



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

Criminal Appeal No. 61/2023

Shri Rajen Taye, S/o Argeswar Taye, R/o –
Village - Jariguri, P.S. – Helam, District –
Biswanath, PIN – 784170.

.....Appellant

-Versus-

1. The State of Assam, represented by Public Prosecutor, Assam.
2. Shri Laxman Mali, S/o - Ganesh Mali, R/o - Phulbari T.E., P.S - Chariduar, District- Sonitpur, PIN – 784103.

.....Respondents

Advocates:

Appellant	: Mr. B. Chakravarty, Advocate
Respondent no. 1	: Ms. B. Bhuyan, Senior Advocate & Additional Public Prosecutor, Assam Ms. M. Chakravarty, Advocate

Date of Hearing and Judgment & Order : 23.04.2024

- B E F O R E -

**HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MR. JUSTICE ROBIN PHUKAN**

JUDGMENT & ORDER

[M. Choudhury, J]

The instant appeal under Section 374[2], Code of Criminal Procedure [‘Cr.P.C.’, for short] is directed against a Judgment and Order dated 12.08.2022 [the State of Assam vs. Rajen Taye] passed by the learned Sessions Judge, Sonitpur, Tezpur in Sessions Case no. 88/2018. By the said Judgment and Order dated 12.08.2022, the accused-appellant has been found guilty of the offence defined in sub-section [5] of Section 370 of the Indian Penal Code [‘IPC’, for short] and he has been sentenced to undergo rigorous imprisonment for a term of 14 [fourteen] years and to pay a fine of Rs. 5,000/-, in default of payment of fine, to undergo simple imprisonment for 3 [three] months.

2. The case of the prosecution, in brief, was that the investigation was set into motion on receipt of a First Information Report [‘FIR’, for short] from one Laxman Mali on 28.12.2016. In the said FIR lodged before the Officer-in-Charge of Chariduar Police Station, the informant had inter alia alleged that at around 2-00 p.m. on 28.12.2016, the members of All Assam Adivasi Students Association [‘the AAASA’ or ‘the Association’, for short], Balipara Unit saw three children, belonging to Adivasi community, being taken away to Arunachal Pradesh as child labours by a suspected person. After questioning the person and the three children, the members of the Association suspected something wrong and the person along with the three children was handed over to Chariduar Police Station.

3. On receipt of the FIR, the Officer In-Charge, Chariduar Police Station registered the same as Chariduar Police Station Case no. 199/2016, on

28.12.2016, for the offence under Section 370 [5], IPC and he himself took up the investigation of the case.

4. The Investigating Officer ['I.O.', for short] of the case during the course of investigation, recorded the statements of the witnesses under Section 161, Cr.P.C.; visited the place of occurrence; and prepared a sketch map. After recording the statements of the alleged victims, they were handed over to the Child Welfare Committee. The I.O. of the case upon completion of investigation, submitted a charge-sheet under Section 173 [2], Cr.P.C. vide Charge-Sheet no. 21/2017 on 28.02.2017 in connection with Chariduar Police Station Case no. 199/2016 [corresponding to G.R. Case no. 7029/2016] finding a prima facie case for the offence under Section 370[5], IPC well established against the accused-appellant.

5. On submission of the charge-sheet, the learned Additional Chief Judicial Magistrate, Sonitpur, Tezpur upon appearance of the accused-appellant, furnished copies to him in compliance of the provisions of Section 207, Cr.P.C. As the offence under Section 370[5], IPC is exclusively triable by the court of Sessions, the learned Additional Chief Judicial Magistrate, Sonitpur, Tezpur committed the case records of G.R. Case no. 7029/2016, arising out of Chariduar Police Station Case no. 199/2016, to the Court of Sessions, Sonitpur, Tezpur ['the trial court', for short] as per the provisions of Section 209, Cr.P.C. by an Order of Commitment date 07.04.2018 and by allowing the accused-appellant to remain on previous bail, in the meantime. On receipt of the case records of G.R. Case no. 7029/2016, arising out of Chariduar Police Station Case no. 199/2016, pursuant to the Order of Commitment dated 07.04.2018, the learned trial court registered the same as Sessions Case no. 88/2018.

6. On appearance of the accused-appellant before the learned trial court, the learned trial court after hearing the learned Public Prosecutor and the learned defence counsel and upon perusal of the materials on record, framed the following charge:

“That you, on 28-12-2016 at about 2 p.m., at Balipara, under Chariduar Police station, committed the offence of trafficking for the purpose of exploitation transported more than one minor namely, X, Y and Z [names withheld] by inducement and thereby committed an offence punishable U/S 370(5) of the Indian Penal Code and within my cognizance.”

7. When the charge was read over and explained to the accused, he pleaded not guilty and claimed to be tried. During the course of the trial, the prosecution side examined seven numbers of witnesses including the I.O. of the case, and exhibited four numbers of documents. After closure of the evidence from the prosecution side, the accused was examined under Section 313, Cr.P.C. and his plea was denial. The defence side did not adduce any evidence. After appreciation of the evidence on record and hearing the learned counsel for the parties, the learned trial court has convicted the accused for the offence, under Section 370[5], IPC and he has been sentenced in the manner, indicated above.

8. We have heard Mr. B. Chakravarty, learned counsel for the accused-appellant and Ms. B. Bhuyan, learned Senior counsel & Additional Public Prosecutor assisted by Ms. M. Chakravarty, learned counsel for the respondent no. 1, State of Assam.

9. Mr. Chakravarty, learned counsel for the accused-appellant has submitted that in the FIR [Ext.-1] lodged on 28.12.2016, the accused-appellant was not named as he was not known to the informant from any earlier point of time. He has submitted that the ingredients of offence of trafficking, defined in sub-section [1] of Section 370, IPC are found absent and in such view of the matter, the accused-appellant cannot be convicted under sub-section [5] of Section 370, IPC, as a conviction under Section 370[5], IPC more ingredients are required to be fulfilled. One of the burden the prosecution is obligated to discharge for an offence under Section 370[5], IPC is that the alleged victims were minors. He has contended that the prosecution side had failed to establish

the ages of the alleged victims in the manner prescribed by law. It is his further contention that out of the three alleged victims, only two of them were examined by the prosecution and as such, there was no evidence as regards the third alleged victim. Out of the two alleged victims who were examined by the prosecution, one of them had testified that he had voluntarily accompanied the accused-appellant. Mr. Chakravarty has submitted that from the evidence on record, it would emerge that the alleged second victim was sent with the accused on that day by her mother to a place of a relative in Arunachal Pradesh. Thus, in the above view of the matter, the accused-appellant is entitled to be acquitted as the learned trial court has erred in reaching findings that the alleged victims were minors and they were trafficked.

10. Au contraire, Ms. Bhuyan, learned Senior Counsel & Additional Public Prosecution appearing for the State, has submitted that the members of the AAASA who deposed as P.W.1, P.W.2 and P.W.6 respectively, had testified that the accused was intercepted when he was in the process of trafficking the three alleged minor victims. Ms. Bhuyan has strenuously contended that on a combined reading of the testimonies of P.W.4 and P.W.5, it was clear that the alleged victim, P.W.4 was a minor and there was application of force on the part of the accused to take her from the guardianship of her mother, P.W.5. The fact that the accused was with the three alleged victims has found corroboration also from the testimony of P.W.3, who had deposed that the accused came to his house and took him along with two other alleged victims. The act of apprehension of the accused along with the three alleged victims by the members of AAASA at a place, which was at a distance from the respective houses of the said three minor victims, would go to show that the prosecution has been able to bring home the charge under Section 370[5], IPC. In so far as the ages of the three alleged victims are concerned, the accused has never taken a plea that the alleged victims were not minors. Ms. Bhuyan has further referred to a decision of the Hon'ble Supreme Court in the case of Sidhartha Vashisht alias Manu Sharma vs. State [NCT of Delhi], reported in [2010] 6 SCC

1, to submit that this court as an appellate court can exercise the powers under Section 391, Cr.P.C. reasonably so as to find out the minority or otherwise of the alleged victims. With such submissions, the learned Additional Public Prosecutor has contended that no interference of the impugned Judgment and Order of conviction and sentence is called for.

11. We have given due consideration to the submissions of learned counsel for the parties and have also gone through the evidence/materials on record including the testimonies of the witnesses, available in the case records of Sessions Case no. 88/2018, in original.

12. The two prosecution witnesses – P.W.1 and P.W.2 were the then President of Tea and Ex-Tea Garden Cell, Sonitpur district and the then President of AAASA, Sonitpur district respectively. In their testimonies, P.W.1 and P.W.2 deposed to the effect that they did not know the accused from any point of time earlier to the date of the alleged incident.

13. P.W.1 stated that on the date of the incident, he, P.W.2 and three/four others were at Balipara Centre. They saw the accused along with the three alleged victims – X [12/13 years], Y [10 years] and Z [8/9 years]. He testified that the alleged three victims - X, Y and Z - belonged to the Adivasi community. On suspicion, the accused and the alleged three victims were intercepted and confronted with and it could be known that the accused was trafficking the alleged three victims to Arunachal Pradesh for the purpose of engaging them there as labours. Then, all of them were handed over to the Chariduar Police Station. In his cross-examination, P.W.1 stated that he did not have any personal knowledge about the occupation of the accused and in the FIR, the name of the accused and the alleged victims were not mentioned.

14. P.W.2's testimony was in similar lines as that of P.W.1. P.W.2 deposed that on the date of the incident, he, P.W.1 and three/four others were at Balipara Centre and they saw the accused along with three children belonging to the Adivasi community. On suspicion, they interrogated the accused and the

three children and on interrogation, they came to know that the children were being trafficked to Arunachal Pradesh by the accused for the purpose of engaging them there as labours and it was P.W.2 who informed the police over telephone. In his cross-examination, he stated that he filed the FIR on suspicion. Narrating about the place of occurrence, P.W.2 stated that at Balipara Centre there used to be many shops and establishments and there used to be public gathering. He further stated that it was fifteen minutes after he made the telephone call, police personnel arrived at the place of occurrence.

15. P.W.6 who was a contractor by profession, deposed that on the date of the incident, at around 12 O' Clock, he was at Balipara Centre along with others. At that time, they saw the accused with 2/3 children proceeding towards Arunachal road on foot. According to him, the children were about 6/7 years old. When they made enquiry with the accused, he replied that he was taking the children to Arunachal for study purpose. According to him, the accused made an attempt to flee and many persons gathered at the place of occurrence. After informing the Police, they were handed over to the Police personnel of Chariduar Police Station. In his cross-examination, P.W.6 stated that the Police did not record his statement.

16. P.W.3 was one of the three alleged victims. In his testimony, P.W.3 stated that the accused came to their house asking for boys and girls to do works as domestic helpers. During that time, his parents were at home. He stated that his mother allowed him to go, if he desired. Then, he went with the accused, who took him to Bhalukpong [Arunachal Pradesh]. P.W.3 stated that X and Z were also with them. It was when they were coming out from a hotel after having tea at Bhalukpong, the members from the AAASA apprehended them and took them to the Police Station. When P.W.3 was cross-examined, he denied the suggestion that they were not taken by the accused to Bhalukpong. He disclosed his age as 17 years on the date of recording his deposition i.e. 10.08.2018.

17. P.W.5 is the mother of P.W.4 [Z], one of the three alleged victims. P.W.4 was also examined on 10.08.2018 who stated her age as 11 years. In her evidence-in-chief, P.W.4 stated that on one day, the accused came to their house and requested her mother to allow the accused to take her with him for the purpose of assisting one child to go to school. She further deposed that on being so requested, her mother [P.W.5] refused. Then, the accused told her mother [P.W.5] that he would pay remuneration and thereafter, she was taken forcefully to a place, and that X and Y were also there. Like P.W.3, P.W.4 also deposed that when they were coming out from a hotel after having tea, the members of AAASA apprehended them and took them to a Police Station. In her cross-examination, P.W.4 denied the suggestions put to her by the defence. Oath was not administered to P.W.4. After putting few questions and receiving answers to those questions, the learned trial court came to a conclusion that P.W.4 had sufficient ability to give rational answers.

18. P.W.5 is the mother of P.W.4 [Z] who deposed to the effect that on one day, about one year ago, the accused came to their house and requested her to give her daughter [Z] for engagement as a domestic helper. Initially, she refused but the accused forcefully took her daughter to Arunachal Pradesh. It was when they were on their way to Arunachal Pradesh, the members of AAASA intercepted and at the time of such interception, X and Y were also there. P.W.5 stated that the age of her daughter, P.W.4 [Z] was about 11 years. When P.W.5 was cross-examined, she stated that she allowed her daughter, P.W.4 [Z] to go with the accused to one of her relatives' house in Arunachal Pradesh. She stated that the said relative used to work in Arunachal Pradesh. P.W.5 further stated that the members of AAASA intercepted the accused, her daughter [P.W.4] and others at Bhalukpong. When the accused visited their house, one of the villagers was also with him.

19. The I.O. of the case was examined as P.W.7. P.W.7 deposed to the effect that on 28.12.2016, it was informed at the Police Station by P.W.2 that one person was taking three children with him for the purpose of engaging

them in works in Arunachal Pradesh. On the basis of the said information, the a General Diary Entry being G.D. Entry no. 937 dated 28.12.2016 [Ext.-2] was registered at 2-30 p.m. Thereafter, he along with staff proceeded to Balipara bus stand to investigate the matter. At Balipara bus stand, he found the accused along with the victim girl and took them to the Police Station. In the meantime, he received the FIR [Ext.-1]. After preparing a Sketch Map [Ext.-3], he recorded the statements of the victims and thereafter, they were handed over to the Children Welfare Committee. In his cross-examination, P.W.7 stated that the accused and the victims were handed over at the Police Station.

20. On a combined reading of the testimonies of the prosecution witnesses, inconsistency is noticed as regards the place of apprehension and the manner of apprehension. The three prosecution witnesses - P.W.1, P.W.2 and P.W.6 - deposed to the effect that the accused and the alleged three victims were apprehended at Balipara Centre/bus stand. On the other hand, P.W.3, one of the alleged victims, and P.W.5, the mother of P.W.4, another alleged victim, deposed that the accused and the alleged victims were apprehended at Bhalukpong when they were coming out of a hotel after having tea. P.W.1 and P.W.2 had stated that after apprehending the accused and the three alleged victims, the matter was informed at the Police Station and on being so informed, Police personnel of Chariduar Police Station arrived at the place of occurrence and took them to the Police Station. On the other hand, P.W.7, the I.O. of the case, deposed to the effect that the accused and the alleged victims were handed over to Police at the Police Station.

21. Sub-section [1] of Section 370, IPC has provided for the offence of trafficking. As per sub-section [1] of Section 370, IPC, whoever, for the purpose of exploitation, [a] recruits, [b] transports, [c] harbours, [d] transfers, or [e] receives, a person or persons, by - *First*. - using threats, or *Secondly*. - using force, or any other form of coercion, or *Thirdly*. - by abduction, or *Fourthly*. - by practising fraud, or deception, or *Fifthly*. - by abuse of power, or *Sixthly*. - by inducement, including the giving or receiving of payments or

benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking. As per Explanation-1, the expression, 'exploitation' shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs. Explanation-2 has stipulated that the consent of the victim is immaterial in determination of the offence of trafficking.

22. Sub-section [2] of Section 370, IPC has provided for punishment for the offence of trafficking and as per sub-section [2], whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine. Sub-section [4] of Section 370, IPC has provided for the punishment where the offence involves trafficking of a minor. As per sub-section [4], where the offence involves trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine. Sub-section [5] of Section 370, IPC is made applicable where the offence of trafficking involves more than one minor. As per sub-section [5], where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine. Both sub-section [4] and sub-section [5] of Section 370, IPC have provided for stringent punishments. It is settled that the more stringent would the punishment, the higher would the burden for the prosecution to discharge. In the case in hand, the prosecution has brought the charge that the accused-appellant was involved in the act of trafficking of more than one minor.

23. Originally, when the FIR was lodged, it was alleged that the accused-appellant was involved in the trafficking of three minors. During the course of the trial, the prosecution had examined only two of the three alleged minor

victims. One of the main burdens for the prosecution to bring home the charge under sub-section [5] of Section 370, IPC is to establish that the alleged victims were minors. When a question arises as regards determination of age of a child in a conflict of law, the provisions contained in the Juvenile Justice [Care and Protection of Children] Act, 2015 [‘the Juvenile Justice Act’, for short] are required to be resorted to. It has been observed in *Jarnail Singh vs. State of Haryana*, reported in [2013] 7 SCC 263, that even though the provisions contained in the Juvenile Justice Act and the rules framed thereunder are strictly applicable only to determine the age of a child in conflict with law, the aforesaid statutory provisions should be the basis for determining the age, even of a child who is a victim of crime. Such observation has been made by taking into consideration that 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.

24. From a reading of the provisions contained in Section 94 of the Juvenile Justice Act and in view of the observations in *Jarnail Singh* [supra], it is evident that wherever a dispute with regard to the age of a child in conflict with law or a child who is a victim of crime, as the case may be, arises for consideration, recourse in the manner indicated and observed therein are to be taken. The provisions of Section 94 have referred to three documents, namely, *firstly*, 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; *secondly*, the birth certificate given by a corporation or a municipal authority or a Panchayat, and only in the absence of the two documents referred above; *thirdly*, the age shall be determined by an ossification test or any other latest medical age determination test. The proof of age whether by way of documentary evidence of the nature indicated above and in the absence of such kinds of documents, by way of an ossification test, etc. lies upon the prosecution to establish as it is the prosecution who brings

the charge that the accused has committed, that is, the offence involving a child as the victim of crime.

25. In the present case, the prosecution has not brought on record any kind of documentary evidence from the side of any of the parties mentioned hereinabove, to establish the case that the two alleged victims who testified before the court, were minors. The prosecution side was silent as to whether any ossification test or other age determination test was conducted at any time before submission of the charge-sheet and at any time thereafter. It does go to show that the prosecution did not take recourse to the procedure required to be followed for the purpose of establishing the age of the alleged victims. In the absence of any documentary evidence as regards the age of the alleged victims, it does not appear safe to rely solely on the oral testimonies of the three prosecution witnesses i.e. P.W.3, P.W.4 and P.W.5. From the testimony of P.W.4, it has not emerged that there was any kind of coercion or use of force or deception on the part of the accused. From the evidence of the prosecution witnesses, that is, P.W.1, P.W.2 and P.W.5, all of them had testified about the ages of the alleged victims on guesswork without any valid basis.

26. When it is required to weigh testimonies of two witnesses on the same issue with one of them as minor and the other a major and more particularly, when they are in the relationship of daughter and mother, it is the testimony of the major and the mother which in the case in hand is P.W.5, which is to be given higher weightage. From the testimony of P.W.5, it has emerged that she had allowed her minor daughter, P.W.4 to accompany the accused to the house of one of her relatives, who used to stay, at that point of time, in Arunachal Pradesh.

27. Having considered the evidence/materials on record in its entirety, we are of the considered view that the higher burden of proof which was required to be discharged by the prosecution to establish that the alleged victims were

minors, could not be discharged by the prosecution. With such evidence/materials on record, this court is not persuaded to reach a view that the prosecution has discharged the burden beyond all reasonable doubts that the alleged victim[s] was/were minors to bring the alleged offence within the scope and ambit of either sub-section [4] or sub-section [5] of Section 370, IPC.

28. In view of failure to discharge the burden of proof required on the part of the prosecution to bring home the charge either under sub-section [4] or sub-section [5] of Section 370, IPC, the scenario which emerges is that on the date of the incident, the accused was found in the company of the alleged victims at a public place, which was also not fully established as to whether the place was Balipara Bus Stand or Bhalukpong, in view of conflicting versions of the prosecution witnesses – P.W.1, P.W.2 and P.W.6, on one hand and the prosecution witnesses – P.W.3 and P.W.5 on the other hand.

29. Even if it is assumed, notwithstanding the dispute as regards the place where the accused was found in the company of three alleged victims, which albeit was a public place, the same would not be sufficient, in the absence of any other cogent and credible evidence, to fulfil the ingredients of the offence under Section 370, IPC. Finding the accused and the three alleged victims roaming at a public place, the members of the association, AAASA who did not know either the accused or the three alleged victims from before, seemed to have acted as vigilantes and apprehended all of them merely on suspicion and thereafter, handed them over to Police. There was no complaint of any nature from the ends of either the alleged three victims or from the families of the said three alleged victims. If the testimonies of P.W.1 and P.W.2 vis-à-vis the testimonies of P.W.6, who claimed to have intercepted the accused and the alleged three victims at the same time, are analysed then also their testimonies are found at variance. While P.W.1 and P.W.2 stated that when interrogated, they got to know that the alleged three victims were being taken to Arunachal Pradesh for the purpose of labour works, the third witness, P.W.6 stated that

when interrogated, he got to know that the alleged three victims were being taken to Arunachal Pradesh for study purpose. It is the settled principle of jurisprudence that in order to bring home charge for an offence, it is the burden of the prosecution to lead evidence fulfilling the ingredients of the offence with which the accused has been charged with and the standard of proof is beyond all reasonable doubts.

30. From the discussions made above and the findings recorded therein, we are of the considered view that in the case in hand, the prosecution has not been able to establish a case of trafficking beyond all reasonable doubts. It is also settled that benefit of doubt, other things being equal, at all stages, goes in favour of the accused. Thus in the case in hand, the accused-appellant is entitled to the benefit of doubt.

31. Accordingly, this criminal appeal is found merited and accordingly, the same is allowed. The impugned Judgment and Order dated 12.08.2022 of the learned trial court passed in Sessions Case no. 88/2018 is set aside and quashed.

32. As the criminal appeal is allowed and the Judgment and Order of conviction and sentence of the learned trial court is interfered with, the accused-appellant is to be set at liberty forthwith, if he is not required in connection with any other case.

33. The office to send back the records of the learned trial court forthwith.

JUDGE

JUDGE

Comparing Assistant