

GAHC010063742023



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

Case No. : Crl.A./105/2023

KARAN TAMANG
S/O SRI KUMAN TAMANG
RESIDENT OF VILLAGE RAMPUR, PO BURIGANG, PS BEHALI, DIST
BISWANATH, ASSAM 784167

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY PP ASSAM

2:SMTI ARUNA DHANUWAR
W/O LEO DHANUWAR

RESIDENT OF VILLAGE RAMPUR
PO BURIGANG
PS BEHALI
DIST BISWANATH
ASSAM 78416

Advocate for the Appellant : Mr. S. Rahman.

Advocate for the Respondent : Mr. P.S. Lahkar.
Addl. P.P., Assam.

Date of Hearing : 23.01.2024

Date of Judgment : 04.03.2024

**BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN**

JUDGMENT (CAV)

Heard Mr. S. Rahman, learned counsel for the appellant and Mr. P.S. Lahkar, learned Addl. P.P. for the State respondent.

2. This appeal, under Section 374(2) of the Cr.P.C. is preferred by the appellant, namely, Shri Karan Tamang, against the judgment and order dated 21.01.2023 and 25.01.2023, passed by the learned Special Judge, (POCSO), Biswanath at Biswanath Chariali, in Special (POCSO) Case No. 16/2022.

3. It is to be noted here that vide impugned judgment and order dated 21.01.2023 and 25.01.2023, the learned court below has convicted the appellant under Section 457 IPC read with section 4 of the POCSO Act and sentenced him to suffer rigorous imprisonment for 7 years with fine of Rs. 5,000/- with default stipulation under section 4 of the POCSO Act and also sentenced him to suffer rigorous imprisonment for 1 month with fine of Rs. 100/- with default stipulation, under section 457 IPC.

4. The background facts, leading to filing of the present appeal, are adumbrated herein below:-

“On 04-05-2022, Smt. Aruna Dhanuwar had lodged an ejahar with the In- Charge, Borgang Police Out Post to the effect that on 03-05-2022, while her cousin Smti ‘X’, name withheld, was sleeping at her room alone then at about 12.00 at mid-night, accused Karan Tamang @ Tolke broke open the window of the room, where ‘X’ was sleeping and gagged her mouth and threatened to kill her

and thereafter, touched her breast and thereafter, committed sexual intercourse on her.

Upon the said FIR, the In-Charge, Borgang Police Out post had recorded a GDE No.63/2022, dated 04-05-2022, and forwarded the same to the Behali Police Station. The Officer-in-Charge, Behali Police Station then registered a case, being Behali Police Station Case No.34/2022, under Section 457/376(3) of Indian Penal Code read with Section 4 of Protection of Children from Sexual Offences (POCSO) Act and carried out investigation, which culminated in filing of charge sheet against the accused/appellant, namely, Karan Tamang @ Tolke, to stand trial under Section 457/376(3) of the IPC and Section 4 of POCSO Act. Thereafter, the accused/appellant had appeared before the learned court below and the learned court below had, after hearing learned Advocates of both side, framed charges under Section 457 IPC read with Section 4 of the POCSO Act and on being read and explained over, the accused/appellant pleaded not guilty and claimed to be tried. Thereafter, the prosecution side has examined as many as 10 (ten) witnesses, and after closing the prosecution evidence, the learned court below has examined the accused/appellant under section 313 Cr.P.C. The accused/appellant had denied adducing evidence in defence and thereafter, hearing arguments of both sides, the learned court below had convicted him under section 457 IPC read with section 4 of the POCSO Act and sentenced him as aforesaid."

5. Being highly aggrieved, the appellant has approached this Court, for setting aside the impugned judgment and order on the following grounds :-

- [i] That, there are material contradictions in the version of the victim as well as the medical evidence and as per evidence of the victim she got injury on her person, but the medical evidence negates the same.
- [ii] That, the evidence of P.W.3 and P.W.7 are also contradictory to the medical evidence as they stated in her evidence that she has seen injury marks on the person of the victim which is negated by medical evidence.
- [iii] That, the evidence brought on record by the prosecution side has failed to establish the guilt of the accused conclusively and beyond all reasonable doubt.
- [iv] That, the learned court below has overlooked the contradictions in the versions of the prosecution witnesses and recorded conviction of the accused.

6. Mr. Rahman, learned counsel for the appellant, during the argument, has reiterated the grounds mentioned herein above, and further submits that the impugned judgment and order suffers from manifest illegalities. Mr. Rahman, submits that in order to establish a charge under section 4 of the POCSO Act the prosecution side has to establish that age the victim is below 18 years. According to Mr. Rahman, the age of the victim is above 18 years and she is a consenting party. Mr. Rahman, also pointed out that the prosecution side has not seized and proved the birth certificate. Mr. Rahman, also submits that there is material contradiction in the version of the victim and P.W.3, with the medical evidence and the same raise doubt about the veracity of their evidence and that the prosecution side has failed to bring home the charges against the

accused/appellant beyond all reasonable doubt and therefore, Mr. Rahman has contended to allow the appeal.

7. On the other hand, Mr. Lahkar, learned Addl. P.P. had supported the impugned judgment and order and submits that the learned court below has rightly arrived at the conclusion of guilt of the appellant under Section 457 IPC and Section 4 of the POCSO Act and that there are sufficient materials to establish the ingredients of the charges under the aforesaid sections of law against the appellant and therefore, it is contended to maintain the conviction and sentence, so passed by the learned court below.

8. Having heard the submissions of learned counsel for both the parties, I have carefully gone through the memo of the appeal as well as the grounds mentioned therein and the record of the learned court below and also the impugned judgment and order dated 21.01.2023 and 25.01.2023, so passed by the learned Special Judge, POCSO, Biswanath at Biswanath Chariali.

9. It is to be mentioned here that in order to establish any charge under any sections of the POCSO Act, the prosecution side has to establish first that the victim is a 'child' as defined in section 2 (d) of the POCSO Act. Under the said section a 'child' is defined any person below the age of 18 years. Now, let it be seen how far the prosecution side has succeeded in establishing that the victim was below 18 years at the material time of commission of the offence.

10. Having gone through the record of the learned court below, I find that the prosecution side has not exhibited any document except the Medical Report of the victim. It is a fact that the I.O. has not seized any documents such as Birth Certificate or School Certificate herein this case to establish the age of the victim girl. The learned court below in the impugned judgment and order had

dealt with the issue as under:-

“Learned defence advocate has also pointed out that the alleged victim is not of 15 years. She is above eighteen years. The prosecution has failed to establish the age of ‘X’ that she was 15 years.

“PW-3, Smt. Aruna Dhanuwar, the aunt of ‘X’, PW-4 Leo Dhanuwar, the uncle of ‘X’ and PW-8 ‘X’, the alleged victim, have categorically stated in their evidence that ‘X’ was 15 (fifteen) years at the time of occurrence.

The defence has not challenged the age of ‘X’ in cross - examination. So, the defence has admitted the age of ‘X’ to be 15 years. Even there found not a single suggestion raised by the defence to deny the age of ‘X’ to be more than 15 years.

It is fact that the investigating officer has not seized any document to authenticate the age of ‘X’ So, it is fault of investigating authority. The principle is that the prosecution case will not suffer because of fault of the investigating agency.

Considering all, the plea of learned defence counsel, with due respect, is not accepted.”

11. Section 34(2) of the POCSO Act provides that - If any question arises in any proceeding before the Special Court, whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination. As indicated in sub section (1) of Section 34 of the POSCO Act,

the age of the victim could be determined by following the procedure contemplated in Section 94 of JJ Act, 2015.

12. In the case of **Jarnail Singh vs. State of Haryana, reported in (2013) 7 SCC 263**, Hon'ble Supreme Court, while dealing with the issue of determination of age of a minor, has held that one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a 'child' who is a victim of crime for, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime.

13. Again in the case of **State of MP v. Anoop Singh reported in 2015 7 SCC 773**, it has been held by Hon'ble Supreme Court that Rule 12(3) of the Juvenile Justice (Care & Protection of Children) Rules, 2007 is applicable to determination of age of rape victim.

14. It is to be noted here that Rule 12(3) (b) of the 2007 Rules, which reads as:

“12. Procedure to be followed in determination of age.—

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining:-

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) And only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

And, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

15. Whereas, Section 94 of Juvenile Justice Act, 2015 provides for presumption and determination of age.-

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence)

that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age.”

2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining-

(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:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

16. In the case in hand, admittedly the I.O. has not seized any of the documents mentioned in Sub-section 2(i) and (ii) of Section 94 of the Juvenile Justice Act, 2015. The learned court below had never embarked upon any

enquiry as mandated by the section. Of course, there is Medical Report of the victim girl and the evidence of P.W.9 Dr. (Smti.) Mitali Borbora, which indicates that on 04-05-2022, the victim was examined at Biswanath Chariali Civil Hospital and she found the followings:-

- “1. Victim conscious and well oriented.
 - 2. Last menstruation 23-04-2022.
 - 3. No sign of injury on her body.
 - 4. Private parts – Vulva, Vagina do not reveal any injury. No blood clot or any other stain found on her private part.
- Vaginal examination – Hymen absent.
- Vagina allow one finger tightly. No sperm was found.

Age of the victim:- According to birth certificate provided, age is 15 years 10 months on 04-05-2022.

Opinion – No sign of sexual activities.

She has confirmed Ext.P-4/PW-9 the medical report. It is to be noted here that cross examination of PW-9 was declined by the defence.

17. Thus, it appears that though the Doctor has opined about the age of the victim as 15 years 10 months on 04-05-2022, yet, the same was not made on the basis of an ossification test or any other latest medical age determination test, as contemplated under section 94 (2) (iii) of the Juvenile Justice Act, 2015. Her opinion is based on the Birth Certificate provided to her. But, said Birth Certificate is not produced before the court. This being the position it cannot be said that victim was 15 years 10 months old as on 04-05-2022.

18. As discussed herein above, the learned court below has relied upon the evidence of P.W.3- Smt. Aruna Dhanuwar, the aunt of the victim and PW-4 -Leo Dhanuwar, the uncle of the victim and the evidence of PW-8- the victim,

who have categorically stated in their evidence that the victim was 15 (fifteen) years at the time of occurrence, and that the defence has not challenged the age of the victim in cross - examination. But, the way the learned court below has dealt with the issue, left this court unimpressed in view of the fact that it was not supported by any of the documents mentioned in Section 94 of Juvenile Justice Act, 2015 or under Rule 12(3) of the Juvenile Justice (Care & Protection of Children) Rules, 2007. Therefore, the finding, so arrived at by the learned court below appears to be not at all acceptable in the eye of law.

19. Therefore, it cannot be said that the prosecution side has succeeded in establishing that the victim was below 18 years at the material time of occurrence. In the given facts and circumstances, I am of the considered view that the prosecution side has failed to establish beyond reasonable doubt that the victim is a 'Child' as defined under section 2(d) of the POCSO Act.

20. That, the evidence of the victim, whom the prosecution side has examined as P.W.8, reveals that on 03-05-2022, after 12.00 at night, while she was sleeping alone in her room then the accused, whom she was familiar with, entered into her room by the window and slept on her bed and got into her body and she then awake up and then he kissed on her cheek and mouth and also bite on her cheek and closed her mouth and gagged and then he entered his penis into her private part. Then after committing sexual intercourse, the accused left the room and having felt pain she wept and told her aunt, Smt. Aruna Dhanuwar about the occurrence. Her evidence also reveals that she had shown her injuries to her aunt and then her aunt, Aruna Dhanuwar called the neighbours and told them about the occurrence. Her statement under section 164 Cr.P.C.-Ext. P -3 is also appears to be consistent with her evidence. And

nothing tangible could be elicited in her cross-examination to discredit her evidence, except that she raised no hue and cry at the time of occurrence.

21. Indisputably, there is no eye witness to the occurrence. The other witnesses, P.W. 1, 2, 3, 4, 5, 6, and 7 have not seen the occurrence. Either they have heard about occurrence from the victim or from the informant-P.W.3. The prosecution side has examined the informant, Smti. Aruna Dhanuwar- PW-3. Her evidence reveals that occurrence took place after 12 at night, while the victim was sleeping in her room alone. Her evidence also reveals that the accused broke the window of the room of the victim and entered into her room and then gagged her mouth and thereafter, committed sexual intercourse with her. Her evidence also reveals that the accused did bite over the breast of the victim and she had seen the stain and injury on the body of the victim. Further, her evidence reveals that before morning the accused left the room and he had threatened the victim not to raise alarm. Then in the morning, the victim told her about the occurrence that had happened at night. Then she told Joseph, Bulu, Junita Kujur, Tartus etc., about the occurrence. Then all of them went to the house of the accused. Thereafter, she lodged the Ejahar, Ext.1 with the Police Station. Her evidence remained un-rebutted in cross-examination and the same lends unstinting support to the version of the victim.

22. PW-1- Shri Kendrabi Rai had heard in the morning that the accused committed sexual intercourse with the victim. But, he could not say from whom he heard about the same. That being so his evidence cannot be accepted.

23. PW-2 Habilal @ Habil Kujur had testified that the In-charge of Borgang Police Out Post asked him to sign over a seizure list, vide which he had seized one birth certificate of the victim. But, such seizure has not been made by the I.O. which is apparent from the evidence of the I.O. i.e. P.W. 10. That

being so his evidence becomes unworthy of credence.

24. PW-4 - Shri Leo Dhanuwar had testified that he heard from his wife that the accused entered into the room of the victim by breaking the window of her room and committed sexual intercourse with her and the same took place about three months back and that the victim told his wife about the same. But, his wife has not been examined herein this case as witness. And that being so, no evidentiary value could be attributed to the evidence of this witness.

25. PW-5 -Mitra Chetry had heard from P.W.3 that the accused had committed sexual intercourse with the victim. And thereafter, they brought the accused to the house of Smt. Aruna Dhanuwar and thereafter, police took him away.

26. PW-6 -Tartius Barla and P.W. 7 Junita Kujur @ Juriza Kujur had heard from P.W.3 that the accused had committed sexual intercourse with the victim on 03-05-2015. Then on call, they went to the house of P.W.3 and they brought the accused to the house of P.W.3, and thereafter, police reached there and took the accused away. Then police seized three clothes, belonging to the victim and Ext.P-2 is the seizure list, and Mat. Ext.1 is the yellow colored frock and Mat. Ext.-2 is the grey colored long pant and Mat. Ext.3 is the navy blue colored under-wear. The factum of seizure of these items i.e. Mat. Exhibit-1, 2 and 3, vide seizure list Exhibit- P-2 is confirmed by the I.O. i.e. P.W. 10.

27. The evidence of PW-10, Shri Busing Bey, reveals that during investigation he had visited the place of occurrence, examined the witnesses and prepared sketch map – Exhibit-5, and seized the clothes of the victim by preparing seizure list-Exhibit P-2 and arrested the accused and forwarded him to the court and on

completion of investigation he laid charge sheet, Exhibit-P-7 against the accused.

28. It is, however, elicited in his cross-examination that he did not seize any document regarding the age of the victim. He also confirmed that PW-7 did not state before him that she saw injury mark on the victim but, he confirmed that PW-1 Smt. Aruna Dhanuwar did not stated in her evidence that the accused did bite on the person of the victim. He also confirmed that the victim-PW-8 did not state in her evidence that the accused got into her body and bite her breast.

29. The learned court below however, relying on a decision of Hon'ble Supreme Court in the case of **Appabhai vs. State of Gujarat, reported in 1988 Supp (1) 241**, has held that though some contradictions are there in the versions of the victim P.W.8, 1 and 7, the same are minor in nature and as such ignored the same.

30. But, having perused the evidence of the victim and P.W.3, the informant, I find that the accused did bite on the person of the victim and she had shown the same to her aunt - P.W.3, on the very morning on 04.05.2022, and P.W.3 noticed the bite mark on the person of the victim. The victim was examined by the Doctor- P.W.9, on 04.05.2022. But, the Doctor found no sign of injury mark on examination of the victim. Mr. Rahman, the learned counsel for the appellant, has rightly pointed this out in his argument and contended to disbelieve the version of the victim and P.W.3. There appears to be substance in his submission. The discrepancy in the version of the victim and P.W.3 though appears to be minor in nature; yet, the same gives rise a reasonable suspicion in mind about the veracity of their version. Admittedly, herein this case there is no direct evidence of the occurrence, except, however, the evidence of the

victim. But, her evidence appears to be not of sterling quality, so as to act upon the same without there being any corroborating materials. Even the medical evidence also has not been supporting to her version.

31. In view of the given facts and circumstances on the record and as discussed herein above, and also in absence of any documentary evidence to establish the age of the victim girl, it is difficult to arrive at a finding that the prosecution side has been able to bring home the charge under section 4 of the POCSO Act read with Section 457 IPC, against the appellant beyond all reasonable doubt. The appellant, as such, is entitled to be acquitted on benefit of doubt. To the considered opinion of this Court, the impugned judgment and order, so passed by the learned court below, failed to withstand the legal scrutiny and on such count it requires to be interfered with.

32. In the result, I find sufficient merit in this appeal, and accordingly, the same stands allowed. The impugned judgment and order of conviction dated 21.01.2023 and 25.01.2023, stands set aside and quashed. The appellant is acquitted on benefit of doubt. He shall be released from the jail hazoot, forthwith, if not warranted in any other case. Send down the record of the learned court below with a copy of the judgment and order.

JUDGE

Comparing Assistant