

GAHC010027102020



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

Case No. : CRL.A(J)/2/2020

UMESH BARAIK
UDALGURI, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MS. BIJITA SARMA, AMICUS CURIAE

Advocate for the Respondent : MR. P BORTHAKUR(ADDL.PP, ASSAM)

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT

Date : 07-11-2023

Heard Ms B Sarma, learned *Amicus Curiae* for the appellant and Mr P Borthakur, learned Additional Public Prosecutor, Assam.

2. This appeal is directed against the judgment and order dated 23.07.2019, passed by the learned Special Judge POCSO, Udalguri in connection with Special (POCSO) Case No. 03 of 2018, convicting Umesh Baraik (hereinafter referred to as the appellant) under Section 376

(2) (l) of the Indian Penal Code (IPC for short) to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs. 10,000/- with default stipulation.

3. The brief facts leading to this appeal are that the appellant committed rape on a 13 year old victim, say -X on 7.11.2017 at about 03:00 p.m. The victim's father is the informant, say-Y, who has also stated that his daughter was physically challenged.

4. The FIR was registered as Rowta PS Case No. 134 of 2017, under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act for short). The Investigating Officer (IO in short) embarked upon the investigation and on finding sufficient materials laid charge sheet against the appellant under Section 6 of the POSCO Act.

5. At the commencement of trial, copies were furnished and after hearing both the parties, a formal charge under Section 6 of the POCSO Act was framed and read over and explained to the appellant and the appellant abjured his guilt and claimed innocence.

6. To connect the appellant to the crime, the prosecution adduced the evidence of 8 (eight) witnesses, including the Medical Officer ('MO', for short) and the Judicial Magistrate, who recorded the statement of the victim under Section 164 CrPC. On the circumstances arising against him, several questions were asked to the appellant under Section 313 of the Code of Criminal Procedure ('CrPC' for short) and the responses of the appellant were recorded.

7. The learned counsel for the appellant laid stress in her argument that the evidence clearly reveals that the key witnesses PW-5 and PW 6 cannot speak either Assamese or Bodo. Their statements have been interpreted without following the proper procedure of the Oaths Act, 1969. Oath was not administered to the interpreter nor the advocate who was also

present when the statements of the witnesses were interpreted by the interpreter. There is no medical evidence of rape. The findings of the doctor clearly reveals that the victim did not suffer from any sexual assault. Her hymen was found to be intact. The learned counsel also relied on the decision of a coordinate Bench of this court in ***Ranjit Hazarika versus State of Assam***, reported ***in 2018 (2) GLJ 585***, wherein the appellant Ranjit Hazarika was acquitted, because despite the allegation of sexual assault against the appellant, the evidence of the doctor revealed absence of any injury on the private parts of the victim and the hymen of the victim was found to be intact. No sign of penetration was significant, casting a shadow of doubt over the veracity of the victim's evidence. It is further submitted that in this case at hand, witnesses PW-5 and PW-6 have admitted in the Court through their depositions that their parents have tutored them and the witnesses deposed according to the narrative of their parents. It is submitted that the appellant deserves the benefit of doubt.

8. Per contra, the learned Additional Public Prosecutor laid stress in his argument that although the medical evidence does not support the offense of rape, yet the testimony of the victim cannot be discarded. It is submitted that the evidence of a victim is sufficient to prove a case of sexual assault even though the hymen of the victim at times is found to be intact. It is submitted that the statement of the victim is found to be reliable and her statement is corroborated by the deposition of her sister, PW-5. The decision of the learned trial court is sustainable and does not require any interference. It has been held by the learned trial court that-

“24. In the instant case the evidence of PW5 and PW6 have been recorded with the help of interpreter who is a practising advocate of

the bar. She is neither related to the victim girl nor in anyway have interest in the case of the prosecution. Both PW5 and PW6 could speak and the interpreter only aided to translate the statements made in Bodo language. The counsel appearing for the prosecution is also from Bodo community and conversant with the Bodo language. But this Court as a measure of abundant caution took the help of a member of the bar who is not anyway connected with the case. Though oath was not administered to the interpreter but as she is neither interested nor related to the victim, there is no possibility of misinterpreting the statements adduced by the witnesses by the interpreter. Hence, in this case merely because oath was not administered to the interpreter does not make the testimony of PW5 and PW6 unreliable and as such I find no force to the contention of the learned defence counsel.

25. In this case the victim has adduced evidence implicating the accused in the alleged incident of sexual assault upon her. She had deposed consistently and in a straightforward manner that on the date of occurrence the accused inside her house laid her down on the ground, gagged her mouth, removed her undergarment and inserted his penis into her vagina. The evidence of the victim(PW5) is consistent with her previous statement recorded by learned Magistrate under Section 164 Cr.P.C. The evidence of the victim is corroborated by her sister (PW6) who had seen the accused covering the victim with the undergarment which was removed from her. The evidence of the parents of the victim had also corroborated the testimony of PW5 and PW6. They were informed about the incident on the date of occurrence itself after they returned from their workplace to their home. PW3, the cousin of the victim was also informed about the incident by PW6. He then immediately went to the house of the

victim but could not trace the accused there. All the prosecution witnesses were cross-examined in length by the defence but failed to extract anything so as to demolish the credibility of their testimony. The evidence of all the prosecution witnesses is consistent and there are no discrepancies in their evidence on material point. Defence has also failed to bring out anything as to why the parents of the victim would file a case falsely against the accused putting the dignity of their daughter at stake."

9. Now, on the anvil of these submissions, the question that falls for consideration is that whether the learned trial court erred in convicting the appellant under Section 376 (2) (I) of the IPC.

To decide this case in its proper perspective, the evidence is once more reappraised.

10. The victim-X deposed as PW-5 that the appellant is known to her. The incident occurred one evening, about a year ago. At the time of the incident, she was alone at home as her parents went out for work. On the fateful evening, the appellant went into her house and pinned her to the ground and gagged her and removed her panties and inserted his penis into her vagina. At that time, her younger sister say- Z (name withheld) arrived. As soon as her sister arrived, the appellant covered himself with a gamosa (a type of towel) and fled. After some time, her parents arrived and she informed her parents about the incident. Her sister Z witnessed the incident. Her father lodged the FIR. She gave her statement before the Magistrate and she affixed her thumb impression. The police also took her to the hospital. Z witnessed the incident.

11. In her cross examination, she deposed that she cannot speak or follow Assamese or English. She was alone at the time when the Magistrate recorded her statement. She gave

her statement in 'Bodo' language. She could not recall after how many days of the incident the Magistrate recorded her statement and after how many days of the incident the Police recorded her statement. Her parents tutored her how to adduce evidence in connection with the incident. She admitted that she had adduced evidence as she was tutored by her parents. However, she denied that the appellant did not commit any bad act on her. She experienced pain on her shoulders at the time of the incident. She did not sustain any bleeding injury at the time of the incident. She also did not raise alarm at the time of the incident.

12. The statement of the victim under Section 164 CrPC is consistent to her deposition in the Court. The victim's younger sister, Z was only ten years old at the time when her deposition was recorded in the court. Several questions were asked to the victim's younger sister to assess her intelligence and after assessment that the witness was intelligent and fit to depose, her evidence was recorded on oath. The victim's sister Z deposed as PW-6 that the appellant is known to her. The incident occurred about a year ago at about 03:00 p.m. At that time, she came back to her house from the playground and then she saw the appellant sprawled over her sister's panties, which were removed. Thereafter, the appellant covered himself with gamosa and hid behind the door and he kept peeping from behind the door. Then, the appellant's brother-in-law came and dragged him out of their house and took him to his house. Then she went and informed a neighbour about the incident. When her sister (PW-5) was confronted by their neighbour, she (PW-5) stated that the appellant gagged her and then her sister started crying. As her sister (PW-5) was crying, her neighbour went away. Meanwhile, their cousin Deepak arrived and he went to her father's place of work to inform her father about the incident. When her mother returned home in the evening, she (PW-6) informed her mother about the incident and her mother informed her father about the

incident. Her father then lodged the FIR.

13. This witness was also cross examined and she admitted in her cross examination that she could not speak Assamese. She also admitted in her cross-examination that she did not inform about the incident to the police. She gave her evidence in the court as her parents have tutored her. She admitted in her cross-examination that her neighbor stays about 50 meters away from her house and her uncles are her neighbours. The names of her uncles are Kanteswar and Hytha. She has also admitted in her cross examination that before opening the bedroom door, she could not hear any commotion or noise. The statements of the witnesses, PW-5 and PW-6 have been interpreted and translated from Bodo language to the language of the Court.

14. The learned counsel for the appellant laid stress in her argument that the evidence of PW-5 is not similar to the evidence of PW-6. PW-5 stated that when Z reached the place of occurrence (PO for short), the appellant covered himself with the gamosa and fled. On the contrary, PW-6 (Z) stated that as soon as she went inside the room and saw the appellant covering her sister's removed panties, he immediately covered himself with gamosa and hid behind a door and started staring at her from behind the door. Thereafter, the appellant's brother-in-law came and dragged him out of their house. The evidence of the victim's mother is also not similar to the evidence of the victim's sister, Z as well as the victim's (X's) evidence.

15. The victim's mother, say-A (name withheld) deposed as PW-4 that the incident occurred in the year 2017 during winter. At that time she and her husband were in the paddy field and their two daughters- X and Z were at home. When she returned home with her husband,

their daughter - Z informed them that the appellant committed rape on their daughter- X. After learning about the incident, her husband and others brought the appellant to their house from the house of the appellant's employer. Her daughter- X told them that the appellant muffled her and pinned her to the ground and committed rape on her. X also stated that she tried to go out of the house but the appellant forcefully prevented her from leaving the house.

16. In her cross examination, the PW-4 (A) stated that she gave her age as 25 years when her statement was recorded by the Police. Her elder daughter was about eleven years. She has denied that she stated before the police that her elder daughter (X) was 13 years old. Initially, when she was cross-examined, she stated that her elder daughter could not speak, but later she (PW-4) admitted that her victim daughter (X) could speak a little both at home and outside.

17. A scrutiny of the cross-examination of PW-4 and PW-6 reveals that the appellant used to work as a labour in a house near the victim's house. The employer of the appellant is also related to the victim. The cross examination of PW-4 (A) also reveals that the witness kept vacillating and was inconsistent in her statements. She even forgot the age at which she got married. She stated that her elder daughter was eleven years, whereas her elder daughter X gave her age as 13 years, when her statement was recorded by the Magistrate and rightly so, because her statement was recorded by the Magistrate on 09.11.2017 and when, the victim deposed in the Court on 03.01.2019, she, PW-5 gave her age as 15 years on 03.01.2019.

18. Another contradiction, surfaced through the evidence of PW-3, Bijoy Brahma. He deposed that the incident occurred about five/six months ago. The appellant used to work as

a labour in their village. On the date of the incident, the appellant was cutting firewood for the village people. The victim was a physically handicapped girl. On the fateful day, while their parents went out for their daily work, the appellant entered into the victim's house and bolted the door from inside and committed rape on the victim (X). When her sister (Z) returned home, she could not open the door and, thereafter, the appellant opened the door and the victim's younger sister saw the victim in a naked condition and meanwhile the appellant fled away. When the victim's sister informed them about the incident, they could not trace out the appellant. This is contradictory to what X and Z deposed. PW-5 (X) deposed that as soon as PW-6 entered, the appellant fled, whereas PW-6 (Z) deposed that the appellant was dragged out of the room by his brother-in-law. On the other hand PW-5 and PW-6's cousin, Bijoy Sarma deposed as PW-3 that the appellant unlatched the door when PW-6 tried to enter into the place of occurrence (PO in short).

19. The learned counsel for the appellant laid stress in her argument that the evidence of PW-3 clearly reveals that the victim cannot speak properly. The victim is physically challenged. It thus appears that the victim cannot speak properly. It would be perilous to rely on the evidence of two minor witnesses, more so, when the victim appears to be a child with special needs. It is also submitted by the learned counsel for the appellant that the medical evidence does not transpire any incident of rape.

20. Dr Bhadra Kanta Sarma deposed as PW-1 that on 8.11.2017, he was serving as Senior M & HO at Udalguri Civil Hospital and on that day he examined the victim (X), who was escorted by WPC/ 458 Snehlata Baglari and on examination, he found the following:-

“Physical examination:-

Height 140 cm, weight- 40 Kg, teeth- 20 Nos., axillary hair- not present, pubic hair- small, breast- normal, hymen intact, vaginal injury not seen, marks of violence not seen, clothing normal.

Vaginal swab examination for spermatozoa:- no spermatozoa seen.

RADIOLOGICAL EXAMINATION:-

X-ray for age determination:- Approximate age 14-16 years.

(1)Right wrist joint- Epiphyseal union completed in upper end of radius and ulna.

(2) Right elbow joint- Epiphyseal union not completed in lower end of radius and ulna and lower medial epiphysis of humerus.

(3) Epiphysis not appeared in iliac crest.

Opinion:

(1) No marks of violence.

(2) Hymen intact.

(3) Secretion outside vulva present.

(4) Smear shows no spermatozoa.

(5) Approximate age 14 to 16 years."

21. The MO proved his medico legal report as Exhibit-1 and his signature as Exhibit 1 (1). He has also reiterated in his cross examination that no injuries were detected on the private parts of the victim nor spermatozoa was seen and no evidence of violence was detected.

22. In this case at hand, FIR (Exhibit-2) was lodged on 08.11.2017 and the incident allegedly occurred on 07.11.2017. The victim was examined by the Medical Officer, PW-1 on 08.11.2017, but no evidence of violence was detected and the hymen was also found to be intact. PW-5 admitted in her cross examination that she had given her evidence as tutored by her parents, whereas the PW-6, the younger sister of PW-5 denied the suggestion of the defence that she had given evidence in the court according to the narrative of her parents. The cross examination of PW-3 and the cross examination of informant, PW-2 reveals that the victim cannot speak properly. The victim appears to be someone with special needs. PW-3 also admitted in his evidence that after the medical examination of the victim, they were certain that the appellant committed rape on the victim. This evidence of PW-3, is, however not substantiated by the evidence of the Medical Officer, PW-1, who categorically stated that no marks of violence were detected on examination of the victim. Moreover, her hymen was found to be intact. The evidence of the Medical Officer does not at all indicate that the victim was physically challenged.

23. The Magistrate who recorded the statement of the victim proved the statement u/s 164 Cr.PC as Exhibit-6. No note was made by the Magistrate that the victim was mentally or physically challenged. The exhibit-7 clearly indicates that the victim had given her statement with clarity, and she has explained how the offence of rape was committed by the

appellant. The statement of the victim was recorded with the help of an interpreter namely, Smti Rupeswari Boro, who is the office peon in the office of the District and Sessions Judge at Udalguri. The Magistrate however, admitted in her cross examination that the name of the interpreter, Smt Rupeswari Boro (office peon) was not mentioned in the Exhibit-6 as the interpreter, nor any notice was issued to the interpreter for her assistance nor her signature was taken on Exhibit-6 (statement under Section 164 CrPC).

24. It is argued on behalf of the appellant that the learned trial Court acted in violation to the provisions of the Oaths Act, 1969 when oath was administered to a witness aged 10 years and when oath was not administered to the interpreter. However attention was drawn by the learned Addl. PP to the provisions of the Section 7 of the Oaths Act, 1969.

25. The informant 'Y' testified as PW-2 that the victim is his daughter and she is physically handicapped. The incident occurred in the month of November 2018 at about 02:00 p.m. As he and his wife went out for work, his daughter X was alone at home. The appellant was in the vicinity of their house, cutting firewood. The appellant is addicted to alcohol. When they went out of their house, the appellant entered into their house and committed rape on their daughter. His other daughter Z witnessed the incident and called the local people. He informed the police and lodged the FIR and he affixed his thumb impression on the FIR.

26. In his cross-examination, he deposed that the FIR was written by one person from Rowta and he did not know what was written on the FIR. He also admitted in his cross examination that he did not mention before the police that his other daughter Z witnessed the incident and informed the local people and his son called him from his place of work. This is a major contradiction in the evidence of the informant. He also admitted in his cross

examination that his uncle Moneswar Basumatary resides on the eastern side of his house and the house of Daneswar Baglary is situated on the western side of his house and his brother Kanteswar resides on the northern side of his house. The appellant was working in Daneswar Baglary's house at the time of the incident. He also mentioned in his cross examination that his daughter cannot speak properly and she does not at all speak outside.

27. It is true that in a case of sexual assault, the evidence of the victim is sufficient to bring the perpetrator to book, but in this case at hand, the sole evidence of two minor witnesses without any substantiating evidence cannot form the basis of conviction, after considering the peculiar situation and facts and circumstances of this case. The victim's younger sister, Z deposed that she immediately informed her sister-in-law about the incident, but this sister-in-law was not examined as a witness. The informant's son was not examined as a witness. The scribe of the FIR was also not examined as a witness. The informant deposed in his cross examination that that his other daughter (Z) witnessed the incident and informed the local people and their son informed the local people about the incident and then his son called him from his place of work, but this son of the informant was not examined as a witness.

28. No acrimonious relation between the appellant and the informant which would prompt the informant to falsely implicate the appellant was projected by the defence. However, the fact remains that the evidence of the victim, PW-5 is not similar to the evidence of her younger sister who witnessed the incident. The victim stated that as soon as the appellant saw her younger sister, he covered himself with the gamosa and fled, whereas the victim's younger sister, PW-6 deposed that as soon as the appellant saw her, he covered himself with a gamosa and hid behind the door. Again, another witness, PW-3 deposed that when the victim's younger sister, PW-6 returned home, she could not open the door and the appellant

opened the door and she saw the appellant in a naked condition. When she (PW-6) saw the appellant, he fled from the PO. On the contrary, PW-6 deposed that she saw the appellant hiding behind the door and his brother-in-law came and dragged him out of the house. PW-6 also stated that she opened the door and went inside, which is contradictory to the evidence of PW-3, who stated that as PW-6 was unable to unlatch the door, the appellant himself opened the door. Although no contradictions could be elicited through the cross examination of the witnesses vis-à-vis the cross examination of the IO, the contradictions which surfaced through the evidence-in-chief of the witnesses casts a shadow of doubt over the veracity of the evidence, more so, when PW-5 admitted in her cross examination that she gave her evidence as tutored by her parents. It is true that the victim has deposed that the appellant committed sexual assault on her, but due to the myriad of contradictions and the medico legal report given by the MO, benefit of doubt has to be extended to the appellant. Although the Medical Officer and the Magistrate have not stated that the victim is physically challenged, yet assuming that the victim is physically challenged, it will even be more perilous to convict the appellant on the sole testimony of the victim when the evidence is bristled with contradictions.

29. In *Ranjit Hazarika's case (supra)*, a co-ordinate Bench of this Court had acquitted the appellant Ranjit Hazarika because despite the allegation of sexual assault against him, the evidence of the doctor revealed absence of any injury on the private parts of the victim and the hymen of the victim was found to be intact.

30. In this instant case, owing to the procedural lapses and the contradictions in the evidence, a benefit of doubt is extended to the appellant.

31. In the wake of foregoing discussions, it is held that prosecution has failed to prove this case beyond a reasonable doubt. This case is bristled with discrepancies and the evidence is replete with contradictions. When two views are possible, the view in favour of the accused is to be taken. As the foundational facts have not been proved beyond a reasonable doubt, presumption does not operate against the appellant. It is thereby held that the Judgment and Order dated 23.07.2019 in Special POCSO Case No. 3/2018, convicting the appellant under Section 376 (2) (I) of the IPC to undergo Rigorous Imprisonment of ten years and to pay a fine of Rs. 10,00,000/- (Rupees Ten Lacs) Only is not sustainable and is hereby set aside. The appellant is set at liberty on benefit of doubt.

32. However, keeping in view the provisions of Section 437-A Cr.P.C., the accused-appellant herein is directed to furnish a personal bond in the sum of Rs. 40,000/- and a surety bond in the like amount before the learned trial court, which shall be effective for a period of six months.

JUDGE

Comparing Assistant