

GAHC010220002022



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IN THE GAUHATI HIGH COURT

REPORTABLE

(THE HIGH COURT OF ASSAM: NAGALAND: MIZORAM & ARUNACHAL PRADESH)
PRINCIPAL SEAT

CRIMINAL APPEAL 286/2022

Sabibar Rahman
S/o Late Harab Ali,
R/o New Bongaigaon,
Samsanpur, Islampur,
P.S. and Dist.- Bongaigaon,
Assam.

----- **Appellant**

VS.

1.The State of Assam
2. Sahera Khatun
W/o Abdul Hussain
VILL.-Santoshpur
P.S.- Chapar
P.O.- Chapar
Dist.- Dhubri
Assam

-----**Respondents**

BEFORE

**HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI
HON'BLE MR. JUSTICE PRANJAL DAS**

Advocated for appellant:

Mr. A. Rahman

Advocate for Respondents:

Ms. A. Begum, learned Addl. P.P

Ms. S. Medhi, Legal Aid Counsel

Date on which judgment is reserved : 26.03.2026

Date of pronouncement of judgment : 08.04.2026

Whether the pronouncement is of

the operative part of the judgment? : No

Whether the full judgment has been Pronounced? : Yes

JUDGMENT & ORDER (CAV)

Pranjal Das, J

1. Heard Mr. A. Rahman, learned counsel for the appellant. Also heard Ms. A. Begum, learned Additional Public Prosecutor for respondent No.1 and Ms. S. Medhi, learned Legal Aid counsel appearing for respondent No.2.

2. The instant criminal appeal has been preferred by the convict appellant, namely Sabibar Rahman, against the judgment and order dated 26-09-2022, passed by the learned Special Judge, Bongaigaon, in Sessions Special POCSO Case No. 1(BGN) of 2022. By the impugned judgment and order, the convict appellant as accused, has been convicted under Section 376 (AB) IPC r/w Section 6 of the POCSO Act

2012. For his such conviction, he has been sentenced to undergo rigorous imprisonment for 20 years and pay a fine of Rs.50,000/-, in default, simple imprisonment for one year. He was given the benefit of set-off.

3. The prosecution case, in brief before the learned Trial_Court was that on 22.09.2021, the_maternal aunt of the victim girl lodged an *Ejahaar* at Bongaigaon Police Station_with the allegation that on 16-09-2021, her niece, aged about 12 years, went to her maternal grandparents' house at Islampur, Samshanpara, New Bongaigaon, in the district of Bongaigaon. That, around 11 pm on 20-09-2021, while she was sleeping in her grandparents' house, abovementioned, the accused No.1namely Sabir Ali, committed rape upon her against her will. When the girl raised alarm, the accused No.2 named in the FIR, Juran Ali, who was the own maternal grandfather of the victim, gagged her. It is alleged that later, both the accused persons threatened the girl not to disclose the matter to anyone. She further alleged that around 10 am on 21-09-2021, the girl informed the incident over phone to her and thereafter, she lodged the *Ejahaar*.

4. On the basis of the complaint, Bongaigaon P.S. Case No. 783 of 2021 was registered under section 376 (AB) IPC r/w section 6 of the POCSO Act 2012. The case was investigated and upon completion of investigation, a charge-sheet was laid against both the FIR named accused persons, including the present appellant Sabibar Rahman under section 376 (AB) IPC r/w Section 6 of the POCSO Act. They were charge-sheeted vide C.S. No. 427 of 2021 dated 30-11-2021.

5. Subsequently, vide order dated 19.04.2022, the learned Special Judge framed charges against the present convict appellant under section 376 AB IPC r/w section 6 of the POCSO Act 2012. With regard to the co-accused Juran Ali, the own maternal grandfather of the victim, the learned Special Judge had framed charge against him under section 17 of the POCSO Act.

6. The denial of the charges by the accused persons led to commencement of the trial. During the trial, the prosecution adduced the evidence of 7(seven) witnesses, including the victim, informant, MO and IO. After completion of prosecution evidence, the accused was examined under section 313 CrPC.

7. The defense did not lead any evidence. After completion of trial, the learned Special Court was pleased to convict the present convict appellant as narrated above. However, the co-accused Juran Ali was acquitted by the learned trial court.

8. Aggrieved by the conviction and sentence, the present appellant Sabibur Rahman has approached this court with this appeal.

9. Mr. Rahman, the learned counsel for the appellant submits that the medical opinion has not supported the alleged offense against the appellant. He further submitted that as per the certificate, the date of birth of the victim is 16-03-2010. But as per the medical opinion, she was 15-16 years of age at the time of examination. It is submitted by the learned counsel that the evidence has not proved the alleged offense against the appellant and therefore, the impugned judgment

and order may be set aside.

10. On the other hand, Ms. A. Begum, the learned Additional Public Prosecutor submits that the testimony of the prosecution witnesses, including the victim, is believable. It is submitted that there is no contention regarding enmity in the statement of the appellant recorded under section 313 Cr.P.C. It is submitted by the learned Additional Public Prosecutor that the impugned judgment does not suffer from any infirmity and therefore, the appeal is devoid of merits.

11. Ms. S. Medhi, the learned Legal Aid counsel appearing for the informant submits that the factum of torn hymen has emerged from the testimony of the MO which clearly proves that the victim was subjected to rape. The learned Legal Aid counsel supporting the contention of the prosecution submits that the testimony of the victim is cogent and trustworthy and that the prosecution case was successfully proved before the learned Trial Court and has rightly convicted and sentenced the appellant for this heinous crime.

12. We have perused the appeal memo, the impugned judgment and order, the evidence on record and considered the submissions of the learned counsel.

13. The victim has adduced evidence as PW-1. In her testimony, she stated that the informant is her aunt and she knew both the accused persons. She testified that about seven months prior to her deposition, she was sleeping in the house of her maternal grandfather, Juran Ali and her three-year-old sister was also sleeping with her and

that on that day, her grandmother was not at home. She stated that only three of them were in that house on that day. She further testified that while she was sleeping, the accused Sabibar Rahman came to their room and uncovered her clothes and had sexual intercourse with her. She testified that her grandfather Juran Ali pressed her mouth while she tried to utter and threatened her not to disclose the matter to anyone by showing a knife. She stated that on the next morning when her maternal grandfather went out, she made a phone call to her aunty. She stated that on the day of the occurrence, her mother was in hospital for which she reported the matter to her brother's sister and she lodged the FIR. She stated that her statement was recorded in the Court under section 164 Cr.P.C, which she exhibited during the trial as Exhibit P-1 and her signatures thereon as Exhibits P-11 and P-12. She testified that at the time of the incident, she was 12 years old and studying in Class VI.

In cross-examination, she stated that the house of Sabibar Rahman is near to the house of her *Nana* maternal grandfather (Juran Ali) and prior to this incident, the appellant had not committed any wrong against her and that he used to come to her *Nana's* house. She denied the suggestion that the appellant had not committed sexual intercourse with her. She also denied that she did not state to the police about the appellant committing forceful sexual intercourse upon her. She also denied the suggestion that she did not recognize the appellant as the night was dark. She reiterated that the appellant had committed bad act upon her. She also denied that as the room was dark, she could not say who entered the room. She denied that she

stated before the Magistrate upon being tutored. She reiterated by denying the suggestion that the appellant had not entered into her room. She denied that the FIR was false or that she had deposed falsely.

14. In cross-examination on behalf of the co-accused Juran Ali, she stated that her grandfather's house consisted of two rooms and on that day in one room, her grandfather slept and in the other room, she slept with her sister. As stated by the victim, her statement was recorded before the Magistrate during the investigation. Her statement which has been exhibited by her as Exhibit-P1 was recorded on 23-09-2021 before learned SDJM(S), Bongaigaon. She had stated that about five days prior to the date of recording her statement, she went to her maternal grandfather's house with her younger sister. She stated that on 29-09-2021 at about 11 pm while they were sleeping, Sabir Ali a neighbour of grandfather had come and her grandfather had opened the door. **Sabir** came and grabbed her and when she tried to raise alarm, her grandfather gagged her. She further stated that **Sabir** committed sexual intercourse with her against her will and her grandfather threatened her by showing a knife, saying that if she raises alarm, he would kill her. She further stated that on the next day when her grandfather entered into bathroom, she made a phone call to her aunt and informed about the incident whereupon she came and recovered her. In her statement, the victim girl has indicated her age as 13 years whereas in her testimony before the court during the trial recorded on 05-05-2022, she indicated her age as 13 years.

15. We take up the evidence of the informant who was the maternal aunt of the victim. She testified as PW-2 that she knew both the accused persons and the victim was her cousin. She stated that at the time of the incident, the victim was aged 12 years old and studying in Class VII. She stated that about 8 months prior to her deposition, she was in hospital and the victim informed her over phone that on the previous night at about 11 pm while she was sleeping in one room in the house of her grandfather, the appellant Sabibar came and entered into her room and grabbed her and had forceful sexual intercourse with her and that the other accused Juran Ali covered her face with his hands. She also informed that Sabibar showed her a knife not to disclose the incident to anyone. On the next day when her grandfather went to latrine, keeping aside the mobile, she informed PW-2 through that mobile. She stated that on the same day she came to her father's house and next day she lodged the *Ejaha*. She proved the birth certificate of the victim as Material Exhibit1.

In cross-examination, she stated that the victim used to come to her grandfather's house and stay for 2-3 days and that before the incident she never heard any illegal activities towards the victim by her father Juran Ali. She admitted that she had not seen the occurrence. She denied the suggestion that the birth certificate of the victim was not genuine. She denied that she did not state before the police that the accused did not have forceful sexual intercourse with the victim and threatened her by showing knife. She denied that the appellant did not come to the house of the other accused Juran Ali and that Juran Ali did not cover her mouth of the victim by his hands.

16. One Manowar Hussain testified as PW-3 in which he stated that he knew the informant, the victim and also both the accused persons. He stated that about 8 months prior to his deposition he heard from the public and the victim that accused Sabibar Rahman and Juran Ali committed rape on the victim. He stated that on the next day of the incident, he saw the victim on the road and she was going to her house and she was weeping and upon being asked she told that she was raped by Sabibar Rahman and she also told that she will disclose the whole matter later on. PW-3 stated that victim was aged about 12 years at the time of the incident. In cross-examination, he admitted that he did not state before police about being reported about the incident by the victim on the road as stated above. He denied the suggestion that the appellant did not rape the victim.

17. Abdul Gofur testified as PW-4 in which he stated that he knew the informant and both the accused persons. He stated that about 8 months prior to his deposition one day when he came from hospital, police came to the place of occurrence and upon being asked, the informant stated that accused appellant raped the informant's niece. He stated that he heard the incident from village people and that at the time of the occurrence victim was 12-13 years.

In cross- examination he admitted that he did not state to the police about the age of the victim. He also could not say the name of the member of the public from whom he heard about the incident.

18. The Medical Officer Dr. Gitika Pathak who examined the victim after the incident adduced evidence as PW6. She stated that on 22-09-

2021 she was working as Sub-Divisional Medical and Health Officer, Bongaigaon Civil Hospital. On that day around 4 AM, she examined the victim girl aged about 12 years escorted by WPG (**Verify if WHG**) Gunamoni Roy. She stated that she examined the victim in connection with Bongaigaon P.S. Case No. 783 of 21 under the POCSO Act. Upon examination, she did not find any external injury on the body of the victim or her private parts. She stated that the vagina admitted of one finger. She found the hymen to be torn and from the X-Ray reports, she stated her age to be 15-16 years. She also did not find any vaginal spermatozoa. PW-6 opined that no opinion could be given whether she was raped or not. She proved the medical report as Exhibit- P5 and her signature thereon as Exhibit-P5(1).

In cross-examination she stated that there was no swelling or redness on the vagina of the victim.

19. One John K. Deka, testified as PW-7 and stated that at the time of his deposition, he was working as Health Assistant at Salkocha SHC and that he was authorized to depose by In-Charge Medical and Health Officer Lutfar Pradhani. He exhibited the authorization letter as Exhibit P5 and as Exhibit- P5(1), the signature of Lutfar Pradhani. He stated that he had brought the Birth Register containing entries from 2003 till 2010 and he proved the Register as Exhibit- P6. He proved the relevant page as Exhibit- P6-1 and the relevant entry as P6(2) which is Registration_No.481/10. He stated that as per the Birth Register, the date of birth of the victim was 16.03.2010. He stated that the issue date of the birth certificate was 17.03.2013. He proved the Birth

Certificate as Material Exhibit-1.

In cross-examination, he stated that he cannot say who applied for the birth certificate and he has not brought the application and documents given at the time of procuring the certificate. He denied the suggestion that the birth certificate was not genuine. He denied that the birth certificate and the registration in the register are not for the same girl.

20. S.I. Dalim Das was the Investigating Officer of the case and he testified during the trial as PW-5. He stated that on 22-09-2021, he was posted as attached officer at Bongaigaon police station. Thereupon, Sahera Khatun lodged the FIR which was registered into Bongaigaon police station Case No. 783/2021 under section 376 (AB) IPC r/w Section 6 of the POCSO Act and he was endorsed to investigate the same. He proved the FIR as Exhibit-P2 and the signature of the then O/C, Bongaigaon Police namely, Upen Kalita as Exhibit P 2(1). He stated about examining the victim, recording her statement and proceeding to the place of occurrence. He proved the sketch map as Exhibit- P3 and his signature thereon as Exhibit-P3(1). He arrested the accused person subsequently and later collected the medical report of the victim. He submitted charge-sheet upon completion of investigation which he proved as Exhibit-P4 and his signature as Exhibit- P4(1).

In cross-examination, he stated that he had not seized any wearing apparel of the victim or any knife. He confirmed that the victim had not stated before him that – she and her 3-year-old sister were sleeping in the same room that the accused threatened her not to disclose the

matter to anyone; the accused Sabibar Rahman forcefully committed sexual intercourse with her, uncovering her cloths. He also confirmed that informant Sahera Khatun did not state before him that while committing sexual intercourse, accused showed knife. He denied that he had falsely charge-sheeted the accused.

21. From the medical evidence, what we find is that on one hand the hymen was found to be torn, but the MO opined that it cannot be said as to whether the victim was raped or not. However, no tenderness or swelling or lacerations were found on her private parts.

22. It is well settled that mere absences of injuries on private parts do not necessarily disprove rape. Mere presence of a hymen does not necessarily disprove penetration. It is also equally true that a mere absence of hymen would not also necessarily prove rape. The said body organ of a girl being in the nature of a membrane can get removed or ruptured in other ways as well. Medically, there are also cases where a woman is born with a very elastic membrane or even the membrane may be absent.

23. Though it is well settled that in a prosecution for sexual offence, the sole testimony of the prosecutrix can be relied upon to arrive at a finding, but the medical evidence can be very helpful in lending corroboration to the same and satisfying the conscience of the court. However, even if that is not the case, the sole testimony of the prosecutrix can still be relied upon to arrive at a finding.

24. In the instant case, the medical evidence does not throw

proper light on whether she was subjected to rape and it also does not rule out rape. In other words, the medical opinion is ambiguous.

25. However, as already mentioned, considering the tender age of the girl being about 12-13 years, her hymen was found to be torn. The testimony of the victim is consistent throughout her evidence during the trial and also in her statement before Magistrate recorded during investigation. In both the statements, she has described the incident on similar lines and stated that she was in the house of her maternal grandfather and sleeping in the other room with her minor sister, aged only 3(three) years, whereupon the appellant intruded into her room and committed a sexual offence upon her by way of sexual intercourse. She has also alleged about being threatened by the other co-accused, Juran Ali, who happened to be her own maternal grandfather. The victim girl, PW-1, has stated on similar lines in her statement before learned Judicial Magistrate also.

26. Thus, the testimony of the victim is consistent through both the statements. Further, the testimony of the victim remains unshaken in cross-examination in as much as, she has denied the suggestions and repelled suggestions to the contrary. The testimony of PW-3 is also vital as much as, she saw her on the road on the next day of the incident. At that time, the victim was weeping and going to her room and upon being asked, she stated about the incident committed by the appellant. This aspect of the testimony of PW-3 lends vital corroboration to the testimony of the victim. And the part of his testimony regarding her behaviour at that time is also an important

factor lending support to the prosecution case.

27. In her statements, the victim has indicated her age to be 13 years and medically, the MO has stated her age to be 15-16 years. But during the trial, the birth certificate of the victim was exhibited by PW-7 and as per as the birth certificate, her date of birth was 16.03.2010. We find the testimony of PW-7 to be cogent and there is no reason not to disbelieve the birth certificate and the date of birth. Going by the birth certificate, the victim was aged about 11 ½ years at the time of the incident.

28. In any case, it is settled law that when there is an issue with regard to the age of the victim in a POCSO case, the relevant provisions of Section 94 of the Juvenile Justice Act, 2015 can be resorted to, which lays down the criteria to be used for determining the age of a child in conflict with law. And in terms of Section 94, a birth certificate has higher precedence than the age revealed by any medical test. Therefore, the learned trial court rightly relied upon the birth certificate in taking the age of the victim and holding her to be a minor.

29. We are thus of the opinion and finding that the victim was a minor at the time of the incident, aged about 12 years, a little less than 12 years. No aspect of false implication against the present convict appellant has emerged from the evidence. The defence has not adduced any evidence from its side. Though, the appellant in his examination under Section 313 Cr.P.C has stated about being falsely implicated, but we find it to be a faint attempt to project an alternative

theory, especially, when no evidence whatsoever was adduced by the defence, when it could have been done.

30. One important aspect that has emerged from the examination of the accused persons under Section 313 Cr.P.C itself is that the appellant and the co-accused (who was acquitted and who was the maternal grandfather of the petitioner) were under the influence of liquor at the relevant time. From the statements also, the presence of the convict appellant in the house of the victim's maternal grandfather has emerged.

31. Further, it has also emerged from the testimony of PW-1 that the appellant used to visit the house of her maternal grandfather where she also used to go earlier. And therefore, there is no reason to disbelieve her testimony about recognizing him at the time of the incident, though it was night and dark. Despite the ambiguous nature of the medical evidence (it does not however rule out rape or sexual assault) – upon perusing the entire evidence on record, especially, the cogent testimony of the victim corroborated by the testimony of PW-3 and the informant, we find no reason to disbelieve the testimony of the prosecutrix.

32. We find the testimony of the prosecutrix to be cogent, consistent and trustworthy. And therefore, in terms of the settled law, the same can be relied upon to arrive at the finding that she was speaking the truth and on the day of the incident, the convict appellant committed forceful sexual intercourse upon her. Therefore, the conviction is upheld. We also do not find reasons to modify the

sentence in such a heinous crime.

33. Accordingly, the impugned judgment and order dated 26.09.2022, passed by the learned Special Judge, Bongaigaon, in Sessions Special (POCSO) Case No. 1(BGN) of 2022, is hereby **upheld** and **confirmed**.

34. Resultantly, the instant criminal appeal stands dismissed.

35. Send the original TCR.

JUDGE

JUDGE

S.Saha

Comparing Assistant