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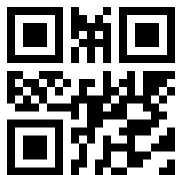

THE GAUHATI HIGH COURT

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

Case No. : CRL.A(J)/8/2022

JITEN RAY
DHUBRI, ASSAM. …. Appellant

VERSUS

THE STATE OF ASSAM …. Respondent
REP. BY PP, ASSAM.

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE MITALI THAKURIA

Advocate for the appellant : Mr. M. Dutta, Amicus Curiae

For the respondent : Mr. K.K. Das, Addl. P.P., Assam

Date of hearing : 19.09.2024
Date of Judgment : 24.09.2024

JUDGMENT AND ORDER (CAV)

(M. Zothankhuma, J)

1. Heard Mr. M. Dutta, learned Amicus Curiae appearing for the appellant and

Mr. K.K. Das, learned Addl. P.P., Assam appearing for the State.

2. The appellant has challenged the judgment dated 25.03.2021 passed by the Court of the Addl. Sessions Judge/Special Judge, Dhubri in Special Case No.81/2019, by which the appellant has been convicted under Sections 376AB/506 of IPC read with Section 6 of the POCSO Act. Thereafter, in terms of Section 42 of the POCSO Act, 2012, the appellant was sentenced to undergo rigorous imprisonment for life with fine of Rs.5000/-, in default, to undergo simple imprisonment for 6 months under Section 6 of the POCSO Act. Further, the appellant was sentenced to undergo rigorous imprisonment for 2 years in terms of Section 506 of IPC. Both the sentences were to run concurrently.

3. The prosecution case, in brief, is that the informant, who is the mother of the victim and prosecution witness No.1 (PW 1), had lodged and FIR dated 16.09.2019, stating that at around 8 a.m. on 13.09.2019, the appellant had raped her minor daughter aged about 10 years in his bedroom. On asking her daughter why she was crying at around 10 p.m., the victim informed PW 1 about the rape and stated that the appellant had threatened her with death, if she disclosed the matter to anyone. PW 1 also stated that the lodging of the FIR was delayed, inasmuch as, she was waiting for an extra judicial settlement in the village. Pursuant to the FIR dated 16.09.2019, Golokganj P.S. Case No. 1081/2019 under Sections 376AB/506 IPC read with Section 6 of the POCSO Act was registered against the appellant.

4. After investigation of the case by the case I.O. and after having the victim’s statement recorded under Section 164 Cr.P.C. besides having the victim examined by a Doctor, the case I.O. filed the charge-sheet, having found a

prima facie case under Sections 376AB/506 IPC read with Section 6 of the POCSO Act against the appellant. .

5. The learned Trial Court thereafter framed 3 charges against the appellant under Sections 376AB/506 of IPC and under Section 6 of the POCSO Act, to which the appellant pleaded not guilty and claimed trial.

6. During trial, the evidence of 9 prosecution witnesses and 2 defence witnesses were recorded by the learned Trial Court. Thereafter, the appellant was examined under Section 313 Cr.P.C. The appellant was thereafter found to be guilty of the charges framed against him and accordingly, convicted under Section 376AB/506 of IPC and Section 6 of the POCSO Act. The sentence imposed upon the appellant was thereafter awarded by the learned Trial Court as stated in the foregoing paragraphs.

7. Mr. M. Dutta, learned Amicus Curiae appearing for the appellant submits that though the medical Doctor had examined the victim, there is nothing to show that the hymen of the child was ruptured by any act allegedly done by the appellant. He submits that there is no finding on the part of the Doctor that the victim was subjected to any penetrative sexual assault. He also submits that the only evidence against the appellant is the testimony given by the victim girl. Further, the case was fabricated against the appellant due to the fact that there was a land dispute between the family of the victim and family of the appellant, even though they were close relatives. He submits that the appellant is the grand uncle of the victim. As there is no corroboration with regard to the allegation of rape made against the appellant in the medical Doctor's evidence and report, the impugned judgment is not sustainable and the same has to be

set aside.

8. Mr. K.K. Das, learned Addl. P.P., on the other hand, submits that the evidence of the victim girl (PW 2) has not been shaken or controverted during cross-examination. There is nothing to show that the evidence of the victim girl is fabricated, inasmuch as, the appellant has till date not been able to show that any land dispute case has been filed before any Civil Court in the State of Assam. He also submits that the testimony of the victim girl has been corroborated by the statement given by the victim under Section 164 Cr.P.C. He submits that the medical report having clearly stated that there was redness in the vulva of victim girl, the same implied that the redness was caused due to the illegal act on the part of the appellant. He further submits that as per the evidence of the informant (PW 1), the brother of the appellant had offered Rs.7,000/- to PW 1 for the medical treatment of her daughter. He submits that all the above factors point to the guilt of the appellant and as such, this Court should not interfere with the judgment and order passed by the learned Trial Court.

9. We have heard the learned counsels for the parties.

10. The evidence recorded by the learned Trial Court shows that the finding that the appellant had raped the victim has been made solely on the basis of the testimony of the victim, who testified that the appellant had raped her. The evidence of the Doctor has not made any mention with regard to whether the hymen of the victim was examined. The Doctor has only stated that there was redness in the vulva of the victim girl and no comment has been made against the word "hymen."

11. The evidence of PW 1, who is the mother of the victim is to the effect that the victim, who was a student of Class-V, did not go to school on 13.09.2019. The appellant had called the victim to his house in the morning and when she was sleeping at night with the victim, the victim was crying. When asked as to what had happened to her, the victim informed PW 1 that the appellant had inserted his penis into her private parts. Further, the appellant had threatened to kill the victim if she disclosed the matter to anybody. PW 1 thereafter stated that she called her neighbours to her house and that the brother of the appellant, who was also in her house, had offered Rs.7000/- for the medical treatment of the victim. However, PW 1 refused to accept the money, as she wanted punishment to be meted out to the appellant. PW 1 also denied that there was any land dispute with the appellant in her cross-examination or that she had filed a false case against the appellant.

12. On perusal of the evidence of the victim (PW 2), it is seen that the learned Trial Court had asked preliminary questions to the victim, to ascertain whether the victim was able to understand the questions put to her and was capable of giving rational answers. Thereafter, the learned Trial Court recorded the testimony of the victim by asking questions to the victim and the victim stated that the appellant had inserted his penis into her private parts and threatened her not to disclose the incident to anybody.

13. The evidence of PW 3, who is the father of the victim, is to the effect that he was away at Guwahati at the time of the incident and he came to know of the incident when he came home, on being told of the same by PW 1.

14. The evidence of PW 4 is that he came to know of the incident of rape from

villagers.

15. The evidence of PW 5, who is a villager, is to the effect that he did not make any statement before the police that PW 1 had informed him about the incident of rape.

16. The evidence of PW 6, who is the Doctor, is to the effect that she examined the victim on 17.09.2019 and found that there was redness in her vulva, though there was no injury and active bleeding. The Doctor's final opinion was that as the examination of the genital organ of the victim was not consistent with recent sexual intercourse or assault and that the redness of the vulva might be due to some external pressure. The evidence of the Medical Doctor is as follows :

> "*On 17.9.19, I was working as Medical & Health Officer, Dhubri Maternity Health Centre. On that day, on police requisition, I examined Payel Rani Ray escorted by WPC/473 Anju Neog. On examination, I found as following:-*
>
> *General examination : Normal. Examination of genital organ, vulva: redness in vulva and there is no injury and active bleeding.*
>
> *Final opinion: Not consistent with recent sexual intercourse or assault. But redness of vulva is present but no active bleeding is present.*
>
> *The redness of the vulva may be due to some external pressure.*
>
> *Ext-4 is the medical report. Ext-4 (1) is my signature.*
>
> *X X X Cross is declined by defence."*

17. The evidence of PW 7 is to the effect that he heard a hue and cry in the house of the informant and when he went to the house of the informant, the informant informed him that the appellant had raped the victim.

18. PW 8 is the case I.O., who stated that the informant and the victim were present in the police station. However, he could record the statement of the informant only, as the victim was not in a position to depose due to fear. On the next date, the victim was sent for medical examination and for recording her statement under Section 164 Cr.P.C. The place of occurrence was visited and a sketch map was also made. Thereafter, the statements of the witnesses were recorded. Having found sufficient materials against the appellant, charge-sheet was submitted against him under Sections 376AB/506 IPC read with Section 6 of the POCSO Act. He also stated that PW 5 had stated before him that a village meeting had been held on account of the allegation of rape, but no decision could be arrived at in the village meeting. He also stated that he did not send the victim for medical examination on the date of filing of the FIR as it was too late. In his cross-examination, PW 8 stated that the houses of appellant and the victim were located in the same compound.

19. The evidence of DW 1 is to the effect that he knew the informant and the appellant. Further, a land dispute cropped up between the appellant and the husband of the informant, on account of the land purchased by the appellant from the father-in-law of the informant.

20. The evidence of DW 2 is to the effect that the house of the appellant was adjacent to the house of the informant. The said land was purchased by the father-in-law of the informant. A land dispute cropped up between the parties, wherein the husband of the informant had asked the appellant to vacate the said land on several occasions.

21. The examination of the appellant under Section 313 Cr.P.C. shows that the

appellant gave a blanket denial to the evidence that had been adduced against him.

22. As can be seen from the evidence of the witnesses, the only evidence against the appellant is the evidence of the victim, who has stated that the appellant had raped her. The medical examination report on the minor victim has not been properly done. It is unfortunate that the medical Doctor had not examined the hymen of the victim girl and/or made any comment with regard to the hymen of the victim girl. The medical report, by itself does not indicate in any manner that there was any rape committed by the appellant on the minor girl.

23. On the other hand, there is nothing to show that the victim girl had been tutored or that she has given a false testimony. There is nothing brought out by the appellant with regard to there being any case being filed by the appellant or the parents of the victim, regarding a property dispute between them.

24. The above being said, the statement of the victim given under Section 164 Cr.P.C. is to the following effect:-

> "*Question: What was done to you?*
>
> *Answer: Last Friday, Jiten Ray, whom I addressed as Dadu (grandfather), asked me to watch T.V. at his home and removed my panty by sitting beside me. He inserted his Nunu (penis) into my Nunu (vagina). He said that if I raised hue and cry, he would kill me and keep me in a sack and gave Rs.10/- to me. I was crying as I felt soreness in my Nunu (vagina) and when my mother asked me, I told her about the incident.*
>
> *Question: What do you understand by 'nunu'?*
>
> *Answer: The urinary organ (Vagina)."*

25. It is also seen that prior to taking the statement of the victim girl, the learned Magistrate had asked preliminary questions to the victim girl and after being satisfied with the ability of the victim to understand questions, by considering her answers, the learned Magistrate recorded the statement of the victim under Section 164 Cr.P.C. The statement of the victim under Section 164 Cr.P.C. corroborates the testimony of the victim girl given during trial.

26. In the case of ***Sri Ranjit Hazarika Vs. State of Assam and Anr.,*** in ***Crl. A. No. 55/2015,*** this Court had held that the evidence of the doctor with regard to absence of any injury on the private parts and the hymen remaining intact and having not found any sign of penetration, casts a shadow of doubt on the testimony of the victim, as regards having sexual intercourse or rape. This Court further held that the uncontroverted medical evidence was found to have completely ruled out the probability of sexual intercourse and also lent support to some of the prosecution witnesses testimonies that the victim did not make any statement about the accused therein committing rape on the victim. Rather, the victim only spoke about an assault made by a boy. In this case, the victim has categorically stated that the appellant had inserted his penis into her private parts, though there is nothing indicative in the medical report and the evidence of the Doctor that the victim had been subjected to rape. However, the fact remains that the victim girl has made a categorical statement to that effect, which has not been shaken at the time of her cross-examination.

27. In the case of ***Ganesan Vs. State Represented By Its Inspector of Police,*** reported in ***(2020) 10 SCC 573,*** the Supreme Court has held that as per the proposition of law, there can be a conviction based on the sole testimony of the victim. However, she must be found to be reliable and

trustworthy.

28. In the case of ***State of Himachal Pradesh Vs. Raghubir Singh,*** reported in ***(1993) 2 SCC 622,*** the Supreme Court has held that there is no legal compulsion to look for corroboration of the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity.

29. In the case of ***Madan Gopal Kakkad Vs. Naval Dubey and Anr.,*** reported in ***(1992) 3 SCC 204,*** the Supreme Court had considered various judgments and books on medical jurisprudence, which basically stated that medical jurisprudence was not an exact science and whether rape had occurred or not is a legal conclusion and not a medical one. The Supreme Court further held that when the evidence of the Medical Officer showed that there was abrasion on the medial side of the Labia Majora and redness was present around the said area with white discharge even after 5 days, it could be safely concluded that there was partial penetration within the labia majora or the vulva or pudenda which in the legal sense is sufficient to constitute the offence of rape.

30. Para 36 to 38 of the judgment in ***Madan Gopal Kakkad (supra)*** is reproduced hereinbelow as follows:-

> "36. *Fazal Ali, J. in Pratap Misra v. State of Orissa*[16] *has stated thus:*
>
> *" [I] it is well settled that medical jurisprudence is not an exact science and it is indeed difficult for any Doctor to say with precision and exactitude as to when a particular injury was caused as to the exact time when the appellants*

may have had sexual intercourse with the prosecutrix."

37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty First Edition) at page 369 which reads thus:

"Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one". (emphasis supplied)

38. In Parikhs Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

"Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

31. In terms of Section 3 of the POCSO Act, penetration, however slight, into the private parts of another, is sufficient to constitute penetrative sexual assault. When the victim is below 12 years of age, the same amounts to aggravated penetrative sexual assault in terms of Section 5(m) of the POCSO Act.

32. In the case of ***Eera Vs. State (NCT of Delhi),*** reported in ***(2017) 15 SCC 133,*** the Supreme Court has observed on the statement of objects and reasons of the POCSO Act in Para 20 as follows:-

"*20. The purpose of referring to the Statement of Objects and Reasons and the Preamble of the POCSO Act is to appreciate that the very purpose of*

bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the child. On an avid and diligent discernment of the preamble, it is manifest that it recognizes the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child. Best interest and well being are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The statement of objects and reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing childfriendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the POCSO Act.'

33. In the present case, it is reiterated that the medical evidence does not in any manner indicate that rape had been committed upon the victim by the appellant. The doctor did not make any comment with regard to the hymen of the victim, even though the examination of the hymen was important. Further, there appears to be no injuries on the private parts of the victim, though there was redness in the vulva. However, there is nothing to doubt the veracity of the testimony of the victim girl before the learned Trial Court, which has been corroborated by her statement recorded under Section 164 Cr.P.C. In the 161 Cr.P.C statement made by the victim girl, she has given a similar statement as has been recorded under Section 164 Cr.P.C and during her testimony before the learned Trial Court. On considering the testimony of the victim girl, we find the testimony of the victim girl to be trustworthy. Though there is no opinion made

by the doctor with regard to the hymen of the victim, which cast a doubt as to whether the doctor had even examined the hymen of the victim, we are of the view that the lacuna/fault on the part of the doctor in allegedly not examining the hymen of the victim and/or not making a comment on the same in the Medical Report and in the evidence, cannot be said to support the case of the appellant, which is to the effect that no rape was committed by him upon the victim. In the case of ***State of H.P. vs. Manga Singh***, reported in ***(2019) 16 SCC 759***, the Supreme Court has held that merely because there was no rupture of the hymen, it cannot be said that there was no penetration of the perpetrator’s penis into the private parts of the victim. It further held that in a case of rape, it is not necessary that external injury is to be found on the body of the prosecutrix.

34. In the case of ***State of Tamil Nadu vs. Raju @ Nejru,*** reported in ***(2006) 10 SCC 534,*** the Supreme Court held that rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the Medical Officer treating the victim. The only statement that can be made by the Medical Officer is that there is evidence of recent sexual activity. Whether rape has occurred or not is a legal conclusion, not a medical one. Thus, even if the opinion of the Doctor is to the effect that examination of the victim showed that the findings were not consistent with recent sexual intercourse or assault, cannot be sufficient to disbelieve the accusation of rape by the victim. The probative value of medical evidence is merely that of a corroborating nature, if at all any such corroboration is necessary. Though medical evidence is necessary in cases of rape, keeping in view that rape takes place in secrecy, the absence of a medical report cannot be said to be fatal to the prosecution case.

35. In view of the reasons stated above, we do not find any reason to interfere with the impugned judgment convicting the appellant. However, on considering the fact that the appellant is approximately 54 years old, we are of the view that justice would be served if the appellant is sentenced to undergo rigorous imprisonment for 20 years with a fine of Rs.5,000/-, in default, to undergo simple imprisonment for 2 months. Consequently, while the impugned judgment dated 25.03.2021 convicting the appellant under Sections 376AB/506 of IPC read with Section 6 of the POCSO Act is not interfered with, the sentence imposed upon the appellant under Section 6 of the POCSO Act is interfered with, by modifying the sentence period to be undergone, to rigorous imprisonment for 20 years with fine of Rs.5,000/-, in default, to undergo simple imprisonment for 2 months. The sentence imposed under Section 506 of IPC is not interfered with. The sentences shall run concurrently.

36. The appeal is accordingly disposed of.

37. Send back the LCR.

38. In appreciation of the assistance provided by the learned Amicus Curiae, Mr. M. Dutta, the fees payable to him shall be paid by the Assam State Legal Services Authority.

JUDGE **JUDGE**

Comparing Assistant