GAHC010153902019

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

Criminal Appeal No. 276/2019

Sri Utpal Debnath,
S/o. Sri Asim Debnath,
Vill.- Morakordoiguri Gaon,
P.S. Bokajan,
District-Karbi Anglong, Assam.

Appellant

-***Versus***-

1. The State of Assam.

2. Sri Haren Rajbongshi
S/o. Sri Abhinam Rajbongshi,
Sanihajan, Guwahatiagaon,
P.S. Bokajan,
District-Karbi Anglong, Assam.

Respondents

– BEFORE –

HON'BLE MR JUSTICE MRIDUL KUMAR KALITA

For appellant(s) : Mr. A.K. Borah,
Mr. S.Bora,
Mr. P. Hazarika,
Mr. P.K.Munir,

Mr. H.S.Borah,
Ms. J. Rajkumari

For respondent(s) : Ms. M. Barman,
Mr. M. Islam, (Respondent No. 2)
Mr. M. Rahman,
Mr. D. Das, Additional Public Prosecutor, Assam.

Date of hearing : 27.04.2023
Date of judgment : 04.05.2023

JUDGMENT & ORDER

Being highly aggrieved by the Judgment and Order, dated 11.06.2019, passed in POCSO Case No. 03/2017 (*corresponding to G.R. Case No. 308/2017 and Bokajan P.S. Case No. 74/2017)* by learned Special Judge, Karbi Anglong, Diphu whereby the present appellant, Sri Utpal Debnath, was convicted under section 363 of the Indian Penal Code as well as section 6 of the POCSO Act, 2012 and was sentenced to undergo Rigorous Imprisonment for 6(six) months under section 363 of the Indian Penal Code and Rigorous Imprisonment for 10(ten) years and to pay a fine of Rs. 1,000/- in default Simple Imprisonment for 2(two) months under section 6 of the POCSO Act, 2012, this appeal has been preferred under section 374 of the Code of Criminal Procedure, 1973 by the above named appellant.

2. The facts relevant for adjudication of this appeal, in brief, are as follows:-

(i) That on 01.05.2017, the informant Sri Haren Rajbongshi

lodged an FIR before Officer-in-Charge of the Bokajan Police Station, *inter alia,* alleging that his daughter (*hereinafter referred to as victim girl*) has been kidnapped, by the accused Utpal Debnath (*present appellant*), at about 8:00 A.M., on the same day and the whereabouts of his daughter was not known.

(ii) On receipt of the said FIR, the Bokajan P.S. Case No. 74/2017 was registered under section 363 of the Indian Penal Code and one Sri Dhaniram Nath, S.I. of Police was entrusted to investigate the case. Ultimately, after completion of the investigation, the Investigating Officer laid the charge-sheet against the present appellant Sri Utpal Debnath under section 363/376 of the Indian Penal Code read with Section 4 of the POCSO Act, 2012. The accused (present appellant) faced the trial remaining on bail. Learned Special Judge, Karbi Anglong, Diphu, after consideration of the materials available on record and after hearing learned counsel for both the sides, framed the charges under section 363 of the Indian Penal Code and section 6 of the POCSO Act, 2012 against the present appellant. The charges were read over and explained to him, to which he pleaded not guilty and claimed to be tried. During trial, the prosecution side adduced the evidence of as many as 11 Prosecution Witnesses. The accused *(present appellant)* was examined under section 313 Cr.P.C during which he denied the truthfulness of the testimony of Prosecution Witnesses and pleaded his innocence.

3. I have heard Mr. P.K. Munir, learned counsel for the appellant. I have also heard Mr. D. Das, learned Addl. Public Prosecutor appearing for the State of Assam as well as Mr. M. Islam, learned counsel appearing for the respondent No. 2 *(first informant)*.

4. Before considering the rival contentions of learned counsel for both sides, let me go through the evidences available on record.

5. P.W. 1, Sri Haren Rajbongshi, who is the father of the victim girl has deposed that on the date of incident his daughter went out to "*Guwahatia Gaon*" to bring one mobile charger and after sometime people informed him that one Udhab Debnath, who is the relative of the present appellant, forcibly took his daughter in an auto-rickshaw. Thereafter, he lodged an FIR in the Police Station which is exhibited as Ext.- 1. P.W. 1 has further stated that, after coming to know about the incident, he also confronted Udhab Debnath about it, who denied the said fact before him. However, P.W. 1 has further stated that said Udhab Debnath confessed before Police that he took the daughter of the 1st informant in an auto-rickshaw and handed over her to the present appellant. P.W. 1 has further deposed that after eight months of this incident he received a phone call from his daughter, wherein she informed him that the present appellant had kept her in a place which is about 52 K.Ms away from Agartala in the State of Tripura. P.W. 1 has also stated that thereafter he informed this fact to Police and he along with the father of the present appellant went to Agartala and found them in the said village as stated by his daughter. Thereafter, both the victim and the present appellant were brought to Bokajan. The victim was produced before Bokajan Police Station by the P.W. 1. However, the present appellant did not appear before the Police. P.W. 1 has also stated that at the time of incident the age of his daughter was 16 years only.

During cross-examination P.W. 1 has stated that at Tripura, he developed a good relationship with the accused, his daughter as well as father of the present appellant so that he could bring his daughter back to his home.

6. P.W. 2 is one Smti. Manju Singh who has deposed that on the date of incident, in the year 2017, at about 8:00 A.M. in the morning, when she was cleaning the courtyard in front of her shop, she saw the victim running away in

front of her shop. She also saw an auto-rickshaw there. The victim stopped the auto-rickshaw and boarded on it and went away. After sometime, the mother of the victim came there and enquired about her daughter, to which P.W. 2 informed her about the victim leaving from that place in an auto-rickshaw.

During cross-examination, she has stated that on the date of incident she saw that the victim alone came running from her house and she stopped one auto-rickshaw and boarded on it. P.W. 2 has not seen who else was there in the said auto-rickshaw.

7. P.W. 3:- Smti Niva Dutta has stated that in the year 2017, on the date of the incident, in the morning, when she went to collect water from water tap, she saw the victim. She also saw one auto-rickshaw coming there and later on she came to know that the present appellant had eloped with the victim. She has also deposed that at the time of incident that the victim was a student of class-IX and her age was 15-16 years.

8. P.W. 4:- Smti. Mina Rajbangsi, who is the mother of the victim, has deposed that, on 01.05.2017 at about 8:30 A.M., her daughter went out to bring one mobile charger. However, when she did not return for a long time, P.W. 4 went out in search of her daughter and at that time one Bihari shop keeper informed her that someone has taken away her daughter from *Hariahjan Guwahatia Gaon* in an auto-rickshaw. Later on, she came to know that one auto-driver, namely, Udhab Debnath took her daughter in an auto-rickshaw and handed her daughter to the present appellant. She has further stated that later on her husband lodged an FIR. P.W. 4 has further stated that after about seven months of the incident she received a phone call from his daughter informing her that she has been kept in Tripura in a village by the present appellant. When

this fact was informed to the Police, Police advised them to have good relationship with the family of the accused in order to get more clues from them regarding the whereabouts of her daughter. P.W. 4 has further stated that accordingly, her husband along with the father of the accused went to Tripura and rescued the victim and brought both the victim and the present appellant to Bokajan and later on the statement of victim was recorded by the Magistrate.

P.W. 4 has further stated that at the time of incident the age of her daughter was 16 years and her birth certificate was seized by Police. She also exhibited the seizure-list as Ext.-2 and her signature thereon as Ext.-2(1).

During cross-examination she has deposed that after rescuing her daughter from Tripura both her daughter and the present appellant were kept in the house of one Khagen at Guwahati for sometime, by them. She has also deposed that before making a call over telephone from Tripura her daughter also send a letter to her through the family members of the accused persons.

9. P.W. 5, Smti. Hunti Dutta, has deposed that on the date of incident in the year 2017 she saw the victim coming out of her home. However, she does not know with whom she went away.

10. P.W. 6, Smti. Numali Medhi, has deposed that on the date of incident in the year 2017 at about 8:30 A.M. in the morning when she was washing clothes near a water tap in front of her house, she saw the victim going away on the road alone and after sometime her mother came in search of her and enquired her about her daughter on which P.W. 6 told her that she saw her walking away before sometime.

11. P.W. 7, who is the victim girl, has deposed that on 01.05.2017 at about 7:30 A.M., in the morning, she went out of her house to a neighbour's

house for bringing one mobile charger and on the way she saw one auto-rickshaw. She has stated that when auto-rickshaw came near her she does not know *what happened to her* and after sometime when she regained her consciousness, she came to know that she was taken in an auto-rickshaw and from there to another auto-rickshaw in which the present appellant was present and thereafter she was taken, in a van, to a tea garden where she was kept in the house of a person for 2(two) days. She has also stated that in the house of the said person the present appellant subjected her to forcibly sexual intercourse on two occasions. Later on, she was taken to another tea garden and she was kept in the house of another person where they stayed for 4-5 days. During this period she was not subjected to any sexual intercourse. Thereafter, she was again taken to another place where she was again subjected to forcible sexual intercourse. She has further deposed that thereafter, the accused *(present appellant)* took her to Tripura by train where they stayed for about 8-9 months together. P.W. 7 has stated that in Tripura also she was subjected to forcible sexual intercourse by the present appellant and in Tripura she was also beaten up by the present appellant and her aunt. Thereafter, her father along with the father of the present appellant brought them back from Tripura to Dimapur and from there to Guwahati. She has stated that from Guwahati the present appellant fled away and she was again taken back to Bokajan. In Bokajan her statement was recorded before the Court. She has exhibited her statement recorded, which was recorded before the Magistrate, as Ext.-3 and her signatures as Ext.-3 (1) and 3(2). She has also deposed that at the time of incident she was 16 years of age and was a student of Class-IX.

During cross-examination she has stated that she used to travel in the auto-rickshaw of the accused *(present appellant)* even before the incident. She

has answered in negative to a suggestion given by the learned counsel for the defence that her date of birth is 10.06.1998 and not 10.09.2001. She has denied that she has written any letter to her family from Tripura.

12. P.W. 8, Smti. Anima Dutta, has deposed that on the date of incident she came to collect water and at that time the mother of the victim enquired her as to whether she had seen her daughter or not to which she replied that she had seen her walking away on the road. Later on, she heard that the present appellant had eloped the victim girl with him.

13. P.W. 9, Dr. Atreyee Goswami, has deposed that on 08.02.2018 when she was attached at Diphu Civil Hospital, as Senior Medical & Health Officer, and on that day she examined the victim girl who was brought by a Woman Police Constable in reference to Bokajan P.S. Case No. 74/2017 under Section 363 of the Indian Penal Code. On examination she came to know that the victim went away willingly with a known person who took her to Golaghat, Siliguri and Agartala where she had intercourse with him on many occasions. P.W. 9 has also deposed that the age of the victim is below 18 years (16-17 years) as per Radiologist report. However, no injury was found anywhere in the body and no spermatozoa was found on the slide as per the pathologist. She exhibited Medical Examination Report as Ext.-4.

14. P.W. 10, Sri Raju Das, deposed that at the time of incident he was an auto-driver and on the date of incident he had sent his colleague Udhab Debnath to *Guwahatia basti* to pick up one person named Ratul Bora. However, later on he came to know that the said auto-rickshaw was used to pick-up the victim-girl. However, he does not know who took the victim girl in the said auto.

15. P.W. 11, Sri Moyurjit Gogoi, has deposed that on 27.01.2018, he was posted as Officer-in-Charge of Deithor Police Station and the Superintendent of Karbi-Anglong, by an order, directed him to investigate this case and accordingly the earlier Investigating Officer, Sri Dhaniram Nath, S.I. of Police handed over the case diary to him. He has deposed that after taking up the charge of investigation, he recorded the statement of the victim and also got her statement recorded under section 164 Cr.P.C. and her medical examination conducted. Thereafter, on 25.02.2018, the present appellant appeared before him with a bail order from the Court and after from enquiring him about the incident his statement was recorded under section 161 Cr.P.C. and after completion of the investigation, he laid down the charge-sheet against the accused *(present appellant)* under section 366/376 IPC read with section 4 of the POCSO Act, 2012. The said charge-sheet is exhibited as Ext.-5 and the signatures are exhibited as Ext.-5(1).

During cross-examination, he has stated that the victim has not stated before him during investigation that one Angela Devi gave her a letter and a chocolate to eat. She has also stated that when she went to bring the mobile charger she saw the accused (present appellant).

16. Learned counsel for the appellant has submitted that in this case, 11 (eleven) witnesses were examined by the prosecution side, however, the learned trial Court has relied mainly on the testimony of the victim for arriving at a finding of conviction against the present appellant, though on perusal of the testimony of other independent witnesses it appears that she left her home on her own in an auto-rickshaw. Learned counsel also submitted that her testimony is unworthy of any credence as she has stated the different versions of the incident in her statement recorded under section 164 Cr.P.C. vis-a-vis

while deposing before the Court as P.W.-7. Learned counsel for the appellant has also submitted that no credible evidence is there on record to show that the appellant had used force, threat or duress upon the alleged victim. The learned counsel for the appellant has also submitted that this is a case of consensual relationship between two young person who had love affairs with each other.

17. Learned counsel for the appellant has also submitted that the prosecution side has failed miserably to adduce any credible evidence to prove the age of the victim girl and the learned trial Court relied on inadmissible evidence in coming to the finding that the victim is a minor. Learned counsel for the appellant has submitted that the victim had also written a letter to her mother on 16.06.2017 from Bokajan *(said letter is available in the case record)* wherein she had stated that she had accompanied the appellant on her own and he had treated her well and kept her well during her stay with him.

18. Mr. D. Das, the learned Additional Public Prosecutor has also fairly submitted that from the materials available on record, this case appears to be a case of romantic relationship between consensual young person and the Court may take a lenient view of the matter.

19. In this case, the appellant has been convicted under section 6 of the POCSO Act, 2012 as well as under section 363 of the Indian Penal Code and any offence under the said provisions may only committed against a minor, hence the primary requirement in a trial involving above two provisions is that the victim has to be a minor. Moreover, as the punishment prescribed for the said offences, more particularly for the offence under section 6 of the POCSO Act, 2012 is very harsh and stringent, there has to be unimpeachable and clinching evidence, on record, to the effect that the alleged victim was minor when the alleged offence was committed. For any conviction, under the above provisions

of law, there should not be any doubt regarding the age of the victim. In case of any doubt, the benefit of the said doubt shall have to be given to the accused.

20. Let us now see as to what evidence was relied upon by the trial Court to come to the finding that the victim was a minor on the date of alleged offence.

21. It is pertinent to note that during cross-examination, P.W.-7 who is the victim girl, the defence side questioned her date of birth and had suggested that her actual date of birth was 10.06.1998 and not 10.09.2001. If we peruse the impugned judgment, it appears that the learned Trial Court relied upon the Ext.-2 which is a seizure list, as well as on oral testimonies of P.W.- 1 who is the father of the victim girl, P.W.- 4 who is the mother of the victim, P.W.- 7 who is the victim girl herself as well as P.W.- 9 who is the Medical Officer who conducted the medical examination of the victim. If we peruse the testimony of P.W. - 1 as well as P.W.- 4 who are the mother and father of the victim, it appears that they have merely stated that the age of the victim, at the time of incident, was 16 years. However, P.W.- 1 has not specifically mentioned any date of birth of his daughter neither he has exhibited any birth certificate, school certificate or any other document in support of his oral testimony regarding age of his daughter. As regards P.W.- 4 is concerned, she has also not mentioned any specific date of birth of her daughter though she has stated that the date of birth certificate was seized by the Police, however, same was not exhibited by her. She has only exhibited the seizure list as Ext.- 2 by which the birth certificate of the victim is shown to have been seized. None of the other witnesses has exhibited any birth certificate, school certificate or any other certificate relating to birth of the victim child.

22. As regards, determination of age of a child who is the victim of

crime, the Hon'ble Supreme Court of India in the case of "***Jarnail Singh –Vs- State of Haryana"*** reported in "***(2013) 7 SCC 263"*** has observed as follows:-

> ***"23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3)***

postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion.

24. Following the scheme of Rule 12 of the 2007 Rules, it is apparent that the age of the prosecutrix VW, PW 6 could not be determined on the basis of the matriculation (or equivalent) certificate as she had herself deposed, that she had studied up to Class 3 only, and thereafter, had left her school and had started to do household work. The prosecution in the facts and circumstances of this case, had endeavoured to establish the age of the prosecutrix VW, PW 6 on the next available basis in the sequence of options expressed in Rule 12(3) of the 2007 Rules. The prosecution produced Satpal (PW 4) to prove the age of the prosecutrix VW, PW 6. Satpal (PW 4) was the Head Master of Government High School, Jathlana, where the prosecutrix VW, PW 6 had studied up to Class 3. Satpal (PW 4) had proved the certificate Ext. PG, as having been made on the basis of the school records indicating that the prosecutrix VW, PW 6 was born on 15-5-1977. In the scheme contemplated under Rule 12(3) of the 2007 Rules, it is not permissible to determine age in any other manner, and certainly not on the basis of an option mentioned in a subsequent clause. We are therefore of the view that the High Court was fully justified in relying on the aforesaid basis for establishing the age of the prosecutrix VW, PW 6. It would also be relevant to mention that

under the scheme of Rule 12 of the 2007 Rules, it would have been improper for the High Court to rely on any other material including the ossification test, for determining the age of the prosecutrix VW, PW 6. The deposition of Satpal, PW 4 has not been contested. Therefore, the date of birth of the prosecutrix VW, PW 6 (indicated in Ext. PG as 15-7-1977) assumes finality. Accordingly it is clear that the prosecutrix VW, PW 6, was less than 15 years old on the date of occurrence i.e. on 25-3-1993. In the said view of the matter, there is no room for any doubt that the prosecutrix VW, PW 6 was a minor on the date of occurrence. Accordingly, we hereby endorse the conclusions recorded by the High Court, that even if the prosecutrix VW, PW 6 had accompanied the appellant-accused Jarnail Singh of her own free will, and had had consensual sex with him, the same would have been clearly inconsequential, as she was a minor."

23. Thus, from the above quoted observation of Hon'ble Supreme Court of India, it appears that for determination of the age of a minor victim, the highest rated option would be the matriculation certificate of the child concerned, and in case the said certificate is not available the birth certificate from the school first attended and in its absence the birth certificate given by a Corporation or Municipal Authority or a Panchayat is to be relied upon. It is only in absence of above noted certificates, reliance may be placed on the medical opinion as postulated in Rule- 12(3) (b) of the Juvenile Justice (Care and Protection of Children) Rules, 2007.

24. However, if we peruse the documentary evidence, which is available on record, in the instant case, it appears that no certificate regarding age of the victim girl has been exhibited by any of the prosecution witnesses to prove the age of the victim girl. What has been exhibited as Ext.- 2 is only a seizure list by

which one birth certificate of the victim is shown to have been seized. However, said birth certificate was nor exhibited neither it is available on record and no explanation is given as to why the said birth certificate was not produced before the learned trial Court during trial as a documentary evidence to prove the age of victim girl. Failure on the part of the prosecution side to produce the birth certificate, if it was available, would only lead to the adverse presumption against the prosecution side under section 114(g) of the Indian Evidence Act, 1872.

25. Under no stretch of imagination, a seizure list may be regarded as a substitute of the birth certificate for the purpose of Rule- 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, when no explanation has been given as to why the said birth certificate, though seized, was not produced, before the trial court, by the prosecution side. The seizure list, which is exhibited as Ext.- 2, may not be regarded as a substitute of the birth certificate as a documentary evidence. Thus, in the instant case, no certificate as mentioned in Rule- 12(3)(a)(i), (ii) & (iii) has been produced by the prosecution side.

26. As regards the evidence of P.W. - 9 i.e. Dr. Atreyee Goswami, who examined the victim girl, is concerned, it appears that she exhibited only medical examination report as Ext. - 4 and on perusal of medical examination report, it appears that the Column No. 3 which mentions about the age of the Patient, has been kept unfilled and nothing has been mentioned therein. It also appears that doctor has opined that the age of the victim is below 18 years (16 to 17 years) as per the report of radiologist, though no separate report of radiologist has been exhibited in this case. Even if, we consider the opinion of P.W. - 9 as regards the age of the victim, which was based on radiological

examination of the victim, it is an accepted fact that the age determined on the basis of radiological examination may not be an accurate determination of the age and sufficient margin of error on either way has to be allowed. The Hon'ble Supreme Court of India, in several of its decisions, has laid down that in case of ascertainment of age by radiological examination, a margin of error of two years on either side has to be reckoned with.

27. In the instant case, as no certificate of age has been exhibited, during trial, by any of the prosecution witnesses, the doctor's opinion is the only evidence, available in the present case which may be relied upon. In such a case a margin of error has also to be reckoned with. It is also a settled principle now that in case of determination of age on the basis of the opinion of the radiologist, the benefit of the margin of error should always go to the accused. In the instant case, the doctor has opined that the age of the victim was below 18 years (16 to 17 years) and if we add 2 (two) years of margin of error to 16 (sixteen) to 17 (seventeen) years, it will come 18 (eighteen) to 19 (nineteen) years, in which case, the victim may not be regarded as a minor as under section 2(1) (d) of the POCSO Act, 2012 a child is defined as any person below the age of 18 years. Same is also the case in case of offence under section 363 of the Indian Penal Code. In view of above circumstances, this court is constrained to hold that the prosecution side has failed to prove that the age of the victim was less than 18 years when the alleged offence was committed and the benefit of the same would go to the accused *(present appellant).*

28. As regards the question as to whether the victim was a consenting party, the testimony of PW-2, PW-3, PW-5,PW-6 & PW-8 shows that the victim left her home alone on her own and she boarded the auto-rickshaw on her own, on the date of incident. The testimony of PW-7 that she does not know what

happened to her she saw the auto-rickshaw does not inspire confidence. She travelled with the appellant in auto-rickshaw, van and train and stayed with him for about eight months and there is no evidence that she was ever detained by the appellant, rather, in her statement made under section 164 Cr.P.C., she had stated that she stayed with the appellant as husband and wife. The fact that she narrated different versions of the incident at different stages also makes her testimony unreliable. Thus, this court is of considered opinion that the relationship between the appellant and the victim was consensual.

29. Thus, in view of discussions made above and reason cited in foregoing paragraphs, this court is constrained to hold that the prosecution side has failed to prove the charges under section 6 of the POCSO Act, 2012 as well as under section 363 of the Indian Penal Code beyond reasonable doubt and the present appellant is entitled to get the benefit of doubt. Accordingly, giving benefit of doubt to the present appellant, the conviction and sentence of the present appellant under section 6 of the POCSO Act, 2012 and under section 363 of the Indian Penal Code, by the impugned judgment, is hereby set aside.

30. The accused appellant Sri Utpal Debnath be set at liberty forthwith unless he is required to be detained in connection with some other case.

31. Send back the LCR along with a copy of this judgment.

JUDGE

Comparing Assistant