral fornix.
- i. Evidence of struggle and stain not detected;
- j. No abnormality detected on mental condition;
- k. Intelligence and memory is average. She is co-operative and good;
- l. Gait is normal.

Result of laboratory investigation: Microscopic examination of vaginal smears does not show any presence of spermatozoa or gonococcus.

Opinion: On the basis of physical examination, radiological and laboratory investigations done on the victim 'X', the MO was of the opinion that:

- i. There is no evidence of recent sexual intercourse detected on her person;
- ii. There is no evidence of injuries detected on her person;

iii. Her age is above fourteen years and below sixteen years.

6. On conclusion of investigation, police filed the *charge sheet* against the appellant.

7. The trial court framed the charges under Section 376 of the Indian Penal Code and under Section 4 of the POCSO Act. The appellant pleaded total denial and hence the trial followed.

8. During the trial of the case, the prosecution side examined as many as 8(eight) witnesses. The defence plea is of total denial and no evidence has been adduced.

9. The first prosecution witness to be examined is the Medical Officer (PW-1), who examined the victim girl at the hospital. She has narrated the case history as told to her by the victim. The victim girl reportedly told her that after removing her panty, the appellant tried to insert his penis into her vagina but he could not as she pushed him (appellant) aside. Rest of her evidence relates to her report.

10. The second prosecution witness is the victim girl (PW-2). She has stated that the appellant had forcibly groped her breast and committed rape upon her. On that day, the victim did not inform anyone because the appellant reportedly threatened her of dire consequences. Next morning, she informed her mother, who in turn, informed the mother of the appellant about the aforesaid facts. In this way, the news spread amongst family members. In the meantime, the father of the victim girl ran away and remained absent from the house on several subsequent days. The victim girl has stated that on the advice of the villagers, her mother had informed the police.

11. During cross-examination, the victim girl has stated that at the relevant time of occurrence, her elder brother who is a student of Class-VIII and her younger brother who is a student of Class-III were present in the house. She has stated that her father used to consume alcohol and that is the reason why he was disliked by her mother.

12. The third prosecution witness is the mother (PW-3) of the victim. She has stated in her evidence that one day she noticed that her daughter was in a depressed state and therefore she asked the reason for depression. According to PW-3, her daughter informed her that her husband i.e. the father of her daughter had committed penetrative sexual assault upon her (the victim). PW-3 stated that she immediately confronted her husband but he denied the accusation. PW-3 thereafter, informed other villagers and the Mahila Samity members and the Village Headman informed the police.

13. In her cross-examination, the PW-3 has stated that she never witnessed any stains on the wearing apparels of her daughter.

14. The fourth prosecution witness (PW-4) is the mother of the appellant as well as the grandmother of the victim girl. She was not present in the house when the occurrence took place. When her daughter-in-law i.e. the PW-2 called her home, then only she came to know about the occurrence. According to PW-4, the fellow villagers were informed about the occurrence and the appellant fled away from his house. PW-4 has disclosed that after several days her son was found hiding inside the tea garden. He was handed over to the police.

15. In her cross-examination, PW-4 has stated that the appellant and his

wife (PW-3) had a strained relationship because the appellant used to consume liquor and had fightings with her.

16. The fifth prosecution witness (PW-5) is the sister-in-law of the appellant. She has stated in her evidence that PW-4 i.e. the mother of the appellant had informed her husband about the occurrence. PW-5 has stated that the villagers had apprehended the appellant and handed over to police.

17. In her cross-examination, PW-5 has stated that there was a village meeting in order to sort out the alleged incident. But since there was no solution, ultimately FIR was lodged before police.

18. The sixth prosecution witness (PW-6) is a distant relative of the appellant. He came to know about the occurrence after the villagers informed him about it. He immediately asked the victim girl and she reportedly told him that the appellant had sexually assaulted her. Thereafter, PW-6 has stated, he found the appellant on the road and brought him home. According to PW-6, all the villagers asked him questions about the occurrence and the appellant reportedly told them that since the victim is his daughter, he can do anything with her. Thereafter, the appellant was handed over to police.

19. During his cross-examination, PW-6 has stated that the appellant threatened him that after his release from jail, he would kill him. PW-6 has stated that after he had apprehended the appellant, he slapped him twice.

20. The seventh prosecution witness (PW-7) is the Village Headman. He has stated in his evidence that PW-6 informed him about the occurrence

over telephone. He has heard that the appellant had sexually assaulted his own daughter.

21. The eighth prosecution witness (PW-8) is the police investigating officer who spoke about the investigation.

22. We have carefully gone through the prosecution evidence.

23. In this case, the exact date of occurrence is not known. It has been stated in the FIR that about 10 days prior to its filing, the occurrence took place.

24. The victim girl has stated in her evidence that her father i.e. the appellant has the habit of consuming liquor and for that habit, he was disliked by her mother. The victim girl has further stated that even prior to the occurrence of this case, she did not want to live with her father.

25. In her evidence, the victim girl has stated that she was raped by the appellant. The medical evidence, on the other hand, shows that the hymen of the victim was intact.

26. The doctor (PW-1) who examined the victim girl has quoted the victim girl as saying to her that the appellant tried to insert his penis into her vagina but he could not because she pushed him aside.

27. In ***Madan Gopal Kakkad v. Naval Dubey***, (1992) 3 SCC 204, there was an allegation that an 8 year girl was raped and during medical examination the hymen was found intact. The trial court convicted the appellant under Section 376 of the Indian Penal Code but the High Court, on appeal, set aside the said judgment and convicted the appellant under Section 354 of the Indian Penal Code. While setting

aside the judgment of the High Court, the Supreme Court convicted the appellant under Section 376 of the Indian Penal Code. Paragraphs 29, 34, 37 and 38 of the judgment are relevant and hence quoted as under:

“29. The next crucial question that arises for our consideration is whether the proved facts establish the offence of rape or only attempt to commit rape. Before the High Court, the learned Government Advocate appears to have urged that the offence was punishable under Section 376 read with 511 IPC though the charge was for a specific offence of rape punishable under Section 376 IPC.

34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court.

37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by *Modi in Medical Jurisprudence and Toxicology* (Twenty-first Edition) at page 369 which reads thus:

“Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. *Rape is crime and not a medical condition. Rape is a legal*

term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

(emphasis supplied)

38. In *Parikh's Textbook of Medical Jurisprudence and Toxicology*, the following passage is found:

"Sexual intercourse.— In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

28. In *Madan Gopal Kakkad (supra)*, the appellant reportedly ejaculated in the vagina of the victim girl. But the case in hand, the situation is a little bit different. In the case in hand, there was no ejaculation. The victim girl simply stated in her evidence that the appellant had committed rape upon her. The medical evidence shows that the hymen of the victim girl was found intact. The doctor who examined the victim girl, has stated in her evidence that the victim girl had told her that the appellant had attempted to push his penis into her vagina and she pushed him aside and the appellant could not proceed further.

29. Therefore, we have two factual scenarios before us. One scenario states that the appellant had committed upon the victim. The other scenario states that the appellant attempted to push his penis into the vagina of the victim girl.

30. Upon those points, there are no cross-examinations either of the

victim girl or of the doctor.

31. There is no doubt that the hymen of the victim girl was found intact. So, complete penetration can easily be ruled out. It is true that in order to constitute penetrative sexual intercourse, slightest penetration is sufficient. But in the case in hand, we have before us the evidence of the doctor who quoted the victim girl as saying to her that the appellant tried to insert his penis into her vagina. If this piece of evidence is accepted, then it can be held that there was no penetrative sexual assault.

32. We are of the opinion that there is a doubt about the veracity of the allegation of rape or penetrative sexual intercourse upon the victim girl. The evidence available before us clearly shows that the appellant touched the body of the victim girl with sexual intention.

33. Under the aforesaid premised reasons, we are of the opinion that the offence under Section 6 of the POCSO Act has not been proved against the appellant beyond all reasonable doubt. But the offence under Section 8 of the POCSO Act is proved beyond all reasonable doubt against the appellant.

34. Therefore, the appeal is partially allowed and the impugned judgment is modified to the extent that instead of Section 6 of the POCSO Act, the appellant stands convicted under Section 8 of the POCSO Act.

35. The appellant is sentenced to undergo rigorous imprisonment of 5(five) years for the offence under Section 8 of the POCSO Act. He is also sentenced to pay a fine of Rs.10,000/-, i/d, the appellant shall undergo

another period rigorous imprisonment of 6(six) months.

36. In appreciation of the assistance provided by the learned *Amici Curiae*, they shall be given adequate remuneration as per rules by the State Legal Services Authority.

Send back the LCR.

JUDGE

JUDGE

Comparing Assistant