GAHC010008722023

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

**Case No. : Crl.A./28/2023**

KUNTHA RABHA @ KUNTA RABHA
S/O BEKA RABHA,
R/O DAKHIN GHILABARI,
P.S.- BOKO,
DIST.- KAMRUP, ASSAM, PIN- 781135.

VERSUS

THE STATE OF ASSAM AND ANR.
TO BE REP. BY THE LEARNED P.P., ASSAM.

2:RUTH MARY BORO
D/O MONGAL BORO

R/O DAKHIN GHILABARI

P.S.- BOKO

DIST.- KAMRUP
ASSAM
PIN- 781135

**Advocate for the Petitioner** : MR A K AHMED

**Advocate for the Respondent** : PP, ASSAM

**:::BEFORE:::**

**HON'BLE MRS. JUSTICE MITALI THAKURIA**

Date of hearing : 02.04.2024

Date of Judgment & Order : 31.05.2024

**JUDGMENT & ORDER (CAV)**

Heard Mr. A. K. Ahmed, learned counsel for the appellant. Also heard Mr. P. Borthakur, learned Additional Public Prosecutor for the State respondent No. 1 and Mr. U. Choudhury, learned Legal Aid Counsel for the respondent No. 2.

**2.** This is an appeal under Section 374(2) of the Code of Criminal Procedure, 1973 against the impugned judgment and order dated 15.11.2022, passed by the learned Special Judge (POCSO) Kamrup, Amingaon in Special Sessions (POCSO) Case No. 12/2016, convicting the accused/appellant to undergo rigorous imprisonment for a term of 5 (five) years and to pay a fine of Rs. 30,000/- (Rupees thirty thousand) only and in default to undergo simple imprisonment for 6 (six) months, for the offence under Section 8 of the POCSO Act, 2012.

**3.** The prosecution case, in brief, is that on 28.09.2015, one Ms. X/victim (name withheld) lodged an Ejahar before the Officer-In-Charge, Boko Police Station alleging *inter alia* that on 27.09.2015, at about 3.30 p.m., while she was returning to home from shop, the accused- Kuntha Rabha accosted her on the road and caught hold of her bicycle from the backside and squeezed her breast

as a result she sustained injuries. However, the victim somehow managed to save herself. Accordingly, upon receipt of the said FIR, the Officer-In-Charge, Boko Police Station, registered a case, being Boko P.S. Case No. 558/2015, under Sections 341/354 of the Indian Penal Code *read with* Section 8 of the POCSO Act, 2012 and started investigation.

**4.** On completion of investigation, the Investigating Officer submitted the Charge-Sheet against the present accused/ appellant under Sections 341/354 of the Indian Penal Code *read with* Section 8 of the POCSO Act, 2012, which was subsequently committed before the Court of learned Special Judge (POCSO) Kamrup, Amingaon and after considering the materials available on record as well as in Case Diary and also finding *prima facie* case under Section 8 of the POCSO Act, the Charge was accordingly framed against the accused/appellant and content of the charge was read over and explained to him, to which he pleaded not guilty and claimed to be tried.

**5.** During trial, the prosecution examined as many as 6 (six) numbers of witnesses and exhibited 3 (three) numbers of documents and also recorded the statement of the accused/appellant under Section 313 Cr.P.C. However, the defence did not examine any witnesses. Thereafter, the learned Special Judge (POCSO) Kamrup, Amingaon, after hearing the parties and on perusal of records, vide judgment and order dated 15.11.2022, passed in Special Sessions (POCSO) Case No. 12/2016, found the accused/appellant guilty and convicted him to undergo rigorous imprisonment for a term of 5 (five) years and fine of Rs. 30,000/- (Rupees thirty thousand) only and in default payment of the fine, simple imprisonment for 6 (six) months, for the offence under Section 8 of the POCSO Act, 2012.

**6.** On being highly aggrieved and dissatisfied with the aforesaid judgment and order dated 15.11.2022, passed by the learned Special Judge (POCSO) Kamrup, Amingaon in Special Sessions (POCSO) Case No. 12/2016, the present appeal has been preferred by the accused/appellant.

**7.** Mr. A. K. Ahmed, learned counsel for the appellant, has submitted that the learned Court below did not consider the evidence on record in its true perspective and arrived at a wrong decision which is bad in law and liable to be set aside and quashed. He further submitted that the independent witnesses did not corroborate the evidence of the victim and they are the interested witnesses which is not reliable at all to warrant conviction against the present accused/appellant. The prosecution also failed to examine any of the eye witness and also could not examined the I.O. of this case who is the most vital witness of the prosecution for the purpose of contradiction and corroboration of the witnesses. He further submitted that the P.Ws.- 1, 2 & 5 are the interested witnesses as the P.W.-1 is the informant-cum-victim herself, P.W.-2 is the mother of the prosecutrix, P.W.-5 is the uncle of the prosecutrix. Further, though the P.Ws. 4 & 6 are the independent witnesses, but they did not support the prosecution case. More so, P.W.-3 is the Medical Officer, as per whom there was no injury found in the body of the victim at the time of her examination. Further he submitted that the learned Court below also failed to appreciate some serious lacunae on the investigation of this case which had vitiated the trial against the appellant. Further, the prosecution could not establish the foundational facts of the case to make any presumption under Section 29/30 of the POCSO Act.

**8.** Mr. Ahmed further submitted that the F.I.R. was lodged by the victim on 28.09.2015 by herself and her statement under Section 164 Cr.P.C. was recorded only on 04.11.2015. Further, the prosecution did not produce any birth certificate of the prosecutrix to prove her age, which is the most essential in a case registered under the POCSO Act. As per the prosecution, the incident had happened in a public road, but surprisingly the prosecution failed to examine any of the independent/eye witnesses of the case. Accordingly, it is submitted by Mr. Ahmed that this is not at all a fit case to warrant conviction against the accused/appellant only on the basis of the evidence produced by the prosecution. Moreover, the prosecution could not even establish the foundational facts of the case.

**9.** Mr. P. Borthakur, learned Additional Public Prosecutor, has submitted in this regard that there may not be any eye witness to the occurrence, but all the witnesses have corroborated the prosecution version and there is nothing to disbelieve the prosecution witness in spite of the fact that they are interested witnesses. Rather, the prosecution could establish the foundational fact of the case and thus, the presumption under Section 29/30 of the POCSO Act can be considered.

**10.** Mr. U. Choudhury, learned Legal Aid Counsel for the respondent No. 2, has submitted that the evidence of the victim is found to be consistent and the prosecution witnesses could not be rebutted by the defence and further they failed to produce any rebuttal evidence to discharge the burden as required under Section 29 of the POCSO Act.

**11.** After hearing the submissions made by the learned counsels for both sides, it is seen that as per the prosecution case, the victim was sexually assaulted by the accused/appellant on the road while she was returning home from a shop. The accused/appellant caught hold of her bicycle from the backside and squeezed her breast as a result she sustained injury. But she could somehow managed to escape from the accused/appellant and thereafter she lodged the F.I.R.

**12.** So, before arriving at any decision, let us scrutinize the evidences of the prosecution witnesses.

**13.** The informant/victim has examined herself as P.W.-1 and as per her, while she was returning home from market on her bicycle, the accused pulled her bicycle from backside and caught hold of her breast and she felt pain. But somehow she managed to escape and return back home. Thereafter, she informed the entire incident to her mother and then her mother informed the entire incident over telephone to her uncle- Kumud Boro, who subsequently informed the matter to the village headman.

**14.** In her cross-examination, the victim (P.W.-1) denied when suggested that she had love affairs with the accused. She also denied when suggested that at the time of incident, many people were passing through the road nearby the temple.

**15.** The victim's mother, i.e. the P.W.-2, also narrated the same story and as

per her, the victim told about the incident when she reached home. She further deposed that the accused/appellant tried to drag her daughter towards the jungle. But, during her cross-examination, she contradicted this part of evidence that she did not narrated the said incident before the I.O. and as the prosecution could not examine the I.O., the said suggestion remained intact on record due to non-availability of the I.O. for confirmation. As per her, the victim was 14 years of age at the relevant time of incident and she was studying in Class-IX. She also denied when suggested that her daughter had love affairs with the accused/appellant.

**16.** P.W.-3 is the Doctor, who examined the victim and as per him, he found no injury on the body of the victim at the relevant time of her examination.

**17.** P.W.-4 is the village headman and as per him also, he was informed by the victim and her mother about the incident that the victim was sexually assaulted by the accused/appellant while she was returning home on her bicycle.

**18.** P.W.-5 is the uncle of the victim who was immediately informed about the incident by the P.W.-2, the mother of the victim. As per him also, at the relevant time of incident, the victim was only 14 years of age and she was a student of Class-IX. He also narrated the same story that the accused restrained the victim on the road while she was coming home on her bicycle and touched her breast. Accordingly, he organized a village Mel, but the accused did not attend the meeting. During his cross-examination, he denied when it was suggested that the place of occurrence is the frequent visitors to the temple, rather he stated that the place of occurrence is not used by many villagers and there is jungle by

the side of the road.

**19.** P.W.-6 is one Hari Prasad Boro, who is the independent witness and was present during the village meeting/Mel. He deposed that in the village Mel, he came to know that the accused restrained the victim while she was coming back to her home and touched her breast. He also deposed that at that time, the victim was about 14 years of age. But, from his cross-examination, it is seen that the I.O. did not ask him about the incident.

**20.** So, from the evidences of the prosecution witnesses, it is seen that the accused/appellant sexually molested the victim and touched her breast while she was returning home by restraining her when she was on her bicycle. Her statement made under Section 164 Cr.P.C. also completely corroborated her statement while adducing her evidence before the Court. There is nothing to disbelieve the statement made by the victim that she was misbehaved by the accused/appellant while she was coming back home from a shop. This part of evidence is also corroborated by the mother of the victim before whom she narrated the entire story and then her mother, i.e. the P.W.-2, informed about the incident immediately to her uncle (P.W.-5), who immediately came and tried to convene a village meeting, but due to the absence of the accused/appellant, there could not be any village meeting and subsequently, the F.I.R. was lodged by the victim. It is a fact that the P.Ws.-4 & 6 are the independent witnesses and P.W.-4 is the village headman, who organized the village meeting, and P.W.-6 was also present in the village meeting, wherein he came to know about the incident that the accused/appellant had misbehaved with the daughter of the P.W.-2 while she was returning home on her bicycle. These independent

witnesses did not see the occurrence nor they are the eye witnesses, but they supported the prosecution version to the extent that the accused sexually assaulted the victim on the road by restraining her while she was coming back on her bicycle. So, there is nothing to disbelieve these 2 (two) independent witnesses who came to know about the incident in the village meeting and P.W.-4 himself organized the village meeting being the village headman. As the I.O. could not be examined, some statement of the witnesses could not be confirmed by the defence, but the prosecution version to the extent that the victim girl was sexually assaulted by the accused/appellant could not be rebutted by cross-examining the witnesses.

**21.** It is a fact that the P.W.-3, the Doctor who examined the victim, did not find any mark of injury on the body of the victim at the time of her examination. But, as per the allegation, the accused only caught hold the victim and restrained her while she was coming on her bicycle and touched her breast and that apart, there is no allegation of other kind of assault on the victim. Thus, there may be probability of not having any injury mark on the body or private part of the victim as she brought the allegation against the accused/appellant only to the extent that he touched her breast and she felt pain.

**22.** Coming to the age of the victim, it is seen that at the time of incident, she was claimed to be 14 years of age and a student of Class-IX. It is a fact that the I.O. failed to collect any birth certificate or school certificate at the time of investigation, but the fact remain same that the victim girl was a student of Class- IX at the time of incident and thus, even in absence of any school certificate or birth certificate, it can be considered that the victim girl was not

above 18 years of age at the time of incident, being a student of Class- IX.

**23.** It is the defence version that the victim brought false allegation against the accused/appellant due to love relationship between them, however the defence did not produce any evidence to rebut the prosecution evidence. Thus, there could not be any reason as to why the minor girl will bring such kind of allegation against the accused/appellant. More so, there is no evidence that the family members of the victim had any enmity or previous grudge with the accused/appellant to falsely implicate the accused/appellant in this case. Thus, there is no question to disbelieve the veracity of the evidence of the victim of the sexual assault when her evidence was found otherwise reliable.

**24.** It is a settled law that the victim of a sexual assault is not treated as accomplish and as such her evidence does not require corroboration from any other evidence if her sole testimony inspires confidence and trustworthy.

**25.** The Apex Court in the case of **Moti Lal Vs. State of M.P.**, reported in **2008 0 AIR (SC) 882,** has held in paragraph Nos. 7 & 9 as under:

> "*7. It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian women as tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim has falsely implicated the accused does not appeal to reasoning. There was no apparent reason*

*for a married woman to falsely implicate the accused after scatting her own prestige and honour.*

*9. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge leveled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix. There is no rule of law or practice incorporated in the Indian Evidence Act, 1872 (in short Evidence Act) similar to illustration (b) of Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is own to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. This position was highlighted in State of Maharashtra v. Chandraprakash kewalchand Jain (1990 91) scc 550)."*

**26.** In **State of Himachal Pradesh v. Raghubir Singh, (1993) 2 SCC 622; 1993 SCC (Cri) 674**, the Hon'ble Supreme Court held that there is no legal compulsion to look for any other evidence to corroborate 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. A similar view has been reiterated by the honourable Supreme Court in Wahid Khan v. State of Madhya

Pradesh (2010) 2 SCC 9; AIR 2010 SC 1, placing reliance an earlier judgment in Rameshwar S/o kalian Singh v. State of Rajasthan, AIR 1952 Sc 54. Thus the law that emerges on the issue is to the effect that the statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The Court may convict the accused on the sole testimony of the prosecutrix.

**27.** The learned Special Judge, POCSO also discussed the effect of non-examination of the I.O. and cited the judgment of the Apex Court in paragraph Nos. 16 & 17 of the judgment, which is extracted herein below:-

> *16) Before concluding the discussion it is essential to reiterate that non-examination of IO doesn't nullify the case of the prosecution. The effect of non examination of IO has been considered by the Apex Court in various cases. In the case of Behari Prasad Vs. State of Bihar, 1996 SCC (2), the Hon'ble Supreme Court has held that –*
>
> > "*Such evidences are in conformity with the case made out in F.I.R. and also with the medical evidence. Hence, for non examination of Investigating Officer, the prosecution case should not fail. We may also indicate here that it will not be correct to contend that if an Investigating Officer is not examined in a case, such case should fail on the ground that the accused were deprived of the opportunity to effectively cross examine the witnesses for the prosecution and to bring out contradictions in their statements before the police. A case of prejudice likely to be suffered by an accused must depend on the facts of the case and no universal straight jacket formula should be laid down that non examination of Investigating Officer per se vitiates a criminal trial.*"
>
> *17) Similarly, in the case of Bahadur Naik Vs. State of Bihar, a Division Bench of the Hon'ble Apex Court held that non-examination of an Investigating Officer was of no consequences when the credibility of the eye-witnesses couldn't be shaken, and it could not be shown as to what prejudice had been caused to the accused by such non-examination. In the case of Ram Dev Vs. State of U.P, (1995) Supp. 1 SCC 547, Hon'ble Supreme Court has held that it is always desirable for the prosecution to examine the Investigating Officer, however, non examination of the Investigating Officer does not in any way create any dent in the prosecution case much less affect the credibility of otherwise trustworthy testimony of the eye witnesses.*"

**28.** Thus, from the entire discussion made above, it is seen that even in absence of the evidence of the I.O., the prosecution could establish the case and the witnesses are found to be credible and trustworthy. There found no reason to disbelieve the evidence of the minor victim who alleged that the accused/ appellant sexually assaulted her by touching her breast while she was coming on her bicycle. It is a fact that the entire incident had happened on the road, but the prosecution could not produce any eye witnesses to the case and only for that reason, the prosecution evidence could not be disbelieved which are otherwise reliable and trustworthy. The incident may had occurred on the road, but at that very specific point of time, there may not be any such person who had saw the occurrence as it is evident from the prosecution witnesses that the road is not frequently used by the visitors and there was jungle on both side of the road.

**29.** In a landmark judgment reported in **2020 (3) GLT 403 (Bhupen Kalita Vs. State of Assam**), a co-ordinate Bench of this Court had discussed the legal position concerning the provision of POCSO Act, 2012, and in paragraph No. 71 of the said judgment, it has been held as under:-

> "*71. In the light of the discussions above, the following legal positions emerge in any proceeding under the POCSO Act.*
>
> *(A) The prosecution has to prove the foundational facts of the offence charged against the accused, not based on proof beyond reasonable doubt, but on the basis of preponderance of probability.*
>
> *(B) Accordingly, if the prosecution is not able to prove the foundational facts of the*

*offence based on preponderance of probability, the presumption under Section 29 of the Act cannot be invoked against the accused.*

*(C) if the prosecution is successful in establishing the foundational facts and the presumption is raised against the accused, the accused can rebut the same either by discrediting the prosecution witnesses through cross-examination or by adducing his own evidence to demonstrate that the prosecution case is improbable based on the principle of preponderance of probability. However, if it relates to absence of culpable mental state, the accused has to prove the absence of such culpable mental state beyond reasonable doubt as provided under Section 30(2) of the Act.*

*(D) However, because of legal presumption against the accused, it may not suffice by merely trying to discredit the evidence of the prosecution through cross-examination, and the defence may be required to adduce evidence to dismantle the legal presumption against him and prove that he is not guilty. The accused would be expected to come forward with more positive evidence to establish his innocence to negate the presumption of guilt."*

**30.** Here in the instant case, from the discussion made above, it is seen that the prosecution has been able to prove the foundational facts of the case to discharge the burden. As per Section 29 of the POCSO Act, the prosecution has to prove only the foundational facts of their claim and it does not have to be beyond all reasonable doubt. Once the prosecution has been able to establish the foundational facts of the case, it is the accused appellant who is to discharge his burden to prove his innocence either by producing the evidence or by rebutting the prosecution witnesses. But, here in the instant case, it is seen that the accused only took the plea of denial during the entire trial of the case and even he did not took any plea of previous enmity etc. while recording his statement under Section 313 Cr.P.C. Thus, the accused/appellant could not disprove the prosecution case by adducing any evidence in his support.

**31.** Section 30 of the POCSO Act draws a presumption of culpable mental state of accused and it reads as follows:-

> "*(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*"

**32.** So, from the entire discussion made above, it is seen that the prosecution has succeeded to prove that the accused/ appellant sexually assaulted the victim girl, who was a minor at the relevant time of incident, by touching her breast and thus, the prosecution could establish a case under Section 8 of the POCSO Act against the accused/appellant. Thus, it is seen that the learned Special Judge (POCSO) Kamrup, Amingaon has rightly convicted the accused/appellant under Section 8 of the POCSO Act, 2012 and therefore, I do not find any reason to interfere in the judgment and order passed by the learned Court below. More so, the sentence imposed on the accused appellant is also found to be reasonable and justified and thus, it also needs no interference of this Court.

**33.** Resultantly, the impugned judgment and order dated 15.11.2022, passed by the learned Special Judge (POCSO) Kamrup, Amingaon in Special Sessions (POCSO) Case No. 12/2016, convicting the accused/appellant under Section 8 of the POCSO Act, 2012 is upheld and the present appeal, being devoid of merit, stands dismissed.

**34.** The criminal appeal stands disposed of in terms above.

**JUDGE**

**Comparing Assistant**