

GAHC010283962025



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

Case No. : CrI.A./273/2023

NEPAL ROY
S/O LATE KETAKI ROY

VILL.- KATHAL ROAD
SILCHAR
DIST.- CACHAR (ASSAM).

VERSUS

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

2:APARNA MALAKAR
W/O SRI BAKU MALAKAR

VILL.- NATIONAL HIGHWAY
P.S.- SILCHAR
DIST.- CACHAR
ASSAM
PIN- 788001.

Advocate for : MR. L R MAZUMDER
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND ANR.

:::BEFORE:::

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MR. JUSTICE KAUSHIK GOSWAMI

Advocates for the appellant : Mr. L.R. Mazumder. Advocate.

Advocates for the respondents : Ms. B. Bhuyan, Sr. Counsel. &
Addl. P.P., Assam.
Mr. A. Tiwari, Amicus Curiae for
respondent no.2

Date of hearing & judgment : 08.01.2026

JUDGMENT & ORDER

(M. Zothankhuma, J)

1. Heard Mr. L.R. Mazumder, learned counsel for the appellant. Also heard Ms. B. Bhuyan, learned Senior Counsel and Additional Public Prosecutor, Assam for the State and Mr. A. Tiwari, learned Amicus Curiae for the respondent no.2

2. This appeal has been filed against the impugned judgment dated 26.05.2023 passed by the learned Court of the Additional Sessions Judge (Special Judge POCSO), Cachar, Silchar in Special (POCSO) Case no.14/2022, by which the appellant has been convicted under Section 6 of the POCSO Act read

with Section 376(3) IPC. The appellant was however acquitted under the charge framed against him under Section 366 IPC. The appellant was thereafter sentenced under Section 6 of the POCSO Act, to undergo rigorous imprisonment for 20 years with a fine of Rs.5,000/-, in default to undergo rigorous imprisonment for 2 months.

3. The facts of the case in brief is that the Prosecution Witness (PW) No.2 submitted an FIR dated 07.11.2021 with the In-charge, Rangirkhari T.O.P stating that on 04.11.2021, her daughter (victim) went to a Pulao shop located at Kathal Road where the appellant was the owner of the shop. The appellant kidnapped her minor daughter and took her somewhere and due to the above, PW-2 could not trace her daughter. Rangirkhari T.O.P registered G.D.E No.184 dated 07.11.2021 and forwarded the same to the O.C. of the Silchar Police Station for registering a case. Thereafter Silchar P.S. Case No.3899/2021 under Section 365 IPC was registered.

4. PW-5 was made the Investigating Officer. PW-5 thereupon took up the investigation and also ensured that the victim's statement under Section 164 Cr.P.C was recorded, wherein the victim stated that on 02.11.2021 at about 6 p.m, the appellant had asked her to sweep his house and when she went to sweep the house of the appellant, the appellant pushed her on the bed and undressed her. The appellant then opened his trousers and inserted his penis into the private parts of the victim. The appellant had also touched the breasts of the victim. The victim thereafter came crying out of the appellant's house and when the appellant's wife saw her, the appellant's wife asked the victim why she was crying. The victim then narrated the entire incident to the wife of the appellant. The appellant's wife then asked her to forget about the incident and

not to inform anyone about it. In the evening, the victim's cousin took her to his house and on the next day the appellant's wife and the victim's grandmother brought her back home. On 04.11.2021 at about 5 p.m the victim along with the appellant went to the appellant's sister's house. The victim informed her grandmother about the same. They resided in the appellant's sister's house for 3 days and thereafter the victim returned back home with the appellant.

5. The victim was also produced before the Doctor (PW-4), who conducted a medical examination over the victim, wherein it was stated that the victim's hymen was wide open and there was no injury on the body of the victim. PW-5 thereafter submitted a charge-sheet, on finding a prima facie case under Section 365 IPC read with Section 4 of the POCSO Act against the appellant.

6. The learned Trial Court thereafter framed three charges against the appellant under Section 366 IPC, 376(3) IPC and Section 6 of the POCSO Act, on the ground that the appellant had kidnapped and raped the victim in his house. The appellant pleaded not guilty to the charges framed against him and claimed to be tried.

7. The learned Trial Court thereafter examined 5 Prosecution Witnesses (PWs) and 2 Defence Witnesses (DWs). After recording the statement of the victim under Section 313 Cr.P.C, the learned Trial Court came to a finding that the charge under Section 366 IPC had not been proved against the appellant, while holding that the charges under Section 376(3) IPC and Section 6 of the POCSO Act had been proved against the appellant. In view of the punishment

being more severe under Section 6 of the POCSO Act, the appellant was sentenced to undergo rigorous imprisonment for 20 years with a fine of Rs.5,000/-, in default to undergo rigorous imprisonment for another 2 months under Section 6 POCSO Act, by application of Section 42 of the POCSO Act.

8. The appellant being aggrieved has put to challenge the impugned judgment. The main challenge to his conviction being on the ground that while the charge had been framed against the appellant for having committed aggravated penetrative sexual assault on the victim in the house of the appellant, the evidence of the victim is to the effect that the said aggravated penetrative sexual assault had taken place inside a hotel into which the victim had willingly gone with the appellant.

9. The learned counsel for the appellant submits that the statement of the victim under Section 164 Cr.P.C is to the effect that the victim had been raped by the appellant, while she was sweeping the house of the appellant and even after that alleged incident, the victim had gone to the house of the appellant's sister's with the appellant and stayed there for 3 days. The evidence of the Doctor as PW-4 is to the effect that she had been told by the victim, that while she was alone in her own house on 02.11.2021, the appellant forcefully had sexual intercourse with her. Further, as per the mother of the victim, the victim and the appellant were missing for 4 days prior to finding them near Silchar Medical College. The charge-sheet submitted by PW-5 only states that the appellant had kidnapped the victim and during investigation, a prima facie case under Section 365 IPC and Section 4 of the POCSO Act had been found well

established against the appellant. PW-5 also stated that the FIR dated 07.11.2021 had been registered on 08.11.2021 and that the kidnapping of the victim was done by the appellant on 04.11.2021.

10. Ms. B. Bhuyan, learned Additional Public Prosecutor submits that even though there might have been some omissions on the part of the learned Trial Judge while framing the charges, with respect to the allegation of rape, by not mentioning that the rape had occurred in a hotel, as rape had been committed in the hotel, no prejudice was caused to the appellant. Ms. B. Bhuyan also submits that the impugned judgment should not be interfered with, only on the ground that there was an error, omission or irregularity in the charge framed against the appellant, just because there was nothing stated in the charge that the appellant had raped the victim in a hotel. The same has not occasioned a failure of justice and as it has been proved that the appellant had raped the victim in a hotel, the error or omission in the framing of charge by the learned Trial Court, where the appellant has been charged with raping the victim in a "house", cannot be the basis for invalidating the charges framed against the appellant or setting aside the impugned judgment. In this regard, she has relied upon Section 464 Cr.P.C

11. Mr. A. Tewari, learned Amicus Curiae for the respondent No.2 fairly submits that at the time of framing charges against the appellant, there was nothing stated with regard to rape having been committed in a hotel. The charges framed against the appellant was only with regard to rape being committed in the house of the appellant, which has not been proved as per the testimony of the victim (PW-1).

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

13. The relevant extract of the Charge-sheet at paragraph-7 is reproduced hereinbelow, as follows :

“(7) Charge or information, Nature of offence and circumstances connected with if is concise detail, and under what section of the penal code charged.

The prosecution of story of the case is that on 8.11.21 the complt lodged a written FIR to the effect that the complt minor daughter namely Dibya Malakar live with the father at Kathal Road. On 4-11-21 while the complt minor daughter gone to parlour shop. The complt minor daughter Dibya Malakar kidnapped by accd Nepal Ray from the shop at Kathal Road and his mobile no. 9394557046. Hence the case.

During investigation of the case is that prima facie u/s 365 IPC Add R/w Sec 4 POCSO Act have been found well established against the arrested accd Nepal Ray S/o- Lt. Kalhati Ray of Kathal Road (illegible) Lane P.S.- Silchar.

So I beg to state that the accd person sent up to this Hon'ble Court for standing to trail, said sec of law. For witness noted col. no. 6 will prove the case.”

14. The extract of the 3 (three) charges framed against the appellant by the learned Trial Court, are as follows :-

“Firstly, that, you on 04.11.2021 at about 6 p.m. at Kathal Road under Silchar P.S. kidnapped the victim (name is read out), the minor daughter of the informant with intent that she will be forced or seduced to illicit intercourse and that you thereby committed an offence punishable under Section 366 of I.P.C. and within my cognizance.

Secondly, that, you at your house committed rape upon the victim who is

the daughter of the informant and under 16 years of age (name is read out) and that you thereby committed an offence punishable under Section 376(3) of IPC and within my cognizance.

Thirdly, that, you at your house committed aggravated penetrative sexual assault on the victim (name is read out) who is the minor daughter of the informant and that you thereby committed an offence punishable under Section 6 of POCSO Act and within my cognizance.

And I thereby direct that you be tried by this Court on the said charges.

The said charges under Section 366/376(3) of IPC read with Section 6 of POCSO Act are read over and explained to the accused person to which he pleaded not guilty and claimed to be tried."

15. In the statement given by the victim under section 164 Cr.P.C., the victim had stated that she was raped by the appellant in the appellant's house, while she was sweeping the house. However, the said statement made under section 164 Cr.P.C. does not corroborate the testimony of the victim, where she had stated that she has been raped in a hotel.

16. The statement of the victim under section 164 Cr.P.C., which had been recorded by the learned Judicial Magistrate, 1st Class on 11/11/2021 and the testimony of the victim (PW-1), which was recorded by the learned Trial Court on 29/07/2022, are as follows :-

"Statement under section 164 C.P.C. recorded on 11/11/2021

"The particulars mentioned above are true to my knowledge. On 02/11/21 at about 6:00 p.m. Nepal Ray asked me to sweep his house. When I went to sweep his house he pushed me on the bed

and undressed me. He opened his pants and inserted his penis in my vagina. He touched my breasts also. Thereafter he left. I came out of his house crying. His wife, Jharna Ray saw me and asked me the reason I was crying. I narrated the entire incident to her. She asked me to forget about the same and not inform anyone about it. In the evening my cousin, Liton Ray took me to his home. On the next day Jharna Ray and my grandmother, MalatiMalakar brought me back home. On 04/11/21 at 5:00 p.m. I alongwith Nepal Ray went to his sister, Miton's house. I informed my grandmother about the same. We resided there for 3 days. After that I returned back home with Nepal Ray."

Testimony recorded before the learned Trial Court recorded on 29/07/2022:

The informant is my mother. The occurrence took place last year after 2/3 days of yearly Kali Puja at about 8 p.m. During the Kali Puja I went to the house of my aunt Miton at Nivia. On the day of occurrence which was after 2/3 days of the Kali Puja, I went for outing with the accused Nepal Roy who is brother of my said aunt Miton. As it was late at night the accused Nepal Roy took a room in a hotel on rent of Rs.500/- near SMCH. He brought meal for us. After eating the same I slept. While I was sleeping the accused removed my clothes and forcibly committed sexual intercourse with me. As I did not return home my mother lodged the case. After that police brought me to the police station along with the accused Nepal Roy. My parents were also called to the police station. Thereafter, I told my mother about the occurrence. Police sent me to SMCH wherein my medical examination was done. After that I was sent to Ujjala Home. After two days I was produced in the Court wherein my statement was recorded by Magistrate. Ext.P-1/PW-1 is my statement. Ext.P-1/PW-1 and Ext.P-12/PW-1 are my signatures. At the time of the occurrence my age was 13 years. At that relevant period I was residing with my parents in a rented house at Kathal Road, Silchar. The accused Nepal Roy had a road side "pulad" shop at Kathal Road. Police recorded my statement.

Cross-examination by Defence

At that time I resided with my father, grandmother and younger brother. The house of the accused Nepal Roy was nearby our house. My father is blind. I worked in the said road side shop of the accused for two years. I used to clean utensil there. At the time of the occurrence also I was working in his shop. My mother has been living in Das colony for last 4 years with my maternal grandmother. Earlier also I had gone with the accused for outing. During the Kali Puja I was in the house of Miton for 3 days. I went to Nivia to the house of Miton with the accused Nepal Roy after taking permission from my grandmother. The accused paid me Rs.1500/- per month for working in his road side shop. I read up to Class-IV.

It is not a fact that I have falsely stated that on the day of occurrence which was after 2/3 days of the Kali Puja, I went for outing with the accused Nepal Roy who is brother of my said aunt Miton and that as it was late at night the accused Nepal Roy took a room in a hotel on rent of Rs.500/- near SMCH and that while I was sleeping the accused removed my clothes and forcibly committed sexual intercourse with me and that as I did not return home my mother lodged the case and that after that police brought me to the police station along with the accused Nepal Roy.

It is not a fact that when my grandmother asked the accused Nepal for the money due to me he refused to pay the amount and then out of grudge the instant case is lodged against the accused making false allegations.

Prior to this occurrence once I had gone to Guwahati with the accused."

17. With regard to the submission made by the learned Additional Public Prosecutor, that there was an error/omission in the charges framed against the

appellant, wherein there has been no mention with regard to rape being committed on the victim in a hotel, we are of the view that the said submission of the learned Additional Public Prosecutor cannot be considered for the simple reason that it has never been the case of the prosecution that the charge framed against the appellant had been wrong on facts. It may be reiterated that in terms of Section 212 Cr.P.C, the charge is to contain such particulars as to the time and place of the alleged occurrence. When the charge had specifically stated the place to be the house of the appellant and the victim has stated that the place was the hotel, it is doubtful as to whether the case of the prosecution proves the guilt of the appellant when the provisions of Section 212 Cr.P.C has not been complied with. Further, for the sake of repetition, the evidence of the Doctor is to the effect that he had been told by the victim that the rape had occurred in the victim's house. The charge-sheet does not give the place of occurrence of the offence and as such, when there is a discrepancy with regard to whether the occurrence had taken place in the appellant's house, we are not convinced with the truthfulness of the testimony of the victim. The evidence of the victim does not inspire the confidence of this Court. Consequently, we hold that it would not be safe to convict the appellant on the basis of the sole testimony of the victim, which does not inspire our confidence.

18. We are aware of the fact that the testimony of a child victim of sexual assault, if cogent and inspires confidence, requires no corroboration and that minor consistencies or omissions are inconsequential, provided the testimony remains consistent on material particulars. Further, in the case of ***State of U.P. Vs. Krishna Master & Ors [(2010) 12 SCC 324]***, the Supreme Court has held that a child of tender age will always be receptive of abnormal events which takes place in their life and would never forget those events. The child

would be able to recapitulate correctly and exactly when asked about the same in future. Unfortunately, in this case, the place where the rape had allegedly occurred has been spread between 3 (three) places. As per the testimony of the victim before the learned Trial Court, it is the Hotel. In the Doctor's evidence, the Doctor had stated that the victim told her that the rape had taken place in the victim's house and in the 164 Cr.P.C. statement of the victim, it is in the house of the appellant.

19. On considering the above and the fact that the victim was still moving around with the appellant even after the alleged incident of rape, we are of the view that the victim cannot be said to be a sterling witness. Further, in the case of ***Baij Nath Sah Vs. State of Bihar [(2010) 6 SCC 736]***, the Supreme Court has held that the statement of a prosecutrix recorded under section 164 Cr.P.C. is not enough to convict an accused as it is not substantive evidence. It can only be utilized to corroborate or contradict the witness vis-à-vis the testimony made in Court. In the present case, the testimony of the victim has not been corroborated by her statement under Section 164 Cr.P.C.

20. Consequently, we are of the view that the prosecution has not been able to prove the guilt of the appellant beyond all reasonable doubt. The impugned judgment dated 26.05.2023 passed by the learned Court of the Additional Sessions Judge (Special Judge POCSO), Cachar, Silchar in Special (POCSO) Case no.14/2022, is hereby set aside.

21. The respondent State is directed to release the appellant from judicial custody.

22. Send back the TCR.

23. In appreciation of the assistance provided by Mr. A. Tewari, learned Amicus Curiae for the respondent No.2, his fees should be paid by the Assam State Legal Services Authority as per norms.

JUDGE

JUDGE

Comparing Assistant