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

Case No. : CRL.A(J)/68/2023

BIJAY DAS
S/O DHIREN DAS,
VILL.- GOSHAIBANI, HIRAPARA,
P.S.- MATIA, DIST.- GAOLPARA, PIN- 783125.

VERSUS

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

2:INFORMANT
CHITRA DAS
W/O-LATE DINESH DAS
GOSAIBARI HIRAPARA
P.S.- MATIA
DISTRICT- GOALPARA
ASSA

Advocate for the Petitioner : MS S SARMA HAZARIKA, LEGAL AID COUNSEL, MR D BHATTACHARYA (LEGAL AID COUNSEL)

Advocate for the Respondent : PP, ASSAM, .,MS. R B BORA (LEGAL AID COUNSEL FOR R-2)

– **B E F O R E** –

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MR. JUSTICE KAUSHIK GOSWAMI

For the Appellant (s) : Mr. D Bhattacharya, Ms. S Sarma Hazarika, Legal Aid Counsel.

For the Respondent(s) : Mr. R R Kaushik, APP, Assam for the State
Ms. R B Bora, Legal Aid Counsel for the respondent No. 2.

Date of hearing : **31.03.2026**

Date of judgment : **31.03.2026.**

JUDGMENT & ORDER (ORAL)

(**M. Zothankhuma, J**)

Heard Mr. D Bhattacharya, learned Legal Aid counsel for the appellant. Also heard Mr. R R Kaushik, learned Additional Public Prosecutor, Assam for the State as well as Ms. R B Bora, learned Legal Aid counsel for the respondent No. 2.

2. The appellant has put to challenge the impugned judgment and order

dated 04.02.2023 passed by the learned Special Judge, Goalpara in Special (P) Case No. 42/2021, by which the appellant has been convicted under Sections 448/342 IPC and under Section 4 of the POCSO Act. The appellant has thereafter been sentenced to undergo rigorous imprisonment for 20 (twenty) years with a fine of Rs. 20,000/- (Twenty Thousand) only, in default to undergo simple imprisonment for 4 (four) months under Section 4 of the POCSO Act. The appellant has also been sentenced to undergo rigorous imprisonment for 2 (two) months each under both the Sections 448/342 IPC. The sentences are to run concurrently.

3. The appellant's counsel submits that there is no evidence adduced by the prosecution witnesses to prove that the appellant's private parts had penetrated the private parts of the victim. As such, Section 4 of the POCSO Act was not attracted. He also submits that in view of the testimony of the victim (PW-3), who stated that there was pain in her vagina and due to the sexual assault apparently made by the appellant on the victim girl, the appellant could at best have been convicted only under Section 7 of the POCSO Act and punished under Section 8 of the POCSO Act.

4. The learned counsel for the appellant further submits that though the learned Trial Court had also framed charge under Section 427 IPC along with Sections 448/342/376 IPC read with Section 4 of the POCSO Act, there was contradictory evidence given by the mother of the victim (PW-2) and the victim (PW-3), regarding the house of the victim's mother being damaged due to a fire. As such, it was not safe to rely only upon the evidence of the victim, to convict the appellant under Section 4 of the POCSO Act. He further submits that the age of the victim as 13 year old minor is disputed by the appellant.

5. Mr. R R Kaushik, learned APP, submits that in view of the evidence of the

victim which is to the effect that the appellant had attempted to rape her, coupled with the pain she felt on her vagina and the Doctor's (PW-6) evidence to the effect that the victim's hymen was torn, proved that the appellant had raped the victim. He accordingly submits that the impugned judgment and order should not be interfered with.

6. Ms. R B Bora, learned Legal Aid counsel for the respondent No. 2 adopts the submissions made by the learned Additional Public Prosecutor.

7. We have heard the learned counsels for the parties and perused the materials available on record.

8. The prosecution case in brief is that an FIR dated 07.04.2021 was submitted by the mother of the victim (PW-2) to the Officer-in-Charge of Matia Police Station, stating that at around 11:30 PM on 06.04.2021, the appellant trespassed into her house with the intention to kill her with a Dao. He demolished her dwelling house and took away household articles. He also took away her 12 year 5 month old daughter to his house and raped her. Pursuant to the FIR, Matia Police Station Case No. 76/2021 under Sections 427/379/366A/376 IPC read with Section 4 of the POCSO Act was registered.

9. During investigation of the case, the investigating officer (PW-5) was transferred and as such, the I.O. handed over the case diary to the OC, Matia Police Station. Charge-sheet was thereafter submitted by S.I., Hafiz Ali Saikia. Subsequent to the submission of the charge-sheet, five charges were framed against the appellant under Sections 448/427/342/376 IPC read with Section 4 of the POCSO Act, to which the appellant pleaded not guilty and claimed to be tried.

10. The Trial Court thereafter examined six prosecution witnesses and after

examining the appellant under Section 313 CrPC, came to the finding that the prosecution had been able to prove the charge under Sections 448/342/376 IPC read with Section 4 of the POCSO Act. In view of Section 42 of the POCSO Act, 2012, the appellant was sentenced under Section 4 of the POCSO Act and not under Section 376 IPC, besides being convicted and sentenced under Sections 448/342 IPC.

11. The first question that has to be decided is whether the private parts of the appellant had penetrated the private parts of the victim, in terms of the definition of penetrative sexual assault provided in Section 3 of the POCSO Act. Section 3 of the POCSO Act states that the definition of penetrative sexual assault would mean penetration of the penis to any extent, in the vagina, mouth, urethra or anus of a child. It also means the insertion to any extent, any object or a part of the body, not being the penis, into the vagina etc. of a child. It also includes within its fold, manipulation of any part of the body of the child, so as to cause penetration into the vagina, urethra, anus or any part of the body of the child. It also includes applying the mouth to the penis, vagina, anus, urethra of the child.

12. The victim (PW-3) has stated in her examination-in-chief as follows –

> "*Thereafter, accused removing my dress made attempt to commit rape on me*"

In the cross-examination of the victim, she stated that the appellant tried to insert his penis into her vagina, but could not succeed.

13. The above testimony of the victim does not prove that the appellant had inserted his penis or any part of his body into the private parts of the victim. As such, when Section 3 is not proved, there is no question of conviction under Section 4 of the POCSO Act. The statement of the victim under Section 164

CrPC is to the effect that the appellant made an attempt to fully insert his penis inside her vagina, but he was unable to do so because she was disturbing him continuously.

14. Though the statement of the victim under Section 164 CrPC indicates that there was some penetration of the private parts of the appellant into the private parts of the victim, the statement made by a witness under Section 164 CrPC is not substantive evidence. As held by the Supreme Court in the case of ***R Shaji -Vs- State of Kerela***, reported in ***(2013) 14 SCC 266,*** a witness's statement under Section 164 CrPC can only be used for corroboration or contradiction. It cannot be the basis for conviction, as it is not substantial evidence. It would have been different if the contents of the statements made by the victim under Section 164 CrPC had been reiterated in her testimony. There could have been many reasons for not reiterating the said statement made under Section 164 CrPC in the testimony of the victim, which could be due to shyness, embarrassment etc. However we need not dwell too long on the reasons for the same. Suffice to say that when the victim has not given any evidence to prove that there was penetration into her private parts by the private parts of the appellant, there is no question of attracting the provisions of Section 3 of the POCSO Act, keeping in view the facts and circumstances of the present case.

15. The evidence of PW-3, the victim is to the effect that on the date of the incident, the appellant had directed the victim's mother to cook food, which she had refused. Also prior to the said date, the appellant used to go to their house and harass and beat her mother. On the night of the incident, the victim's mother ran to the back of their compound, as the appellant had beaten up her mother. He then gagged the mouth of the victim and took her to his house,

where he attempted to commit rape on her, but did not succeed. The victim then ran away from the said house, when the appellant was asleep. The evidence of PW-3 is that she was 13 years old at the time of the incident and that her date of birth is 21/11/2007. This fact has not been cross examined by the appellant during cross examination of the victim (PW-3). As such, there is no reason to doubt the fact that the victim was 13 years of age at the time of the incident occurred.

16. The evidence of PW-2, who is the mother of the victim, is to the effect that the appellant was a friend of her husband and that he used to harass PW-2 and also beat her. On the date of the incident, the appellant chased PW-2 with a *dao*, whereupon PW-2 and PW-3 ran out of the house and hid themselves under the bamboo grove. As the appellant has set their house on fire and as PW-3 noticed that her studying books were engulfed, she came out from the hiding place to save her books. Thereafter, the appellant grabbed PW-3 and took her to his house and raped her after undressing. This fact was told to her by PW-3. Further, the birth certificate of the victim along with the dress of the victim was also burnt when the appellant set their house on fire.

17. The evidence of the Doctor (PW-6) is to the effect that the victim's hymen was torn and that there was no sign of any recent sexual act detected at the time of examination of the victim.

18. On considering all the above, we are of the view that there had been an error committed by the learned Trial Court in convicting the appellant under Section 4 of the POCSO Act, on the basis of the evidence of the victim in the Court, as Section 3 POCSO Act is not attracted to this case. Accordingly, we hold that the prosecution has not been able to prove the fact that the appellant had committed penetrative sexual assault upon the victim, in view of the testimony

of the victim, which does not support the prosecution case that the appellant committed penetrative sexual assault on the victim (PW-3).

19. The 2nd question to be decided is as to whether the appellant should have been convicted under Section 18 of the POCSO Act, which provides for punishment for attempt to commit an offence under the POCSO Act.

Section 18 of the POCSO Act states as follows –

"***18. Punishment for attempt to commit an offence****.- Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, an in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extent to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.*"

20. The other issue to be decided is, as to whether the appellant should have been convicted under Section 8 of the POCSO Act for sexual assault, in view of the offence committed under Section 7 of the POCSO Act.

Section 7 of the POCSO Act is reproduced herein below –

"***7. Sexual Assault.-*** *Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.*"

21. A bare perusal of Section 7 and Section 18 of the POCSO Act vis-a-vis the act committed by the appellant as per the evidence of the victim, leads us to believe that the offence under both the Sections have been committed by the appellant. Keeping in view the evidence of the victim girl who stated that the

appellant had tried to insert his penis into her vagina, but could not succeed, we find that sexual assault and attempt to commit penetrative sexual assault in terms of Section 4(2) read with Section 18 of the POCSO Act, 2012, is attracted.

22. On considering the above facts, we are of the view that the charge under Section 4 of the POCSO Act should be altered to Section 4(2) read with Section 18 of the POCSO Act, in terms of Section 216 of the CrPC. Accordingly, the charge framed against the appellant under Section 4 of the POCSO Act is altered to Section 4(2) read with Section 18 of the POCSO Act.

23. In view of the above, the counsel for the appellant and the respondents could have been asked as to whether they want to recall or re-summon any of the witnesses regarding the alteration of the charge, for examining them in view of the altered charge. However, the same is not done as the only difference between the charge framed under Section 4 and the attempt to cause penetrative sexual assault would not have changed the defence taken by the appellant during trial. No prejudice has been caused to the appellant, in terms of Section 217 CrPC.

24. In view of the fact that no charge had been framed against the appellant under Section 8 of the POCSO Act for the offence under Section 7 and keeping in view that the appellant has already been found to be guilty for having attempted to cause penetrative sexual assault on the victim, we do not intend to proceed any further with regard to the sexual assault being made by the appellant on the victim.

25. On considering the facts of this case and the evidence of the witnesses, we do not find any reason to doubt the evidence of the prosecutrix, which we find to be truthful and which inspires our confidence. On considering the facts

regarding the age of the victim, especially the evidence of PW-3, we do not have any reason to doubt that the victim was aged 13 years at the time of the incident. Thus, we do not find any ground to interfere with the impugned judgment and order, except for the conviction and sentence under Section 4 of the POCSO Act. As such, we hold that the prosecution has been able to prove the guilt of the appellant beyond reasonable doubt, for having attempted to cause penetrative sexual assault on the victim.

26. Keeping in view Section 18 of the POCSO Act, we hereby convict and sentence the appellant under Sections 4(2) read with Section 18 of the POCSO Act, to undergo rigorous imprisonment for 10 (Ten) years with a fine of Rs. 20,000/- (Twenty Thousand) only, in default to undergo simple imprisonment for 4 (four) months. Consequently, the conviction and sentence of the appellant under Section 4 of the POCSO Act only, vide the impugned judgment and order, is set aside. We do not find any reason to interfere with the conviction and sentence of the appellant under both the Sections 448/342 IPC. The period of detention already undergone as UTP and as a convicted person in terms of the impugned judgment and order shall be set off against the new sentence passed herein.

27. The impugned judgment and order dated 04.02.2023 passed by the learned Special Judge, Goalpara in Special (P) Case No. 42/2021 is hereby modified to the extent indicated hereinabove.

28. The appeal accordingly stands disposed of.

29. Send back the TCR.

30. In view of the assistance provided by the learned Legal Aid counsels for the appellant as well for the respondent No. 2, their fees should be paid by the

Assam State Legal Services Authority, as per their guidelines/norms.

JUDGE **JUDGE**

Comparing Assistant

Pranab Kumar Deka

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