GAHC010116302019

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

Case No. : Crl.A./235/2019

ASURUDDIN KHAN
S/O- MOMREZ KHAN, R/O- VILLAGE- 1 NO. CHASRA, P.O. SATRAKANARA,
P.S. BAGHBAR, DIST.- BARPETA, ASSAM, PIN- 781308.

VERSUS

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

2:INTAZ ALI
S/O- LATE FAZAR ALI
R/O- VILL.- SATRAKANARA 8 NO. SEAT
P.O. SATRAKANARA
P.S. BAGHBAR
DIST.- BARPETA
ASSAM
PIN- 781308

Advocate for the Petitioner : MR. N UDDIN

Advocate for the Respondent : PP, ASSAM

:: PRESENT ::

HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA

For the Appellant	:	Mr. HRA Choudhury, Sr. Advocate.
For the Respondent(s):		Mr. P. Borthakur, Addl. P.P., Assam.
Date of Hearing	:	07.02.2023.
Date of Judgment	:	05.06.2023.

JUDGMENT AND ORDER (CAV)

Heard Mr. HRA Choudhury, the learned senior counsel appearing for the appellant. Also heard Mr. P. Borthakur, the learned Addl. Public Prosecutor representing the State of Assam.

2. This is an appeal under Section 374 of the Code of Criminal Procedure against the judgment dated 30.04.2019 and order dated 03.05.2019 passed by the learned Special Judge, Barpeta, in Special POCSO Case No.07/2017 convicting and sentencing the appellant under Section 4 of the POCSO Act and to undergo rigorous imprisonment for 10 years with fine stipulations.

3. On 14.08.2016, the prosecutrix, aged about 14 years, was summoned by Saheda Khatun and accordingly, the prosecutrix went to her house. The prosecutrix stayed back in the house of Saheda Khatun. After having dinner there, the prosecutrix went to bed. But after sometime, Saheda Khatun told the prosecutrix that the appellant was coming to her house

and he would sleep with her. Accordingly, the prosecutrix got up from the bed and went to another room. In that room, she slept with the appellant. The appellant had sexual intercourse with her on the promise of marriage. Next morning, the appellant left the place and the prosecutrix also returned home.

4. Narrating the aforesaid facts, Intaz Ali, the grandfather of the prosecutrix lodged an FIR before police.

5. At the time of investigation, the prosecutrix narrated the aforesaid facts before the Magistrate under Section 164 of the CrPC. She further stated before the Magistrate that after her return, she called the appellant over phone. But this time, the appellant refused to recognize her. According to prosecutrix, the appellant was known to her for the preceding one year. The prosecutrix rued before the Magistrate that even after having sexual intercourse with her, the appellant refused to recognize her.

6. During the investigation period, the victim girl was also subjected to medical examination. The doctor opined that she was between 14 to 16 years of age.

7. During the trial of the case, the prosecution side examined 6 witnesses including the police investigating officer and the doctor who examined the prosecutrix during investigation.

8. On the basis of the evidence on record, the trial court arrived at the impugned finding.

9. I have gone through the prosecution evidences.

10. The first witnesses to be examined by the prosecution is the doctor who examined the victim girl. He spoke about his findings.

11. Abul Hussain and Sahara Khatun are the next two witnesses to be examined by the prosecution. They have stated in their evidence that neither they knew the victim and the appellant nor they knew about the occurrence of this case.

12. The fourth prosecution witness is the prosecutrix herself. She has reiterated whatever she had stated before the Magistrate under Section 164 of the CrPC. She further stated in her evidence that after the appellant had sexual intercourse with her, she was not allowed to come out of the room. She told that she even raised hue and cry, but the appellant threatened her with dire consequences if she continued to act like that.

13. In her cross-examination, the prosecutrix has stated that though her father was present in the house, she did not tell him anything about the occurrence. She admitted that she never stated before police and the Magistrate that the appellant did not allow her to go out of the room or the appellant had threatened her with dire consequences if she had raised hue and cry.

14. The fifth prosecution witness is Kabir Ali, who is the father of the prosecutrix. He has stated that he did not know that Saheda Khatun had called his daughter to her house on the day of occurrence. Therefore, he was searching for the girl. He had stated that on the next day at about 12 noon, his daughter returned home. Kabir Ali has stated that he did not have any direct talks with his daughter, rather his father had talks with the

girl and then only, it came to light that the appellant had slept with the girl on the same bed. Kabir Ali has stated that on the promise of marriage, the appellant had committed rape upon his daughter. According to Kabir Ali, after two-three days, the prosecutrix called the appellant over phone and that time the appellant refused to recognize her.

15. In his cross-examination, Kabir Ali has stated that the house of Saheda Khatun is situated at a distance of about 1.5 kms. from his house. He claimed that he even knew the appellant since long. Kabir Ali has stated that his knowledge about the occurrence of this case, is based on whatever he had heard from his father.

16. The sixth prosecution witness is the police investigating officer, who spoke about the investigation.

17. After perusal of the prosecution evidence, it appears that the prosecutrix gave two different versions while giving statement under Section 164 CrPC and while testifying before the court.

18. In the statement under Section 164 CrPC, the prosecutrix simply stated that on the promise of marriage, the appellant had sexual intercourse with her. After returning home, she called the appellant over phone but the appellant refused to recognize her.

19. While testifying in the trial court, the prosecutrix has stated that though on the promise of marriage the appellant had sexual intercourse with her, he did not allow her to go out of the room. She also stated in the court that she raised hue and cry over the incident, but the appellant threatened her of dire consequences.

20. Even her father Kabir Ali has stated in his evidence that after two-three days of the incident, his daughter called the appellant over phone and the appellant refused to recognize her and after that, his father had lodged the FIR before police.

21. On a plain reading of the statement of the victim girl that was recorded under Section 164 CrPC, it appears that the victim girl was a consenting party but her evidence shows that the appellant had forcible sexual intercourse with her.

22. I have reason to hold that when the appellant refused to recognize a girl, she had embellished her evidence to make sure that the appellant is punished by the court.

23. Therefore, I have reasons to hold that the evidence of the prosecutrix failed to inspire confidence. The prosecution evidence failed to prove beyond reasonable doubt that the appellant with a criminal intention had sexual intercourse with the prosecutrix. The prosecutrix seems to be a consenting party to the act of the appellant.

24. Under the aforesaid circumstances, this Court is of the opinion that the learned trial court has erroneously appreciated the prosecution evidence and arrived at incorrect finding. The prosecution evidence failed to prove the offence against the appellant beyond all reasonable doubt.

25. That being the position, the appeal is allowed. The impugned judgment dated 30.04.2019 and order dated 03.05.2019 passed by the learned Special Judge, Barpeta, in Special POCSO Case No.07/2017 convicting and sentencing the appellant under Section 4 of the POCSO

Act, is set aside. The appellant is acquitted from this case. If the appellant is in custody, he shall be set at liberty forthwith.

Send back the LCR.

JUDGE

Comparing Assistant