

Pinku Mirdha @ Rajput Vs State Of Assam

Court: Gauhati High Court

Date of Decision: Jan. 28, 2021

Acts Referred: Protection Of Children From Sexual Offences Act, 2012 " Section 4
Indian Penal Code, 1860 " Section 71, 376, 376(1), 417
Code Of Criminal Procedure, 1973 " Section 164, 313

Hon'ble Judges: Mir Alfaz Ali, J

Bench: Single Bench

Advocate: Bijita Sarma

Final Decision: Disposed Off

Judgement

1. Heard learned Amicus Curiae Ms. Bijita Sarma, for the appellant and Mr. B.B. Gogoi, learned Addl. P.P., Assam for the respondents.

2. This appeal is directed against the judgment and order dated 08.02.2018 passed by the learned Special Judge, Jorhat in Special Case No. 53/2016.

By the said judgment, the learned Special Judge convicted the appellant under Section 4 of the POCSO Act R/W Section 417 of the IPC and

sentenced him to rigorous imprisonment for seven years and fine of Rs. 10,000/- with default stipulation under Section 4 of the POCSO Act and

rigorous imprisonment for one year under Section 417 IPC.

3. As per prosecution case, the appellant developed affair with the victim, who was a minor at the relevant time and established physical relation with

her. Consequently, the victim became pregnant. The appellant induced her to have sexual activities with him upon promise of marriage. However,

when the victim became pregnant, the appellant refused to marry her and forced her to terminate the pregnancy by paying Rs. 2000/-. When she

refused to terminate the pregnancy, the appellant also threatened her to kill and thereafter the FIR was lodged by the victim herself. On the basis of

the said FIR, police registered Pulibar P.S. Case No. 125/2016 under Section 376 IPC and eventually, on completion of the investigation laid charge

sheet against the appellant.

4. In course of trial, learned Special Judge framed charges against the appellant under Section 376(1)/417 IPC R/W Section 4 of the POCSO Act,

which were abjured by the appellant. In order to bring home the charges, prosecution examined 7 witnesses including the doctor and the Investigating

Officer. The appellant was also examined under Section 313 CrPC after completion of the prosecution evidence, wherein the appellant took the plea

of innocence. On appreciation of the evidence, learned trial court convicted the appellant and awarded sentence as indicated above.

5. Aggrieved, the appellant preferred the instant appeal.

6. I have considered the submissions made by the learned amicus curiae and the learned Addl. P.P., Assam and also scrutinized the evidence brought

on record.

7. Learned amicus curiae strenuously arguing for acquittal of the appellant submits that no documentary evidence was adduced in support of the age

of the victim or no DNA test was conducted to establish the paternity of the child, which the victim was carrying.

8. On careful assessment of the evidence brought on record, it appears that basically the prosecution case is banking on the sole testimony of the

victim, inasmuch as, there was no other direct witness as to the occurrence.

9. The victim has been examined as PW-1, who deposed on oath that the appellant was her neighbor, who loved her and on the pretext of showing

love and affection, he also committed sexual intercourse with her on many occasions despite her resistance, with the assurance that he would marry

her. She further stated that due to such sexual activities, she became pregnant. Later on, the appellant refused to marry her and he married another

girl. During cross examination of this witness, her testimony to the extent that the appellant committed sexual activities with the victim could not be

shaken. The statement of the victim recorded under Section 164 CrPC, was proved by the prosecution as Ext.2, which shows that the testimony of the

victim in court is consistent with her previous statement.

10. The doctor, who attended the victim has been examined as PW-7, who found as follows.

“Opinion: On the basis of physical, dental, laboratory and radiological examination findings of Smt. Dipali Ghatowal, I am of the opinion that:

1. Evidence of recent sexual intercourse not detected on her person.

2. Evidence of pregnancy detected on her person and gestational age is 25 weeks 5 days.

3. No injury detected on her person during medical examination.

4. Her age is above fourteen years and below sixteen years.

11. The doctor was not subjected to cross examination and as such, the evidence of the doctor also remained intact. The evidence of the doctor also

supported the evidence of PW-1 with regard to the sexual activities and the factum of the victim being pregnant.

12. PW-2 was the father of the victim, who stated that he was told by the victim that due to sexual activities by the accused, she become pregnant.

This witness was also not subjected to cross examination. Therefore, the evidence of PW-2 also remains un-impeached. The PW-2, though was not

an eye witness, he was reported by PW-1 after the occurrence and as such the evidence of PW-2 also lent support the version of PW-1.

13. The other prosecution witnesses, were more or less reported and post occurrence witnesses. However, according to all of them the victim was

pregnant at the time of lodging the FIR.

14. From the medical evidence and the evidence of PW-1, it is apparent that the victim was a minor at the time of the occurrence. Though, learned

amicus curiae contended that the sexual activity was consensual, in view of the minority of the victim her consent become immaterial. This apart, if

the consent is obtained deceitfully, such consent also cannot be said to be consent in the eye of law. From the evidence of PW-1 and the conduct of

the accused, it also transpires that the appellant had sexual intercourse with the victim promising to marry her and the subsequent conduct shows that

he did not have the intention to marry the victim from the very beginning. Be that as it may, since the so call consent of the victim was of no

consequence because of minority, the accused cannot claim any benefit from such consent in the facts and circumstances of the case and it can only

be termed as inducement to a minor girl for engaging her in sexual activities.

15. In view of the above evidence brought on record, the finding of the learned trial court holding the appellant guilty under Section 4 of the POCSO

Act cannot be faulted.

16. In the facts and circumstances of the case, though, conviction of the appellant under Section 4 of the POCSO Act warrants no interference, the

punishment under Section 417 IPC cannot be imposed in view of the provision under Section 71 IPC. Therefore, the sentence of imprisonment and

fine with default stipulation under Section 4 of the POCSO Act awarded to the appellant is not interfered with. However, the sentence given under

Section 417 IPC is set aside as the same is not required in view of Section 71 of the IPC. Accordingly, the conviction and sentence under Section 4 of

the POCSO Act is hereby confirmed and upheld.

17. With the above modification, the appeal is disposed of.

18. Appreciating the assistance rendered by Ms. Bijita Sarma, learned Amicus Curiae, I hereby provide that he will be entitled to Rs. 7000/- as

professional fee, which shall be paid to her by the Gauhati High Court Legal Services Committee upon production of a copy of this judgment.

19. Send down the LCR.