



GAHC010194012019

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

Case No. : CrI.A./366/2019

SRI SURJYA UPADHAYA
S/O- SRI HARI HAR UPADHYA, R/O- 6TH MILE RAMPUR, P.S. LEKHAPANI,
DIST.- TINSUKIA, ASSAM, PIN- 786125.

VERSUS

THE STATE OF ASSAM AND ANR
REP. BY THE P.P., ASSAM.

2:SRI MAHA PRASAD SHARMA
S/O- LATE KRISHNALAL SHARMA
R/O- NO. 2 RAMPUR SIX MILE
P.S. LEKHAPANI
DIST.- TINSUKIA
ASSAM
PIN- 786125

Advocate for the Petitioner : MR. P J SAIKIA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

JUDGMENT

Date : 09-10-2023

1. Heard Mr. S.P Deka, learned counsel for the appellant and Mr. K.K. Deka, learned Addl. PP, appearing for the State of

Assam.

2. **The challenge:**

The present appeal is directed against the judgment and order dated 13.06.2019 passed by the learned Special Judge, Tinsukia in POCSO Case No.37(M)/2015, convicting the appellant under section 6 of the POCSO Act, 2012 and sentencing him to undergo rigorous imprisonment for 10 (ten) years and to pay a fine of Rs.50,000/- and in default, to pay the fine, to undergo imprisonment for 6 (six) months.

3. **The Prosecution Story:**

I. The prosecution case was launched on the basis of an FIR lodged by the informant i.e., the father of the victim on 27.10.2015 alleging that on 26.10.2015 when the informant was out of his senses after consuming liquor and were somewhere outside his house, the accused in the pretext of dropping him at the house came to the house of the informant in the night at about 9.30 pm and raped the adopted daughter of the informant who was aged about 7 years at that time.

II. On receipt of the said FIR, Lekhapani PS case No.155/2015 under section 376 IPC read with section 6 of the Protection of Children from Sexual Offences Act, 2012 was registered. Accordingly, investigation was started and thereafter, charge sheet was filed under section 376 IPC read with section 6 of the POCSO Act against the accused appellant.

III. Thereafter, the committal court committed the matter to the learned Sessions Judge, Tinsukia to try the case. Charges were

framed on 31.08.2016 against the appellant and the charge was read over and explained to the accused, to which the accused pleaded not guilty and claimed to be tried. Accordingly, the trial commenced.

6. The Prosecution witness :

A. To bring home the charges, the prosecution side examined as many as 11 witnesses including the victim as PW-2 and the doctor as PW-1 who examined the victim. The accused also led evidence as DW-1.

B. Before determining the legality and validity of the judgment impugned, let this court first analyze the depositions of the witnesses who were examined to bring home the charges against the appellant.

I. **PW-1, Dr. Mouchumi Gogoi** who examined the victim deposed that on 27.10.2015 she was working as M&H.O .1 at Tirap Gate State Dispensary. On that day at about 1.10 pm she examined the victim in connection with Lekhapani PS Case No.155/2015. She examined the victim and found that there are injuries in her genital area. There were Vuvlal injury, vagina was swollen and ecchymosis and bleeding were seen. Labia majora swollen and tender on touch. Hymen tear was seen at 6'o clock which indicates that the victim had sexual intercourse. Radiological examination was done to ascertain the victim's age. PW-1 in her evidence deposed that as per radiological examination the victim's age is above 12 years and below 14 years. On laboratory examination, vaginal smear does not show any presence of human spermatozoa at Tinsukia Civil Hospital,

but vaginal smear collected at Assam Medical College Hospital, Dibrugarh shows presence of intact spermatozoa. The PW-1 in her evidence further testified that on the basis of radiological physical and laboratory examination it is evident that the victim had recent sexual intercourse and her age is above 12 years and below 14 years. PW-1 in her cross examination stated that it is not a fact that the victim did not utter the name of the accused before informing about the incident.

II. **PW-2** is the victim of this case. As she was a minor at that point of time the learned Special Judge asked her some questions and on being satisfied with the rational answers given by her, her evidence was recorded without administering oath in camera. The victim in her evidence deposed that on the fateful day the accused knocked the door and asked her to open the same as he said that he left his mobile in their house. As soon as the victim opened the door the accused caught hold of her and gagged her mouth and disrobed her. The accused also put off his clothes and inserted his genital in her private part. When the victim tried to cry the accused gagged her mouth. Thereafter, somehow she managed to escape. Blood was oozing out from her private parts. The victim further deposed that she told about the incident to one lady who resided in her neighbourhood and whom she called as Kaki. The victim further testified that on the next day she informed about the incident to Maha Prasad Sharma and accordingly he lodged the FIR and after that she was medically examined and was also produced before the Magistrate at Margherita for recording her statement. The victim in

her cross examination reaffirmed that the accused took her to her room where she used to sleep and after the incident she went alone to the house of the lady whom she called as kaki and told her about the incident. The victim in her cross examination denied the suggestion that that the accused did not commit any offence as alleged by her and that she was tutored by Maha Prasad Sharma. She also denied the suggestion of the defence that she has deposed falsely before the Magistrate.

III. **PW-3 Dr. Nibedita Shyam** in her evidence deposed that on 27.10.2015 she was working as Medical Officer in the Department of Forensic Medicine at AMCH, Dibrugarh. On that day at about 8.30 PM she examined the victim in connection with Lekhapani PS Case No.155/2015 dated 28.10.2015. She deposed that she took vaginal smear of the victim and examined the smear and found the presence of intact spermatozoa and on 28.10.2015 she was again brought to their department for further medico legal examination. PW-3 deposed that on doing genital examination on the victim she found the following:

- a. Genital organ well developed
- b. Vulva – labia minora is reddened and tender on touch
- c. Hymen – recent tear at 6'o clock position with fourchette tear of 1 cm size, margins are swollen and tender on touch
- d. Vagina – healthy and vaginal canal contained clotted blood
- e. Cervix – healthy
- f. Uterus – not palpable per abdominally
- g. Evidence of venereal diseases – not detected clinically

h. Evidence of injury on her body or private parts – detected on her private parts

PW-3 further deposed that the victims wearing clothes were stained with blood. On examination of her mental condition, no abnormality was detected at the time of examination and she was cooperative and of good behaviour. Intelligence and memory is average and gait is slow. PW-3 further opined that evidence of recent sexual intercourse was detected on her person, evidence of blood stain detected on her wearing garments which has been marked, packed, labeled and sealed and handed to escorting police, evidence of any foreign material not detected in and around her private parts, her age is above 12 years and below 14 years.

She proved the the medical report as Exhibit-3 and her signatures as Exhibit-3(2), 3(3), 3(4) and 3(5). PW-3 in her cross examination testified that she has not mentioned in her report as to at what time she examined the victim on 28.10.2015. On 28.10.2015 Rina Gogoi a female attendant of their department was present at the time of the examination of the victim.

IV. **PW-4 Sri Maha Prasad Sharma** is the informant. In his evidence, he deposed that he knows the accused Surya Upadhya and he hails from the same village. The victim is his adopted daughter and he took her in adoption in the month of February, 2011. On the day of the occurrence as he was feeling unwell he retired to his bedroom. At about 9.30/10.00 PM he was woken up by his elder sister Uma Devi Sharma and informed him about the incident that the accused has committed rape upon his adopted

daughter. He further deposed that he sometimes employ the accused as his casual driver to drive his car. Immediately after the occurrence his daughter was bleeding profusely and so he took her to Jagun Mini PHC and the doctor on seeing her condition informed the police and police came to the hospital. After examination by the doctor they were brought to the police station and the victim was given in custody to Uma Devi Sharma for the night. On the very next morning he lodged the FIR. He proved Exhibit-4 as the ejahar and his signature in the exhibit as exhibit-4(1). He further testified that the ejahar is not written by him. PW-4 during his cross examination deposed that he has not written the FIR and there is no endorsement in the FIR that it was written as per his version. He further deposed in his cross examination that at the time of the occurrence he did not hear any commotion in the house. He denied the suggestion of the defence that he did not get any knowledge about the occurrence on the night of the occurrence. He further denied the suggestion of the defence that his adopted daughter never complained of any rape committed upon her by the accused. He further denied that he had developed business enmity with accused Surjya Upadhaya and for that reason he had deposed falsely against the accused.

V. **PW-5 Gopal Sonar** is a seizure witness. He deposed that police had seized some articles and had asked him to put his signature in the seizure list marked as exhibit-5 and he proved his signature as exhibit-5(1). In his cross examination he deposed that that when he had put his signature on the exhibit-5, the other

witness Raju Gupta was not there. He was the first signatory and he has not seen the material either at the PS or in the court.

VI. **PW-6 Smti Binita Sharma** in her evidence stated that she knows the accused as well as the victim. The victim used to live in the house of her brother in law Mahaprasad Sharma as his adopted daughter. On the day of occurrence at about 8/8.30 PM she saw that the victim girl was crying in the cowshed of the house of her brother in law and on being asked she told that that accused Surjya Upadhyay had committed a sin. She noticed that the victim was bleeding from her private part and her clothes were stained with blood. PW-6 in her cross examination stated that the at the time of occurrence the victim was aged about 7/8 years old and apart from saying that the accused had committed a sin, the victim did not disclose anything before her. She denied the suggestion of the defence that the victim girl never stated before her that the accused committed a bad thing and also denied that the victim girl did not name the person at that time.

VII. **PW-7 is Sri Rup Narayan Sharma** and his evidence is not vital inasmuch as according to him he heard about the incident from wife.

VIII. **PW-8 Maharaja Sharma** in his deposition deposed that the incident took place about two years back. His house is situated near the house of Maha Prasad Sharma. The victim used to stay in the house of Maha Prasad Sharma as a maid. On the day of the incident, the wife of Maha Prasad Sharma was not present in the house. At about 9.00 PM on that day the victim was brought to his

house by Rup Narayan Sharma and his wife Binita Sharma and they informed his wife Rita Sharma that the victim was crying and telling that someone had tried to pierce something into her belly and so she was suffering from pain. After hearing the incident he went to the house of Maha Prasad Sharma who was sleeping at that time in a drunk state. He woke up Maha Prasad Sharma and informed him about the matter and Maha Prasad Sharma came along with him. He also informed the Gaonbura Bhim Prasad Sharma about the incident. The gaonburah sent the victim girl to the hospital for examination. He further deposed that he heard that the accused was arrested by the police later. PW-8 in his cross examination deposed that the victim girl did not tell him anything about the incident. He also stated that the police did not record his statement but had recorded his wife's statement. He further deposed that he did not know whether there was any business enmity between the accused and Maha Prasad Sharma.

IX. **PW-9 Smti Rita Sharma** in her evidence stated that she knows the accused and the victim. The occurrence took place about 2 years ago. On the day of the occurrence the wife of Maha Prasad Sharma was not in the house. At about 9/10 PM they were sleeping in their house when Rup Narayan Sharma and his wife Binita Sharma had come to their house and woke them up. They also brought the victim along with them who was crying at that time. Binita Sharma told PW-9 that the victim told her that the accused had pierced her but she did not tell anything as to how she was pierced by the accused. The husband of Rita Sharma called the

gaonburah who advised them to send the victim girl to the hospital and then Rita Sharma along with some other ladies took the victim to the hospital. PW-9 In her cross examination denied the suggestion of the defence that Binita Sharma never told her that the accused had pierced the victim. PW-9 also stated in her cross examination that as she did not enter into the doctor's chamber so she does not know anything about the opinion of the doctor.

X. **PW-10 S.I Pratap Gogoi** was the I/c of Jagun out post. On 27.10.2015 Maha Prasad Sharma had lodged an FIR in the Jagun outpost stating that on 26.10.2015 the accused Surjya Upadhy had committed rape upon his foster daughter. On receipt of the ejahar he made a GD Entry being No.430 dated 27.10.2015 at about 1.30 PM and sent the ejahar to Lekhapani PS for registering the case and in the meantime he took up investigation of the case. Lekhapani PS registered the case being Case No.155/2015 under section 376 IPC read with section 6 of the POCSO Act and entrusted him to investigate the case. Exhibit-4 is the ejahar and exhibit-4(2) is his signature with endorsement and exhibit-4(3) is the signature with endorsement of Prateem Gogoi, the then O.C of Lekhapani PS. He deposed that on the same day i.e., 27.10.2015 he went to the place of occurrence and recorded the statement of the informant i.e., Maha Prasad Sharma. He also recorded the statement of the victim along with the statements of Rup Narayan Sharma and Binita Sharma. He accordingly prepared a sketch map. He exhibited the sketch map as Exhibit-6 and his signature as exhibit-6(1) is his signature. He sent the victim girl for medical examination to

Lekhapani hospital from where the victim was referred to Tinsukia Civil Hospital and from there she was sent to AMCH, Dibrugarh. He further stated that on 31.10.2015 the victim was released from the AMCH, Dibrugarh and then PW-10 sent her to the court at Margherita for recording her statement under section 164 Cr.P.C and in the meantime PW-10 arrested the accused and kept him on remand for two days. He deposed that he searched the house of the accused and also collected blood samples from the accused and sent the same to FSL for examination. PW-10 deposed that the wearing apparel of the victim were stained with blood and he collected the same and also sent it for FSL examination. After that on 05.03.2016 he was transferred and thus he handed over the case diary of the case to the O.C Lekhapani PS and the case was succeeded by SI Pulak Kumar and the said new SI filed the charge sheet on the basis of the materials and other documents collected by PW-10. The PW-10 in his cross examination denied the suggestion of the defence that he did not investigate the case properly and filed the charge sheet against the accused.

XI. PW-11 SI Pulak Kumar was the successor of PW-10 SI Pratap Gogoi who filed the charge sheet. He deposed in his evidence that he filed the charge sheet on the basis of the material collected by his predecessor. The FSL report collected by him on 20.06.2016 gave positive test for human blood on the wearing apparels of the victim girl. He proved the Exhibit-6 as the FSL report and proved the charge sheet as Exhibit-7 is the charge sheet and his signature in the charge sheet as exhibit-7(1). PW-11 in his

cross examination deposed that the charge sheet is filed on the basis of the materials collected by his predecessor.

8. The Defence evidence:

From the cross examination it is seen that the case of the defence is a case of denial and that a false case has been lodged as there were business rivalry between the informant father of the victim and the accused himself. The similar was the stand of the accused when he was examined under section 313 Cr.P.C. however, one defence evidence of the Gaonburan of the village as DW-1.

The DW-1 Bhim Prasad Sharma in his evidence deposed that he is a Government appointed Gaonburah of Rampur village. He deposed that on the date of the occurrence on the night time there was a kirtan in their village and so he was in the kirtan and at about 9.30 PM he returned from the Kirtan. PW-8 called him and told him that rape was committed upon a girl who resided in the house of Mahaprasad Sharma. DW-1 then advised the PW-8 to take the girl to a doctor immediately. He deposed that the girl was crying at that time. Later on he came to know that the father of the girl (victim) had lodged an FIR against the accused alleging that the father of the girl suspected that the accused committed rape upon the victim girl. The DW-1 in his cross examination deposed that he does not have any personal knowledge about the occurrence. He has never read the ejahar lodged by the father of the victim girl. He also deposed in his cross examination that he assumed that on the basis of suspicion Mahaprasad Sharma had stated in the ejahar that the accused had committed rape upon the victim and further he

deposed that he do not know if Mahaprasad Sharma has directly alleged in the ejahar that the accused had committed rape upon the victim girl. He denied the suggestion of the prosecution that he has been tutored by the accused to depose in his favour.

9. The arguments advanced by Mr. S.P. Deka, the learned counsel for the appellant:-

I. That there are material contradictions in the testimony of the prosecutrix and therefore, her testimony is not trustworthy. Therefore, the conviction ought not to have been based on her sole testimony without there being any corroborative evidence. In support of such contention, she relied on the decision of the Hon'ble Apex Court in the case of ***Rai Sandeep Alias Deepu -Vs- State (NCT of Delhi)*** reported in ***(2012) 8 SCC 21***.

II. The conviction ought not to have been based solely on a child witness inasmuch as the learned Court below has failed to evaluate the testimony of the child witness carefully and with greater circumspection and also ignored the settled proposition of law that the evidence of child witness should be supported by some corroboration and in the case in hand, there is no corroboration of the testimony of the child witness. In support of such contention, the learned counsel relies on the decision of the Hon'ble Apex Court in the case of ***Panchhi and Others -Vs- State of U.P.***, reported in ***(1998) 7 SCC 177***.

10. Per contra, the learned Additional Public Prosecutor for the State of Assam, submits the following:-

I. The prosecution has been able to establish the guilt of the accused beyond all reasonable doubt.

II. It is well settled that there can be a conviction when the victim's deposition is trustworthy and credible and in the case in hand, the testimony of the victim is of sterling quality and her evidence remained firm and unshaken.

III. Accordingly, the learned trial Court has rightly convicted the accused.

11. Decision and determination of this Court:-

I. Section 29 of the POCSO Act, mandates that the Special Court shall presume that the accused has committed or abated or attempted to commit offences under Sections 3, 5, 7 and 9 when a person is prosecuted for committing or abating or attempting to commit any offence mentioned hereinabove.

II. Such presumption of fact can be rebutted by an accused by an explanation which is reasonably possible inasmuch as presumption of law cannot be discharged by explanation alone and it is to be proved that the explanation is true. It is also a settled law that such presumption is rebuttable presumption and the prosecution is to lay the foundational fact for taking such presumption.

III. The learned counsel for the appellant has strenuously argued that the testimony of the victim is not trustworthy and is not of sterling quality inasmuch as her statement is full of contradiction. Therefore, the learned Special Judge ought not have convicted the

accused/appellant on the basis of sole testimony of the victim.

IV. Coming to the trustworthiness of the testimony of the victim, in the considered opinion of this Court, from the evidence on record as discussed herein above, this court is having the unhesitant conclusion that the evidence of the victim remained unshaken that on the fateful day at around 9.30/10.00 PM she was forcefully sexually penetrated/raped by the accused in a room inside the house of Mahaprasad Sharma, the informant. As discussed herein above, the allegation of rape and sexual penetration was not only testified by the victim during her evidence-in-chief the defence could not shake her testimony during cross-examination inasmuch as she has been consistent in this regard in her statement recorded under Section 164 of Cr.P.C.

V. From the evidence of the prosecutrix this court is not having any doubt upon the testimonies of the prosecutrix/victim. Her testimony is reliable and trustworthy. No motive of false implication was also suggested by the defence.

VI. The Hon'ble Apex court in the case of ***Ganesan Vs. State represented by its Inspector of Police*** reported in (2020) 10 SCC 557, and in ***Santosh Prasad @ Santosh Kumar vs. The State Of Bihar*** reported in (2020) 3 SCC 443 in no unambiguous term held that law is well settled that there can be a conviction when the victim/prosecutrix's deposition is trustworthy, immaculate and credible and her evidence is of pristine quality.

VII. In the case in hand, as held by the Hon'ble Apex court in the case of ***State of Maharashtra Vs. Chandraprakash***

Kewal Chand Jain reported in **1990 AIR 658**, the victim is not an accomplice to the crime but is a victim of another person's lust and therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. In the present case, the victim's evidence in the considered opinion of this court is trustworthy and of sterling quality but also her testimony remained unshaken and at the same time, the prosecution through her evidence has been able to lay the strong foundational fact for prosecution under Section 29 of the POCSO Act and the Defence has failed to dislodge such presumption under section 29 and establish its explanation.

VIII. The prosecution through the evidence of the victim has clearly established that the victim was raped by the accused in the night of 26.10.2015. The testimony of the two doctors, PW-1 & PW-3 and the exhibit-3 the medical report, it is clearly established that there is evidence of rape upon the girl and she had injuries in her private part and bleedings from her private part with ruptured hymen and such injuries are the result of rape. Thus, not only the victim's testimony remained unshaken but also her testimony is corroborated by unshaken medical evidence. The prosecution has also been able to establish through the evidence of PW-6 that immediately after the alleged offence she saw the victim crying and also saw bleeding from her private part and her blood-stained clothes and that the victim informed her of the rape committed by the accused. That the age of the victim was between 12-14 years has also been proved through medico-legal evidence established by testimonies of PW-1 and PW-3, the doctors. Therefore, this court is

of the unhesitant view that the prosecution has been able to establish beyond any reasonable doubt that the accused had committed an offence under section 376 IPC read with section 5 of the POCSO Act and therefore, the learned trial court has not committed any illegality in convicting the accused.

IX. Regarding the argument of the learned counsel for the appellant that the conviction was based on testimony of the child witness and such testimony was not properly and carefully evaluated and there was no corroboration of such child witness, stands rejected for the reason as discussed in the previous paragraphs and the reliance of the learned learned counsel upon the decision of **Panchhi** (supra), is misplaced inasmuch as this Court is of the considered opinion that the decision rendered in **Panchhi** (supra), was a case of murder out of a conflict between two families wherein one of the witness was a child witness. In the case in hand, the child herself is the victim, therefore, there is a mark distinction between the evidence of a child who herself is a victim of sexual offence and a child witness to a commission of murder and therefore, no separate corroboration is required as the trial court and this court find the testimony of the victim to be trustworthy inasmuch as her testimonies are also being corroborated by PW's-1, 3 and 6

X. Coming to the statement of the accused recorded under Section 313 Cr.P.C. and the defence evidence laid by the accused, this court is of the view that though it is a well settled principle of law that recording of statement of the accused under Section 313

Cr.P.C. is not a mere formality and the defence evidence is also to be given equal value that to of the prosecution witness. In the case in hand, the defence has failed to rebut or make any explanation as regards the presumption under section 29 of the POCSO Act inasmuch as the evidence of DW-1, in no way helps the defence case rather, it corroborates the occurrence of the crime.

XI. In view of the foregoing finding, this court is of the view that the learned trial court has not committed any error either in law or fact in convicting the appellant. Accordingly, the impugned judgment and sentence dated 13.06.2019 passed by the learned Special Judge, Tinsukia in POCSO Case No.37(M)/2015 convicting the appellant under Sections 6 of the POCSO Act, 2012 by which the appellant was sentenced to undergo 10 years rigorous imprisonment with a fine of Rs. 50,000/- and in default to pay the fine, imprisonment of 6 months is upheld.

XII. Send back the LCR.

JUDGE

Comparing Assistant