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GAHC010085242019

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

Case No. : CRL.A(J)/28/2019

BUDUL DAS
HAILAKANDI

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MS. S KANUNGOE, AMICUS CURIAE, MS. D SAIKIA (AMICUS CURIAE)

Advocate for the Respondent : MR. B SHARMA(ADDL.PP, ASSAM),

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

Date of Judgment/ Order : 05.08.2024

JUDGMENT & ORDER (CAV)

Heard Ms.D.Saikia, learned Amicus Curiae for the appellant and Mr. B.Sarma, learned Additional Public Prosecutor for the State/respondent.

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2. This appeal has been preferred by the accused appellant against the Judgment and Order dated 28.11.2018 passed by the learned Special Judge, Hailakandi in Special (POCSO T-1) Case No. 04/2017 under Section 4 of POCSO Act, 2012 whereby the appellant was convicted and sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.2000/- in default, further rigorous imprisonment for 2 months.

3. The brief facts of the case is that on 03.05.2017 an FIR had been lodged by the father of the victim stating *inter-alia* that the appellant had lured his four years old daughter to his house and thereafter, he tried to commit sexual assault with his daughter by confining her in his room. On hearing her scream, his wife entered inside the house of the accused appellant and found the appellant and her daughter in naked condition. His wife brought back his daughter and informed the matter to the neighbours. As the appellant tried to commit sexual intercourse with his daughter forcibly, she sustained swollen injury in her private parts.

4. On receipt of the complaint, a case was registered vide Ramnathpur PS case No. 115/2017 under Section 4 of POCSO Act and the investigation was initiated. During investigation, the investigating officer visited the place of occurrence, recorded the statement of the witnesses and the victim was sent for medical examination. On collection of medical report of the victim, after completion of the investigation, charge sheet was laid against the appellant under Section 4 of POCSO Act.

5. During trial, charge was framed under Section 4 of POCSO Act which was read over and explained to the accused appellant to which he pleaded not guilty and claimed to be tried.

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6. To substantiate the case of the prosecution, nine witnesses were examined and exhibited some documents before the trial court. In support of his case, the accused appellant also adduced two witnesses DW-1 and DW-2. After closure of the trial, the statement of the accused appellant was recorded under Section 313 CrPC on the incriminating materials found in the evidence of the witnesses to which he denied the same. The appellant specifically stated that there is land dispute between him and the informant. He has a 12 years old minor daughter in his house. The informant and his children and other family members used his land for defecation but his daughter closed the gate. Since, then they started quarrelling with him and filed this case which is totally false.

7. After hearing the arguments advanced by the learned counsel for the parties, the appellant was convicted as aforesaid.

8. Learned Amicus Curiae has stressed her argument on the point that the learned trial court has not made any effort to determine the age of the victim girl which is necessary to establish a charge under the POCSO Act. It is further submitted that no birth certificate, or no school certificate was produced and no ossification test was also conducted to prove the age of the victim as per Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015. As the prosecution has failed to prove the age of the victim as such, the accused appellant cannot be convicted under the provision of POCSO Act.

9. The next limb of argument of the learned Amicus Curiae is that before recording evidence of a minor, it is the duty of judicial officer to ask preliminary questions to him/her with a view to ascertain whether the minor can answer the question put to him/ her and is in a position to give rational answers. Learned Amicus Curiae has pointed out that in the case in hand, the learned Special Judge has not done his duty properly. Only three four questions were put to the

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minor on the basis of which, the learned Special Judge came to the conclusion that the witness was capable of giving answer to each and every question. Under such backdrop, the learned Amicus Curiae prays that the appellant deserves to be acquitted on benefit of doubt.

10. In support of her submission, learned Amicus Curiae has relied on the following case laws:

a. 2023 Live Law (SC) 509 (Pradeep vs. State of Haryana)

b. Criminal Appeal 197/2022 (Md. Noor Hussain @ Karen @ Nur Hussain vs-State of Assam)

11. On the other hand, learned Addl.P.P. has appreciated the judgment of the trial court by stating that PW-2, the victim who is a minor girl has clearly stated that the appellant has committed sexual assault towards her for which she sustained injury on her private parts. The informant, the mother of the victim has also supported the fact by stating that she noticed some injury on her private parts. According to learned Addl.P.P., the medical officer has proved the age of the victim by stating that she was around five/six years of age at the relevant time of the incident. Learned Addl.P.P. submits that the learned trial court has rightly passed the judgment of conviction which needs no interference by this court.

12. Admittedly, in the case in hand, except the victim, there is no eye witness to the incident. On hearing the scream of her daughter, the PW-1 who is the mother of the victim, rushed to the house of the appellant and found her daughter and the accused in naked condition. She also found injuries on the private parts of the victim.

13. PW-1 deposed in her evidence that the accused appellant is her next door

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neighbour. On the date of incident, at about 2.30 pm, she was in her house and her husband was in the market. At that time, she heard sound of crying of her six years old daughter coming from the house of the appellant and immediately she went there and saw her daughter and the accused in naked condition. Having seen her, the appellant fled away. The wife of the accused used to stay in Bangalore along with her two sons. The accused used to reside with his daughter, Junaki. At the relevant time, Junaki was not in the house and was in the house of her aunt, Mukta. She informed the incident to Mukta and Mukta told her to inform the matter to the village headman.

14. In her cross examination, PW-1 replied that on the relevant date of the incident, she went to the house of elderly village people informing the incident seeking justice. On the same day of her medical examination, she was released from the hospital. It was suggested that whatever stated by PW-1 in the court, she did not state the same before the police.

15. PW-2 is the victim who is around six years of age as per trial court record. The Special Judge noted down that on being questioned, it was found that the witness was a child witness and she was able to give some of the answers. Considering the nature of the case, the examination of the witness was very important and as such, she was examined without administering oath.

16. PW-2 stated that 'Jetha', the accused made her naked and touched his penis in her vagina (which was indicated by her finger). Who was 'Jetha', the witness indicated towards the accused by raising her finger.

17. PW-3 who is the father of the victim, lodged the FIR as reported by his wife. According to PW-3, his daughter is about 5 years old at the relevant time. PW-4, PW-6 and PW-7 were not present when the incident occurred. They came

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to know about the incident from the mother of the victim that the appellant committed sexual assault towards the victim girl. PW-5 is the medical officer who examined the victim on 04.05.2017 at Civil Hospital, Hailakandi and on examination, he found no mark of violence on her private parts. The age of the victim was assessed five/six years.

18. PW-8 is the investigating officer. He deposed in his evidence that on 04.05.2017, he was attached to Ramnathpur PS. On that day, on the strength of an FIR lodged by one Chandan Das, the then O/c, after registering the case, endorsed the same in his name for investigation. Accordingly, he visited the place of occurrence, recorded the statements of witnesses, drew up the sketch map of the place of occurrence vide Exhibit-5 and also got the victim medically examined. On 03.06.2017, after completion of investigation, he handed over the case diary to the Officer-in-charge of Ramnathpur PS who submitted the charge sheet vide Exhibit-6.

19. In his cross-examination, PW-8 replied that as per FIR, the incident occurred on 01.05.2017 and the incident was reported to the police Station on 04.05.2017. The distance between the place of occurrence and the police station is around 3 km. After receiving the FIR, the victim was forwarded for medical examination.

20. The accused examined two witnesses in support of his case vide DW-1 and DW-2. According to DW-1, about one year back, one day, while he was passing through the road, he heard the accused rebuking the informant stating that why they discharged stool in the said path. He also asked the informant to construct latrine. Thereafter, he left the place. On the same day, in the evening, he again came and found the victim and the daughter of the accused as well as other children playing. On the next day, he came to know that the accused

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committed rape on the daughter of the informant.

21. DW-2 also more or less stated the same thing whatever stated by DW-1. From cross-examination of DW-1 and DW-2, it reveals that they did not receive any summons from the court and they were brought by the accused to depose in his favour. DW-1 and DW-2 categorically stated that they did not know the names of the children of the appellant and informant.

22. Regarding age of the victim, it is true that during investigation, I.O. has failed to collect any birth certificate or school certificate of the victim and admittedly, no ossification test of the victim was conducted as per Section 94 of the JJ Act, 2015. According to PW-1, who is the mother of the victim, her daughter was 6 years of age when the incident occurred. PW-3 who is the father of the victim also stated that his daughter was five years of age at the relevant time of incident. PW-5, who is the medical officer, examined the victim and stated that on examination, he found the victim 5/6 years of age. Apparently, there is corroboration regarding age of the victim that she was around five/six years of age at the relevant time of incident. It is interesting to note that there is no cross-examination on the point regarding the age of the victim stated by PW-1, PW-3 and PW-5. It is a settled position of law, as there was no cross-examination on the point, the matter cannot be challenged before the appellate court.

23. In ***Mahavir vs. State of Uttar Pradesh***, reported in 2017-3 All Cri R 2407, it was held as under:

> "*35. The main object of cross-examination is to bring out falsity and to find out the truth. Cross-examination is an art. It would help the Court to assess the relative merits of the case projected by the*

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parties. Matter of cross-examination is not a mere empty formality, but one is required to put its own case in cross-examination, otherwise deposition of the witness has to be taken as unchallenged. The matter has been considered in a number of decisions that it is the duty to put ones own version to opponent in cross-examination, otherwise deposition of the witness cannot be discredited as was held in Maroti Bansi Teli Vs. Radhabai, AIR 1945 Nag 60: 1944 NLJ 492. In Chunni Lal Dwarka Nath Vs. Hartford Fire Insurance Co.Ltd.,AIR 1958 Punj 440, it has been held as under:

It is well established rule of evidence that a party should put to each of his opponent's witnesses so much of his case as concerns that particular witness. If no such questions are put, the Courts presume that the witness's account has been accepted. If it is intended to suggest that a witness was not speaking the truth upon a particular point, his attention must first be directed to the fact by cross-examination so that he may have an opportunity of giving an explanation."

24. In ***Jesu Asir Singh v. State***, (2007) 12 SCC 19, it is held in ***Muneem Ahmad v. State of U.P***., 2017-171 AIC 895 that the question put in the cross-examination to a great extent probabilise the prosecution version; and that, though questions put in cross-examination are not always determinative in finding an accused guilty, they are certainly relevant.

25. In ***Mehra vs. State of Rajasthan***, AIR 1957 SC 369 and ***Yusuf Ali v. State of Maharashtra*** AIR 1968 SC 147, it was held that when the accused

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did not suggest to prosecution witnesses in cross-examination his defence, it was held that the defence version may be rejected as an afterthought.

26. In the case of ***P.Yuva Prakash –vs- State represented by Inspector of Police*** (Criminal Appeal No. 1898 of 2023) decided by the Hon'ble Supreme Court wherein it has been observed as below:

> *"It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:*
>
> *"(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;*
>
> *(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;*
>
> *(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board".*
>
> *16. In the above said authority, reliance was placed on Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and*

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> *the three documents mentioned therein would become important for determination of age even for the victim. Here there is no birth certificate from the school. It is the school leaving certificate wherein birth date is mentioned but it is not the first school in which the admission was taken. There was no ossification test conducted in the case, however, this question would come when the girl is on the border line. Where there is still margin of four years, it cannot be said that the girl was not a "child" as defined under Section 2 (d) of the POCSO Act. The father of the victim who has the knowledge of the date of birth of the daughter, his testimony would be also important in that respect and, therefore, in this case the prosecution had proved that the victim was child."*

27. Coming to the question of testimony of the victim, it is also a settled position of law that when considering evidence of a minor victim girl subjected to sexual offence, the court does not necessarily demand an almost accurate account of incident.

28. Law is well settled that generally speaking oral testimony may be classified into three categories i.e. (i) wholly reliable (ii) wholly unreliable (iii) neither wholly reliable nor wholly unreliable. The first two categories of cases may not pose serious difficulty for the court in arriving at its conclusion. However, in the third category the court has to be circumspect and look for corroboration of any material particulars by reliable testimony, direct or circumstantial as a requirement of the rule of prudence.

29. In ***Ganeshan –vs- State***, reported in (2020) 10 SCC 573, Hon'ble Supreme court has held that the sole testimony of the victim if found reliable and trustworthy, requires no corroboration and may be sufficient to invite

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conviction of the accused.

30. Hon'ble Supreme court was tasked to adjudicate a matter involving gang rape allegations under Section 376 (2) (g) IPC in ***Rai Sandeep vs- State (NCT of Delhi)*** , reported in (2012) 8 SCC 21. The court found totally conflicting versions of the prosecutrix from what was stated in the complaint and what was deposed before the court, resulting in material inconsistency. Reversing the conviction and holding that the prosecutrix cannot be held to be a 'sterling witness', the court opined as under:

"*22. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It*

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can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

31. In ***Krishan Kumar Malik vs. State of Haryana*** reported in (2011) 7 SCC 130, the Hon'ble Supreme Court laid down that although the victim's solitary evidence in matters relating to sexual offences is generally deemed sufficient to hold and accused guilty, the conviction cannot be sustained if the prosecutrix's testimony is found unreliable and insufficient due to identified flaws and lacunae.

> "*31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does*

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not fall in that category and cannot be relied upon to hold the Appellant guilty of the said offences.

32. Indeed there are several significant variations in material facts in her S.164 statement, S.161 statement (Cr.P.C.), FIR and deposition in Court. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. Record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the Appellant."

32. What flows from the aforesaid decision is that in cases where witnesses are neither wholly reliable nor wholly unreliable, the court should strive to find out the true genesis of the incident. The court can rely on the victim as a 'sterling witness' without further corroboration. But the quality and credulity must be exceptionally high. The statement of the prosecutrix ought to be consistent from the beginning to end, from the initial statement to the oral testimony, without creating any doubt about the prosecution case.

33. Guided by the law as aforesaid, in the case in hand, it reveals from the evidence of PW-8, investigating officer that victim did not make any statement before him and she was crying all through. It transpires that the statement of the victim was recorded in the trial court for the first time. The learned trial court has noted down that considering the nature of the case, examination of the victim is very important and as such, she was examined without administering oath. Prior to that, the learned trial court put some questions to the victim to which she answered. The trial court also noted down that on being

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questioned, it was found that the witness was a child witness and she was able to give some of answers. The victim as PW-2 clearly stated before the trial court that the accused had sexually abused her. It also indicates from cross-examination of the victim that during cross-examination she started crying.

34. In a trial involving of a child witness, the trial court is required to record its satisfaction as to the competency of the child witness. For such purpose, the trial court needs to test the capacity of a child witness. It has been held in plethora of decisions that no precise rule can be laid down regarding the degree of intelligence and knowledge which would render a child a competent witness. The competency of a child witness can be ascertained by questioning her / him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceeding, a person of any age is competent to give evidence if she/he is able to understand questions put as a witness and if such answers to the question that can be understood. A child of tender age can be allowed to testify if he/she has the intellectual capacity to understand question and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to understand the question and answers them in coherent and comprehensive manner. If the child understands the question put to him/her and gives rational answers to those question, it can be taken that she/he is a competent witness to be examined.

35. In the present case, it is seen that the trial court after putting some questions correctly recorded its satisfaction as to the competency of the child witness.

36. It is a settled law that in case of sexual offence, the finding of guilt can be recorded even on the basis of uncorroborated statement of the victim provided

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the same is cogent and relevant. In the case of ***Ishwer Soni vs- State (Government of NCT of Delhi)*** wherein it has been held as under:

" *It is well settled that in a case of rape, the finding of guilt can be recorded even on the basis of uncorroborated testimony of the prosecutrix provided it is cogent and reliable. Reference in this regard is made to the decisions rendered by the Supreme Court in Vijay @ Chinee vs- State of Madhya Pradesh reported in (2010) 8 SCC 191 and Rajinder @ Raju vs- State of Himachal Pradesh reported in (2009) 16 SCC 69.*

So far as testimony of child witness is concerned, it has to be evaluated even more carefully as the same is susceptible to tutoring. In State of Madhya Pradesh –vs- Ramesh & anr. reported in (2011) 4 SCC 786, the Supreme Court held as under:

"*In view of the above, the law on the issue can be summarised to the effect that the deposition of child witness may require corroboration but in case his deposition inspires confidence of the court and there is no embellishment or improvement, the court may rely upon his evidence. The evidence of a child witness must be evaluated more with greater circumspection because he is susceptible to tutoring. Only in case there is evidence or record to show that a child has been tutored the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not can be drawn from the contents of his deposition."*

37. The Bombay High Court in the case of ***Sunil vs- State of Maharashtra*** in Criminal Appeal No. 718/2016, has held that there was no ossification test conducted in this case. However, this question would come when the girl is on the border line. When, there is margin of four years, it cannot be said that the

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girl was not a child as defined under Section 2(d) of the POCSO Act, 2012.

38. Learned Amicus Curiae contended that the trial judge did not properly appreciate the evidence and raised concerns about the delay in lodging the FIR. The appellant also questioned the victim identification of the accused and pointed out alleged inconsistencies in her statement. Learned Amicus Curiae argued that the medical evidence did not support the prosecution case.

39. After going through the judgment of the trial court, it reveals that the trial court carefully examined the evidence, focussing on the victim testimony. The trial court found the victim statement credible and consistent, noting that whatever stated by the victim in her evidence is sufficient to prove the case of sexual assault against the accused appellant. Even if for the sake of arguments, we take that the medical evidence is not supporting the prosecution case, still we will have to apply the rule in case of variance between the ocular and the medical evidence, the ocular evidence would prevail and as aforesaid, the evidence of the victim is consistent.

40. Regarding the victim's identification of the accused, the trial court found the identification of the appellant was credible even though the victim did not know the name of the accused. It appears that the accused appellant is the adjacent neighbour and she called him 'jetha'. From the evidence of the victim, it also reveals that the victim identified the accused by raising her finger towards the accused before the trial court.

41. Admittedly, the statement of the victim was not recorded by the investigating officer under Section 161 CrPC or by the magistrate under Section 164 CrPC. It is understood that the victim was 5/6 years of age at the relevant time and would have felt embarrassed to tell some facts. It is rather the failure

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on the part of the investigating officer to get such proper statement of the victim. In such case, the investigating officer should make the victim girl comfortable and then try to get the statement recorded.

42. Taking into consideration the testimony of all the witnesses including the victim, this court is of the opinion that the prosecution has proved that the accused appellant was the person who had ravished the victim who was minor aged about 5/6 years at the relevant time and there is absolutely no perversity in the conclusion arrived at by the learned trial judge. In the absence of any merit in the appeal, the appeal is dismissed and the conviction vide Judgment and Order dated 28.11.2018 passed by the learned Special Judge, Hailakandi in Special (POCSO T-1) Case No. 04/2017 under Section 4 of POCSO Act, 2012 is hereby affirmed.

Send back the trial court record.

JUDGE

Comparing Assistant