



GAHC010009262011

Page No.# 1/12



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

**Case No. : CrI.A./195/2011**

IMRAN ISLAM BORA  
S/O KADIR BORA, R/O BORDOLOI NAGAR, P.O. and P.S. TINSUKIA, DIST.  
TINSUKIA, ASSAM.

VERSUS

THE STATE OF ASSAM,

**Advocate for the Petitioner : MR.A K GUPTA**

**Advocate for the Respondent : MR. D DAS(ADDL.PP, ASSAM)**

**- B E F O R E -**

**HON'BLE MR. JUSTICE ARUN DEV CHOUDHURY**

For the Appellant	: Mr. P. J. Saikia, Sr. Advocate. Assisted by Mr. P. Bordoloi, Adv.
For the Respondents	: Mr. D. Das, Addl. PP
Date of hearing	: 07.09.2023, 13.09.2023, 14.09.2023
Date of judgment	: 21.09.2023

### JUDGMENT & ORDER (CAV)

1. Heard Mr. P. J. Saikia, learned Senior Counsel assisted by Mr. P. Bordoloi, learned counsel for the appellant. Also heard Mr. D. Das, learned Additional Public Prosecutor for the State of Assam.
2. The present appeal is directed against the Judgment and order dated 16.09.2011 passed by the learned Sessions Judge, Tinsukia in Sessions Case No. 78 (T)/2010 convicting the appellant/ accused under Section 354 of I.P.C. and sentencing him to undergo imprisonment for 2 months and 7 days and to pay a fine of Rs. 5,000/- and in default of payment of fine to undergo Simple Imprisonment for a period of another 15 days and to pay Rs. 15,000/- as compensation.
3. The prosecution case in brief is that one Smt. Namita Sengupta lodged an Ejahar before the Officer-in-Charge of Tinsukia Police Station on 21.07.2009 stating inter-alia that appellant was residing with his family as tenant under the same landlord of the informant and that the minor daughter of the informant used to call the appellant as uncle and that her daughter used to visit the house of the appellant on and off and that on 18.07.2009, the appellant called the victim to his house and at that time the wife of the accused was absent and his son was sent for bringing betel nut from a nearby shop and taking advantage of the situation, the appellant undressed the victim and committed rape on her and that the victim disclosed the aforesaid incident to the informant on 19.07.2009.
4. On receipt of the said Ejahar, the officer in charge, Tinsukia Police Station registered a case being Tinsukia Police Station Case 479/2009

under Section 376 (f) of IPC for investigation. Accordingly, the investigation was conducted and thereafter, charge sheet was filed under section 376 (f) of IPC against the appellant/accused.

5. Thereafter, committal court committed the matter to the Court of learned Sessions Judge, Tinsukia. Charges were framed under Section 376 (f) of IPC, on 07.08.2010 against the appellant and was read over and explained to the accused/appellant to which he pleaded not to be guilty and claimed to be tried. Accordingly, the trial commenced.

6. To bring home the charges, the prosecution examined as many as 11 witnesses including the victim and no defence evidence has been adduced on behalf of the appellant. The statement of the accused was recorded under section 313 Cr.P.C.

7. Thereafter, the learned trial Court convicted the appellant/ accused under Section 354 of I.P.C. and sentenced him to undergo imprisonment for 2 months and 7 days and to pay a fine of Rs. 5,000/-and in default of payment of fine to undergo Simple imprisonment for a period of another 15 days and to pay Rs. 15,000/- as compensation. Assailing such judgment and conviction, the present criminal appeal is filed.

8. Before determining the legality and validity of such conviction, let this Court now examine the deposition of the witnesses so as to arrive at a just and fair decision.

I. PW-1 Smti. Namita Sengupta, was the mother of the victim and informant of the case. In her examination-in-chief, she deposed that victim was of 5 years of age at the time of occurrence. On 09.07.2009, in the morning, the victim reported to

her that the accused on the previous night put off her pants and committed bad acts by applying oil. The victim also informed her about burning sensation in her vagina. But when examined she deposed that she did not notice any abnormality in her vagina. She further deposed that victim on 18.07.2009 informed her about the bad acts committed by the accused with her but she did not pay any attention as her husband was not at home. On 19.07.2009, after return of her husband, the matter was informed to him and he called his neighbours – Sujit Kumar Bhowal, Bimal Dahutia (PW-5), Dipa Dahutia (PW-3), Anjali Hazarika (PW-7) etc. On hearing about the occurrence, many people assembled in her house and then they went to the house of the accused but his house was found under lock and key. The people assembled there informed the police and on the same night the police came. On the following day, the medical examination of the victim was done and FIR was lodged on 21.07.2009 at Tinsukia Police Station. The statement of victim, was also recorded under Section 164 of Cr.P.C.

During cross-examination, she deposed that the victim told her about the bad act which the accused done with her but it was not true that she did not state such thing to the police.

II. PW-3 Dipa Dahutia, in her examination-in-chief deposed that victim told her about the incident.

During cross-examination, she stated that it was not true that she did not tell the police about the act done by the accused. She also deposed that it was also not true that victim did not tell her any thing about the incident.

III. PW-4 Smti. Dolly Gogoi, in her examination-in-chief deposed that victim's mother told her about the incident and she asked the victim about it and the victim told her about the acts done by the accused.

During cross-examination, she deposed that it was not true that she did not tell such thing to police.

IV. PW-5 Sri Bimal Singh Dahatia, in his examination-in-chief deposed that on the day of incident, hearing hue and cry, he went to the house of the victim and he came to know about the incident that the accused had done bad act with the victim. His cross examination was declined by the defence.

V. PW-6 Sri Prasanta Hazarika and PW-7 Smti. Anjali Hazarika, who are the neighbours were declared hostile by the prosecution.

VI. PW-10 Sri Paritosh Brahma who was the investigating officer in the case in his examination-in-chief deposed that he recorded the statement of the informant and the victim under Section 161 of Cr.P.C., at the police station itself and he took steps for recording the victim's statement under Section 164 of Cr.P.C.

He further deposed that on his transfer, investigation was carried out by an another police officer and on the completion of investigation ,charge-sheet under Section 376 (f) of the IPC was laid.

VII. PW-11 Dr Sanat Kr. Dutta, who conducted the medical examination of the victim in his examination-in-chief deposed that on 20.07.2009, he was working as M. & H.O., at

Tinsukia Civil Hospital and during examination of the victim, he found no injury on the private part of the victim. He deposed that no spermatozoa was found on her private parts. He proved Medical report as Exhibit-3 and his signature on it as Exhibit-3(1).

During cross-examination, defence did not able to elicit anything from him favourable to it.

9. **Arguments advanced by Mr. P. J. Saikia, learned Senior Counsel for the appellant.**

I. The conviction of the appellant is entirely based on child witness who is the victim of the alleged offence. According to him, child witnesses are most untrustworthy class of witness inasmuch as in tender age, they often mistake dreams to be reality, repeat glibly as of their own knowledge what they have heard from others and are greatly influenced by fear of punishment, by hope of reward and desire of notoriety. Therefore, while considering the evidence of child witness, this facts should not be lost sight of. In support of such contention, the learned Senior Counsel relies on the judgment of this Court in the case of ***Md. Bachhu Miah and Ali Noyaj –Vs- State of Tripura*** reported in ***1993 1 GLR Supp 253***. The learned trial Court has ignored the inconsistencies and material discrepancies in the statement of the victim recorded under section 161 Cr.P.C., under Section 164 Cr.P.C., and her testimony before the Court below and convicted the appellant on the basis of the sole evidence of the child witness and thus committed serious error of law. In support of such contention, Mr. Saikia, learned Senior Counsel relies on the decision of



III. Regarding the decision of the Hon'ble Apex Court in the case of Major Singh(supra) Mr. Das, learned Additional Public Prosecutor argues that the judgment relied on by the counsel for the appellant is the minority view and the majority view in that case held that it is irrelevant while determining the offence under Section 354 of IPC to consider the age, physical condition or subjective attitude of a women against whom the assault has been committed or criminal force used and therefore, such judgment is of no help.

11. This Court has given anxious consideration to the submissions made by the learned counsel for the parties. Also perused the materials available on record including the deposition of witnesses and the statement of the minor victim recorded under Section 161 of Cr.P.C., under Section 164 of Cr.P.C. and also her testimony before the learned Court below.

12. Law is by now well settled that the sole testimony of a victim, may be a child victim, could be relied upon in cases of sexual assault provided her evidence is trustworthy, unblemished and of starling quality.

13. Law is equally well settled that material discrepancies are those discrepancies which are not expected from a normal person i.e. these are not normal. However, it is also well settled that in deposition of witnesses, there are always some normal discrepancies, howsoever, honest and truthful the witnesses may be. It is also equally well settled that these discrepancies are due to normal errors of observation, normal errors of memory due to lag of time, due to mental disposition, such as shock and horror at the time of occurrence etc. For such proposition of law, this Court can gainfully rely on the decision of the Hon'ble Apex Court in the case of ***State of Rajasthan –Vs- Smti. Kalki and others*** reported in **1981 2**



**SCC 752.**

14. Now let this Court consider the present appeal in the given facts and deposition of the present case.

I. The victim was examined as PW-2 and before recording her deposition, considering the age of victim witness, the learned Sessions Judge tested her the mental capacity of the said witness, whether she is able to depose before the Court. Accordingly, certain questions were asked. Those questions are also recorded in the depositions and the girl has properly answered those questions such as though she belongs to a Bengali speaking family, she has learnt to speak Assamese from her mother and from her friends. She further deposed that she also can talk in Assamese language.

II. As many as 13 questions were put regarding different facet of life including her friends, her teachers, relation with her mother, father etc. and she answered all the question properly. Even a specific question was asked whether her father and mother has tutored her to state what is required to be stated before the Court on that day, to which she denied. A suggestion was made by the learned Judge to the victim that the Judge has learnt that she is a liar, then she answered in negative and further stated that it is bad to speak a lie. Again the learned Judge asked whether she will make any false statement in the Court, she straightaway denied that she will not tell lie. Considering the entire questions and answers, the learned Judge was satisfied that the victim was able to depose and also treated her to be a truthful witness. From the questions and answers, this Court is also of the view that she was competent to depose before the

Court and she was matured enough at that time to answer those questions.

III. Now coming to her deposition, as discussed hereinabove, she has specifically deposed and testified before the Court, how the offence was committed even she pointed her finger to her private part before the learned Judge as is reflected in the deposition.

IV. Her evidence remained firm and the defence has measurably failed to shake her evidence.

V. The only discrepancy in her statement is whether she had informed her mother on the day of the incident or on the next date when her father reached home inasmuch as father was not available on the date of incident. Such discrepancy in the considered opinion of this Court cannot be said to be a material discrepancy as discussed hereinabove, more particularly in the given facts of the present case.

15. The fact also remains that even if there is any discrepancies or improvements by the victim witness, the defence has not confronted the witness with those discrepancies in recording of her statement either under Sections 161 and 164 of Cr.P.C.. Until and unless, a witness is confronted with such discrepancies it cannot be said that the defence has been able to establish that there are material discrepancies or improvement in the statement of the witnesses.

16. From the testimony of the child, this Court is also having no doubt regarding her competency and trustworthiness. Even there was no suggestion made by the defence that her deposition/testimony is tutored by her parents. Going through her statement recorded under Section 161 of Cr.P.C., Section 164 of Cr.P.C., and her testimonies before the trial Court,

this Court is of the unhesitant view that her testimony before the Court was consistent and corroborated by her statement recorded under Section 164 of the Cr.P.C.

17. This Court is also of the unhesitant view that the testimony/statement of the victim in all stages is trustworthy/ unblemished and of starling quality. As discussed hereinabove, there is no material discrepancies between the victim's testimony and her statement recorded under Sections 164 of Cr.P.C., regarding the manner of the sexual assault.

18. Now coming to the judgment relied on by the learned Senior Counsel, Mr. P. J. Saikia, the ratio in the case of **Major Singh** (Supra), is that for commission of an offence under Section 354 of IPC, it is irrelevant to consider the age, physical condition or subjective attitude of the women against whom the assault has been committed or the criminal force is used. Such view is the majority view.

19. So far coming to the judgment of this Court in the case of **Md. Bachhu Miah and Ali Noyaj** (supra), observation made in the said judgment regarding mental status of a child witness and its reliability cannot have an universal application in all the cases inasmuch as in the case of **Radhe Shyam** (supra), the Court has clarified that when and how the child witnesses are to be relied on.

20. In view of the aforesaid, the decision rendered in **Md. Bachhu Miah and Ali Noyaj** (supra) shall also render no help to the case of the present appellant.

21. In view of the aforesaid conclusion, this Court finds no infirmity in the Judgment and order dated 16.09.2011 passed by the learned Sessions Judge, Tinsukia in Sessions Case No. 78 (T)/2010 convicting the appellant/



accused under Section 354 of I.P.C. and sentenced him to undergo imprisonment for 2 months and 7 days and to pay a fine of Rs. 5,000/- and in default of payment of fine to undergo Simple Imprisonment for a period of another 15 days and to pay Rs. 15,000/- as compensation. Accordingly, the present appeal stands dismissed.

**J U D G E**

**Comparing Assistant**