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

**Case No. : CRL.A(J)/9/2018**

ADHAN DAS
BONGAIGAON

VERSUS

THE STATE OF ASSAM
GHC, GHY.

**Advocate for the Petitioner** : Shri AM Dutta, Amicus Curiae.

**Advocate for the Respondent** : Shri K Baishya, Addl. PP, Assam.

**BEFORE**
**HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI**
**HON'BLE MRS. JUSTICE MITALI THAKURIA**

## *Judgment & Order*

***11.11.2024***

**(SK Medhi, J)**

The instant appeal has been preferred from jail against a judgment dated 12.09.2017 passed in Special (P) Case No.4(M)/2017 whereby the learned Sessions Judge, Bongaigaon had convicted and sentenced the accused to

undergo Rigorous Imprisonment for total 11 years, comprising of 7 years and also to pay a fine of Rs.5000/- in default to undergo rigorous imprisonment for another two months for Offence under Section 4 of the Protection of Children from Sexual Offence Act (POCSO), 3 years with fine of Rs. 5000/- in default to undergo rigorous imprisonment for another two months for offence under Section 8 of the POCSO Act and 1 year and to pay a fine of Rs. 1000/- in default to undergo rigorous imprisonment for another one month for the offence under Section 12 of the POCSO Act. It was further directed that the sentences will run consecutively. It was also directed that the period of detention already undergone by the accused shall be set off against the terms of imprisonment.

**2.** The criminal law was set into motion by lodging of an *Ejahar* on 24.09.2016 by one Ajay Sarkar (PW1). It was alleged that the appellant had been showing naked videos in the mobile phone to certain minor boys, including his son and was sexually harassing them with the threatening to kill them. It was also stated that on coming to know about the incident, the matter was tried to be settled in a *bichar*. However, the accused person-appellant did not come for the *bichar* and was absconding and accordingly, the FIR had to be lodged. It has also been stated that prior to such incident also, the appellant had committed bad acts earlier.

**3.** Based on the aforesaid FIR, the investigation was done leading to filing of the charge sheet. The charges were accordingly framed against the appellant under Sections 4, 8 and 12 of the POCSO Act. As the appellant had pleaded not guilty, the trial was initiated by the learned Special Judge, Bongaigaon.

**4.** The prosecution had adduced evidence through 11 nos. of witnesses, including the IO and the Doctor who had examined the alleged victims. Based on the said evidence and the material exhibits, including the medical reports for the 5 nos. of alleged victims, the appellant was put to examination under Section 313 of the Cr.PC. After the same, the impugned judgment was passed on 12.09.2017 convicting and sentencing the appellant in the manner, as indicated above. The statements of the 5 nos. of alleged victims were also recorded under Section 164 of the Cr.PC immediately after lodging of the FIR.

**5.** It is the legality and validity of the aforesaid impugned judgment dated 12.09.2017 which is the subject matter of challenge in the present appeal.

**6.** We have heard Shri AM Dutta, learned Amicus Curiae for the appellant. We have also heard Shri K Baishya, learned Addl. Public Prosecutor, Assam.

**7.** The learned Amicus Curiae has submitted that the contents of the FIR are vague and would not constitute any offence. He has assailed the proceedings on the ground of delay in lodging the FIR and lack of foundational facts. The assailment on the impugned judgment is also made on the ground that there were no independent witnesses in spite of the fact that as per the FIR itself, *bichar* was called for settlement of the matter. He has also highlighted the aspect that the places of occurrence were busy areas adjacent to a railway track wherein the alleged misdeeds could not have been done. He has also urged the ground that the medical reports were not supporting the ocular evidence and in view of such medical report wherein there were no indications of sexual assault, no judgment of conviction could have been passed. He has also highlighted the

aspect that there are lacunae in the evidence of the Investigating Officer.

**8.** He has submitted that for a conviction under the POCSO Act, the foundational facts are required to be proved and one of the essential factors is the age of the alleged victim so as to bring an offence under the ambit of the said Act. He submits that no endeavour was made by the prosecution with regard to prove the age of the alleged victims by producing documents from the concerned schools or their birth certificates. He submits that the reliance upon the opinion of the Doctor regarding the age can be taken resort to only when the prosecution, in spite of its best efforts fails to gather the birth certificate or school certificate to ascertain the age.

**9.** Elaborating his submission, the learned Amicus has contended that the FIR was lodged on 24.09.2016 with certain allegations which were at least 15 to 20 days earlier. He submits that there is no explanation at all for the delay in lodging the FIR. He, however has candidly accepted that there was an error in the date of the FIR which was written as 24.09.2015 which should have been 24.09.2016 and this clarification would appear from the other materials on record. By drawing the attention of this Court to the evidence on record, the learned Amicus has submitted that the informant had deposed as PW1 and there were suggestions given that the said PW1 had previous animosity with the appellant.

**10.** The PW2 is the father of two other victims, namely, PW4 and PW7 and he submits that such depositions are mere hearsay which cannot be relied upon. He has highlighted that in the said deposition, PW2 has stated that his son told

him about the incident on 21.09.2016. PW3 is the father of another victim (PW6). It is submitted that even his version is based on what he had heard from his son and other persons. Though the PW4, PW5, PW6, PW7, PW8 are the alleged victims, the learned Amicus has submitted that there are contradictions in their narrations and evidence. By drawing the attention of this Court to the deposition of PW10, the learned Amicus has submitted that as per his version, the allegation is of a period of almost a year earlier and in view of such discrepancy, the prosecution case was wholly untrustworthy.

**11.** The learned Amicus has referred to the evidence of the Doctor as PW9 in which, there has been a categorical finding that there were no signs of sexual assault and rather, there were observations that there was negative test for *spermatozea* and *gonococei* on the anal swab.

**12.** The learned Amicus Curiae has also highlighted that though the Doctor in his evidence has deposed with regard to the age of the alleged victims and their juvenilities, in absence of steps taken by the prosecution to prove the age of the alleged victims by producing the relevant documents, namely, the school certificate or the birth certificate, such resort could not have been taken to. In this connection, he has referred to Section 94 of the Juvenile Justice (Care and Protection of Children) Act 2015. By relying upon Section 94 (2), it is submitted that so far as the age of the victims are concerned, the procedure has been laid down that such age is to be proved from the documents of the school or the birth certificate and only in absence of such documents, age can be ascertained by medical examination. He submits that in the instant case, the resort to medical examination without fulfilling the first two criteria is not permitted in law

and therefore, the foundational facts to invoke the POCSO Act were not established. He has also submitted that though one of the prime allegations is of use of the mobile phone to show pornographic materials to the alleged victims, the mobile phone itself was not seized or exhibited. He submits that in absence of such proof, the allegations did not stand proved and was therefore, liable to be discarded. In support of his submissions, the learned Amicus has relied upon the following decisions.

**i)** ***Manirul Islam Vs. State of Assam & Anr.***, **2021 (3) GLT 128**,

**ii)** ***Raju & Ors. Vs. State of Madhya Pradesh***, **(2008) 15 SCC 133**,

**iii)** ***Mrinal Das Vs. State of Assam & Anr.***, **2017 (5) GLT 626**,

**iv)** ***Md. Rekman Choudhury Vs. State of Assam***, passed in **Crl. A(J)/106/2018**, vide judgment dated **06.02.2020**,

**v)** ***Pradeep Vs. State of Haryana***, **2023 LiveLaw (SC) 501**,

**vi)** ***Rajendra Prasad Vs. Narcotic Cell***, **(1999) 6 SCC 110**,

**vii)** ***Judgment dated 04.04.2019*** *in* ***Criminal Appeal No. 1110/2017*** passed by Hon'ble Gujarat High Court **(*Ajitkumar Kumarsinha Bhagora Vs. State of Gujarat*)**.

**13.** The case of ***Manirul Islam*** (*supra*) has been cited to bring home the contention that though Sections 29 and 30 of the POCSO Act lay down the provision of drawing a presumption, a conviction under the said Act cannot be on the sole basis of such presumption. In the said case, the requirement of establishing the foundational facts to invoke the Act in question has also been

highlighted. The delay in lodging the FIR has also been taken into consideration in the said case.

**14.** In the case of ***Raju & Ors.*** (*supra*), the Hon'ble Supreme Court has laid great emphasis on the ramification of a false allegation of rape or sexual assault which causes tremendous and immense agony.

**15.** In the case of ***Mrinal Das*** (*supra*), this Court has laid down that in case of rape, though sole testimony of the victim can be relied upon, the same is required to be trustworthy.

**16.** In the case of ***Md. Rekman Choudhury*** (*supra*), this Court has laid down that the presumption under Section 29 of the Act is to be balanced with the universal proposition of criminal law wherein there is a presumption of innocence. Since evidence of children had played a vital role in the present case, the case of ***Pradeep Vs. State of Haryana***, **2023 LiveLaw (SC) 501** has been cited wherein the Hon'ble Supreme Court has laid down that there has to be a proper scrutiny of such child witness. The case of ***Rajendra Prasad*** (*supra*) has been cited to highlight the aspect of lacunae in the prosecution case which would vitiate the trial. The case of Gujarat High Court has been referred to highlight the aspect of long and inordinate delay in lodging an FIR. It may, however be noted that in the said case, the delay was about 9 months.

**17.** *Per contra*, Shri Baishya, learned Addl. Public Prosecutor, Assam has supported the impugned judgment and has contended that the present appeal is bereft of any merits. He has submitted that the date of the FIR has been

clarified from the materials on record and the date should be 24.09.2016 instead of 24.09.2015. He submits that though much emphasis has been laid on the aspect of delay in lodging the FIR, in cases of this nature where minor children are involved, such delay cannot be held to be fatal. He has also referred to the aspect that a *bichar* was called for settlement of the matter in which the appellant did not participate and in the process, some time was consumed.

**18.** It is submitted that the charges are under Sections 4, 8 and 12 of the POCSO Act. Coming to the evidence on record, more particularly that of the alleged victims, namely PW4, PW5 and PW6, PW7 and PW8, it is submitted that their versions, as witnesses are wholly consistent with their statements made under Section 164 of the Cr.PC. He submits that the evidence of PW4 and PW5 who are victims constitute allegation of repeated sexual assaults.

**19.** On the aspect that the investigation did not make seizure of the mobile phone which was used to display pornographic materials, the learned APP has submitted that even if the aspect of use of mobile phone is overlooked, the other offences of sexual assault under the POCSO Act are fully proved. It is submitted that the PW1, who is the informant, in his deposition has clearly explained the delay.

**20.** He has stated that before the FIR, an attempt was made to settle the matter in which there was no cooperation by the accused for which there was some delay in lodging the *Ejahar*. He has also drawn the attention of this Court to the evidence of PW2, Shri Adhir Das who is the father of the victims, namely, Prasenjit Das and Bapuji Das (PW 4 and PW 7). He has adequately explained

the delay inasmuch as the matter was sought to be settled by way of a discussion. The learned APP accordingly submits that the judgment does not suffer from any legal infirmity and the appeal is liable to be dismissed. In support of his submissions, he has relied upon a decision of the Hon'ble Supreme Court in the case of ***P Yuvaprakash Vs. State of Rep. by Inspector of Police***, reported in **[2023] 10 SCR 478** wherein, the aspect of determination of age under the Juvenile Justice (Care and Protection of Children) Act, 2015 has been explained in the following manner:

> "*14. Section 94 (2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997. Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.*
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> *19. It is clear from the above narrative that none of the documents*

*produced during the trial answered the description of "the date of birth certificate from the school" or "the matriculation or equivalent certificate" from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstances, it was incumbent for the prosecution to prove through acceptable medical tests/examination that the victim's age was below 18 years as per Section 94(2)(iii) of the JJ Act. PW-9, Dr. Thenmozhi, Chief Civil Doctor and Radiologist at the General Hospital at Vellore, produced the X-ray reports and deposed that in terms of the examination of M, a certificate was issued stating "that the age of the said girl would be more than 18 years and less than 20 years". In the cross-examination, she admitted that M's age could be taken as 19 years. However, the High Court rejected this evidence, saying that "when the precise date of birth is available from out of the school records, the approximate age estimated by the medical expert cannot be the determining factor". This finding is, in this court's considered view, incorrect and erroneous. As held earlier, the documents produced, i.e., a transfer certificate and extracts of the admission register, are not what Section 94 (2) (i) mandates; nor are they in accord with Section 94 (2)(ii) because DW-1 clearly deposed that there were no records relating to the birth of the victim, M. In these circumstances, the only piece of evidence, accorded with Section 94 of the JJ Act was the medical ossification test, based on several X-Rays of the victim, and on the basis of which PW-9 made her statement. She explained the details regarding examination of the victim's bones, stage of their development and opined that she was between 18-20 years; in cross-examination she said that the age might be 19 years. Given all these circumstances, this court is of the opinion that the result of the ossification or bone test was the most authentic evidence, corroborated by the examining doctor, PW-9.*"

**21.** The rival submissions have been duly considered and the materials placed on records carefully examined.

**22.** The allegations are pertaining to offences under the POCSO Act and in the instant case, apart from the other witnesses, there is direct evidence of at least 5 nos. of witnesses who were victims of the offences alleged against the appellant. PW1, apart from being the informant is the father of one of the

victims who was examined as PW5. Similarly, PW2 is the father of two victims who were examined as PW 4 and PW7. PW5 in his evidence had made clear and direct allegation against the appellant. Similarly PW4 and PW7 had also made direct evidence who were the victims of the offence committed by the appellant.

**23.** PW8 is another victim who had also made direct allegation against the appellant. The aforesaid victims, namely, PW4, PW5, PW6 and PW7 had also got their statements recorded under Section 164 of the Cr.PC and their depositions, as witnesses are wholly consistent with such statement. An argument was sought to be made on behalf of the appellant with regard to the deposition of PW10 by contending that he is not an eyewitness. However, on a careful reading of the same deposition, it is seen that though PW10 was a victim, the offences committed against him were of an earlier period which was not mentioned in the instant FIR lodged on 24.09.2016.

**24.** Much stress has been laid on behalf of the appellant on the aspect of foundational facts to be proved by the prosecution, more particularly with regard to the age of the alleged victims. It has been urged that apart from the report of the Doctor from which the age of the victim has been stated to be below 18 years and would come within the POCSO Act, there was no effort from the prosecution for production of their school certificates or birth certificates. In this regard, the learned Amicus had referred to the provisions of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 which has been mentioned above.

**25.** Though the procedure has been laid down with regard to proving of the

age in which examination by the Doctor is one of the modes and such mode should be resorted to normally only if the victim in question does not have any documentary evidence, in the instant case, it cannot be said that there was no evidence at all with regard to their age. The above submission has to be examined from the point of view as to whether the determination of age by a medical examination is permissible in law. There is no manner of doubt that such a mode is a well-recognized mode and moreover, in the instant case, the ages of the victims are not on the margin of 18 years but much below. In view of the aforesaid facts and circumstances, this Court is of the opinion that the point which has been tried to be raised by the learned Amicus on the aspect of lack of foundational facts cannot be sustained. We have also noticed that at no stage of the trial, even a suggestion was put by the defence that the victims were not minors within the meaning of the POCSO Act. From the evidence of PW9, the Doctor, the ages of the victims range from 10 to 16 years.

**26.** Under those circumstances, we are of the view that the said aspect stands fully established that the victims in question were minors and they would come under the POCSO Act. With regard to the aspect of delay in lodging the FIR, we are of the considered opinion that the deposition of PW1 as well as PW2 would explain the reason of some delay in lodging the FIR. This Court cannot be oblivious of the fact that the victims involved in this case are minors and there appears on record that a *bichar* was called in which the appellant did not attend and rather, he was found to be absconding.

**27.** So far as the argument that there was no independent witness which has been made by contending that the places of occurrence were busy areas, we

are unable to accept the said argument. In an allegation involving an offence under the POCSO Act, presence of an independent witness would be a rare occasion. We are also not able to accept the argument that the place of occurrence was a busy area merely because it was near a railway track. The materials on record would show that the place of occurrence was not a single place but was on different places.

**28.** A contention was raised that in the medical report, there was no evidence of any sexual assault. Though the said submission appears to be apparently correct, it cannot be overlooked that the FIR was lodged on 24.09.2016 for offences made about 15-20 days ago and even prior to that and the medical examination was done only on 26.09.2016. It is quite natural that after a delay of about 20 days, there may not be any signs of sexual assault. As regards the lacuna in the evidence of the IO, we are of the opinion that the said contention cannot be sustained inasmuch as, the IO, in his deposition had explained all the steps he had taken post lodging of the FIR on 24.09.2016. We also find force in the contention made by the learned APP with regard to the aspect of non-seizure of the mobile phone in connection with the allegation of display of sexual and pornographic materials to the victims. It is seen that irrespective of the said part of the offence, there are other allegations which have been fully established by the evidence on record, more particularly the evidence of the victims in question. The evidence would also show that the appellant was found indulging in similar illegal activities on earlier occasions and was, in fact punished by the society.

**29.** In view of the aforesaid facts and circumstances, we are of the considered

opinion that the prosecution was able to prove the case against the appellant beyond all reasonable doubt and the learned Sessions Judge, Bongaigaon had come to a correct finding of guilt against the appellant and thereby had imposed the sentence against the appellant.

**30.** Accordingly the appeal stands dismissed.

**31.** Let the LCRs be sent back.

**32.** Before parting, we wish to put on record our appreciation for the assistance rendered by Sri A. M. Dutta, the learned Amicus Curiae and he would be entitled for the fee, as prescribed.

**JUDGE** **JUDGE**

**Comparing Assistant**