

VOL 2

AKSHAY SARMA v. STATE OF ASSAM

121

(2017) 2 GAUHATI LAW REPORTS 121

RUMI KUMARI PHUKAN, J

a **AKSHAY SARMA** *Appellant*

Versus

STATE OF ASSAM AND ANR. *Respondents*

Criminal Appeal No.110 of 2016 decided on 22.12.2016

b **Indian Penal Code, 1860, S.376(2)(i) – Protection of Children from Sexual**
Offences Act, 2012, S.6 – Accused attempted to commit sexual intercourse
with victim aged about 5 years, who happened to be a friend of the son of
the accused – Nothing emerged from the evidence on record so as to
c **falsely implicate the accused – No authenticity as about plea of animosity –**
Conduct of the victim girl found to be natural who reported the matter to
her mother after the occurrence while she was disturbed by the pain at
her private parts – FIR filed instantly without any delay – Evidence of
d **family members of victim cannot be discarded only because they were**
relatives of the victim – Evidence of the witnesses not suffering from any
material omission and contradiction – No effective cross-examination made
so as to destroy the credibility of the witnesses – Testimony of the victim
girl remained consistent while giving statements under section 161, Cr.PC
e **before the Magistrate as well as before the Court – Finding of the medical**
officer also supported the contention of the victim about insertion of
finger into the private parts of the victim – Conviction and sentence
upheld.

Obviously this is a sexual offence relating to a minor child aged about 7
years, who happens to be a friend of the son of the accused. There is nothing
emerges from the evidence on record so as to falsely implicate the accused
f neither on the part of the minor child nor on the part of the informant and
her family. We have discussed above that there is no authenticity as about
plea of animosity. The conduct of the victim girl is also found natural who
reported the matter to her mother after the occurrence while she was disturbed
by the pain at her private parts. Such a minor girl aged about 7 years cannot
g assess implication and consequences of the conduct of the accused appellant
and as such she returned to her house and only when she find it difficult to
urinate then she reported the matter to her mother/informant PW 1 who in
turn returned the same to PW 2 and PW 3 and immediately thereafter on
being asked victim reported the matter to her two grandmothers PW 2 and
h PW 3. We are also aware that such a matter of sexual assault is generally not
discussed to all in the society in the fear of shame and insecurity and social
stigma to the child. However, it is found that FIR in this case was filed
instantly without any delay to raise doubt for any deliberation and

afterthought. That apart, there is no pleasure on the part of a woman in the context of Indian society to lodge a false FIR by projecting a minor child at the peril of her future and social stigma at large. The contention about non-examination of wife of accused appellant has no substance, as no wife will give evidence against her husband [Para 20].

a

On the next, it has been contended by the appellant that as the victim girl has stated in her cross-examination that she has given the deposition as tutored by her mother so her evidence cannot be acted upon. However, this court is not agreeable to such a contention raised by the appellant, being alive to the facts situation that we are dealing with a case of a minor that too aged about 7 years, who neither have any prosecution about the sexual conduct of a person nor could gauge the animosity, if any. The testimony of the victim girl remained consistent while giving statement under section 161, Cr.PC before I.O. and under section 164, Cr.PC before Magistrate and even before the Court of Trial. She made her first statement after the incident on 20.1.2013 and before the Magistrate on 21.1.2013 and she gave deposition before the court as on 17.12.2013 and by this time around 12 months have elapsed and it is quite natural that her memory is to be refreshed by her mother while coming to the court after a long lapse as to what to say in the court. Though the court while recording evidence in English has used the word 'tutored' but the same was perhaps not the exact word stated by the victim in vernacular. Thus, the word tutor has no necessary implication that the victim girl was persuaded to give false evidence [Para 22].

b

c

d

The present case relates to an offence to a minor child aged about 7 years and it is seen that though the learned trial court has given an opinion that a child has level of understanding and could answer the question put to her, so her evidence was recorded, but, however, considering her age no oath was administer to her. But however, the learned trial court has made no query to the said witness as to what was tutored by her mother, while she replied to the defence in cross-examination that she was tutored by her mother. It does not reflect that while examining the minor witness, the parents or any guardian of the witness was also present with her [Para 23].

e

f

Criminal trial – Child witnesses – Facets relating to the examination of a child witness – Duty of the presiding officer while recording evidence of a child witness – Guidelines laid down to be followed by a trial court as well the Magistrate concerned while recording the statement of child witness [Para 31].

g

Advocates who appeared in the case :

h

Mr. U.K. Das for the appellant.

Mr. B. Sarma and Ms. Rituja Dutta for the respondents.

Cases referred : Chronological

Zahira Habibulla H Seikh v. State of Gujarat, (2004) 4 SCC 158,
Surya Narayana v. State of Karnataka, 2001 CrI. LJ; (2001) 9 SCC 129.
State of Rajasthan v. Ani @ Hanif, (1997) 6 SCC 162.
Ram Chander v. State of Haryana, 1981 CrI. LJ 609.

JUDGMENT AND ORDER

1. Heard Mr. U.K. Das, learned counsel appearing for the appellant, Mr. B. Sarma, learned Addl. Public Prosecutor, Assam and Mrs. Rituja Dutta, learned counsel appearing for respondent No.2/informant.

2. This appeal has been preferred against the judgment and order dated 16.3.2015 rendered by the learned Sessions Judge, Kamrup (M) in Sessions case No.252/2013 convicting the appellant under section 376(2)(i), IPC read with section 6 of the Protection of Children from Sexual Offences Act, 2012 and sentencing him to undergo rigorous imprisonment for 10 years and pay fine of Rs.10,000 and in default to suffer rigorous imprisonment for another period of 2 months.

3. The prosecution story in brief is that the respondent No.2/informant lodged an FIR before the Officer in-charge, Dispur Police Station alleging that on 19.1.2013 at about 7 p.m. her daughter aged about 5 years reported to her that she could not pass urine. On enquiry about the reason of her difficulty in passing urine, the victim child disclosed that the appellant/accused penetrated finger into her private part, for which she sustained injury and attempted to commit sexual intercourse with her. On receipt of the FIR Dispur P.S. Case No.134/2013 under section 376(f)/511, IPC was registered. During investigation the victim girl was sent for medical examination and her statement was recorded under section 164, Cr.PC. On completion of investigation, the I.O. submitted charge sheet against the accused appellant under section 376(f)/511, IPC read with section 6 of the Children from Sexual Offence Act, 2012 (POSCO).

4. The case was committed to the Court of learned Special Judge (POSCO)-cum-Sessions Judge, Kamrup (M), by the learned Addl. Chief Judicial Magistrate, Kamrup (M) Guwahati after complying with the necessary formalities under section 209, Cr.PC, for favour of trial. The learned Sessions Judge framed the charge against the appellant under section 6 of the POCSO Act, 2012 and under section 376, IPC and when the same was read over and explained, the appellant pleaded not guilty and claimed to be tried. Accordingly, the appellant stood the trial.

5. The prosecution examined as many as eight witnesses including the doctor and the I.O. and defence examined one witness. At the conclusion

of trial the learned trial court passed the impugned judgment and order convicting and sentencing the appellant as stated earlier. Hence, this appeal.

6. I have perused the FIR, Ext.1 which was filed by the mother of the victim girl. The statement of the victim girl was recorded under section 164, Cr.PC and the victim girl's age was recorded 7 years.

a

7. PW 1, victim's mother deposed that on 19.1.2013 at around 7 p.m. her 5 years old daughter reported her that she was finding difficult to pass urine. When she questioned her as to the reason of her discomfort, her daughter replied that that accused appellant Akshay Sarma inserted his finger into her vagina. Her daughter reported that said incident took place on that day around 4 pm when she went to the residence of her classmate, the son of the accused appellant. Thus, she filed Ext.1, the FIR, Dispur Police Station, on next day morning on 20.1.2013.

b

c

She has denied the suggestion given in cross-examination that the allegation lodged falsely in order to force the accused to vacate his pan shop, as due to running a similar pan shop by the accused as that of informant, the pan shop of the informant is running at loss.

d

8. PW 5 is the victim girl. According to her, the accused is their neighbour. The son of the accused is her classmate. On the fateful day when she went to the house of the accused to play with her classmate but the accused called her near him and thereafter he took up her on his lap and removed her panty and after that he inserted his finger into her vagina. When she started shouting the wife of the accused opened the door as a result the accused could not continue his act and PW 5 came to her residence. Though at first she did not dare to disclose the occurrence but due to the pain after the aforesaid occurrence she was compelled to disclose the said work of the accused to her mother and resultantly her mother lodged an FIR before the concerned police station.

e

f

In cross-examination she disclosed that when she went to the residence of the accused-appellant then her classmate was sleeping. It is stated by her that she was tutored by her mother as to what is to be stated in the court.

g

9. The other witness PW 2, Smt. Kishori Rabha is the mother of the informant and PW 3, Smt. Asha Basumatari is the mother-in-law of the informant and PW 4, Smt. Sonaba Boro is the related sister of the informant. In their evidence PW 2 and PW 3 have stated that the incident was reported to them by the informant and accordingly when they asked PW 5/victim (name withheld) it was told by PW 5 that while she went to the house of the accused to play with her classmate, who is the son of the accused, then the accused called her inside a room and inserted his

h

a finger on her private part and then she shouted on pain, the wife of the accused opened the door and rescued her, she also told them that she was facing difficulty in passing urine. According to PW 4 the accused persons reside in their house as tenant and she heard from chandaki about the incident (she narrated the story as stated by other witness). However, she has no direct knowledge about the occurrence.

b 10. Similar suggestion was given to PW 2 and PW 3 (that was given to the PW 1 also) that the allegation has been lodged falsely in order to force the accused to vacate his pan shop, as due to running a similar pan shop by the accused as that of informant, the paan shop of the informant is running at loss and the said suggestion was denied by both of them.

c 11. PW 8 Dr. Tribeni Athparia is the Medical Officer, in the Department of Forensic Medicine, GMCH, Guwahati, who happened to examine the victim girl as on 20.1.2013 and has given the following findings –

“Physical examination :

Height – 109 cm

Weight – 17 kg

d Chest girth (at nipples line) – 55 cm

Abdomen girth (at umbilicus – 52 cm.

Teeth – Temporary – 20 Nos., permanent - 1 / 2

e Sclap hair – 15 cm, black in colour

Auxiliary hairs – Absent

Pubic hair – Absent

Breast – Childlike

f Menarche – Not attended.

Menstrual cycle – Not attended

Last menstrual period – Not attended.

g Genital examination –

Genital organs – Childlike

Vulva – Labia majora covers labia minora at lithotomy position

Hymen – Hymeneal orifice is intact. However, there is redness and tenderness over the area around the orifice.

h Vagina – Not examined.

Cervix – Not examined

Uterus – Not palpable per abdomen

Evidence of venereal diseases –Not detected

Evidence of injury on her body or private parts – Not detected.

a

Vaginal smears taken on glass slides for laboratory investigation – Smear taken from around the hymeneal orifice.

Mental condition – No abnormality detected

Co-operative and behaviours – Co-operative

b

Intelligence and memoray – Average

Gait – Normal.”

On radiological investigation skiagram No.(R)41 dated 13/2/13

X-ray wrist, sholder joint-epiphyseal union of bones are not completed.

c

Result of Laboratory Investigation –

Microscopic examination of vaginal smear does not show presence of spermatozoa or gonococci.

Opinion – On the basis of physical examination, radiological and laboratory Investigations done on the victim he has given opinion that – (i) There is no evidence of recent sexual intercourse detected on her person, (ii) Her age is above 6 years and below 7 years.

d

Vide Ext. 7 is his medical report.

e

12. The Investigating Officer Dimbeswar Thakuria as PW 6 has stated about the receipt of the FIR as well as sending of victim for medical examination and also for recording her statement before the Magistrate. Under section 164, Cr.PC. Finally he submitted charge sheet under section 376(f)/511 of the IPC read with section 6 of the Protection of Children from Sexual Offence Act, 2012.

f

13. The fact that the statement of the victim girl was recorded under section 164, Cr.PC vide Ext.4 has been proved by the evidence of PW 7 Smt. Ipsita Borthakur, SDJM (S) Kamrup, who has testified that as per order of the learned CJM the victim girl as well as the concerned case record was produced before her on 20.1.2013 and she recorded the aforesaid statement.

g

14. It was the defence plea that the allegation has been lodged falsely only in order to forced him to vacate the paan shop run by the accused as it has hampered the smooth running of the paan shop of the informant in the same locality. To prove the aforesaid plea defence has examined one witness namely, Smt. Anamika Mahanta as DW 1, who has stated that the accused resides in a rental house situated near her house. She

h

does not know anything about the occurrence. Mother of the victim girl was selling country liquor, hence, Village people dismantled their liquor shop. Accused appellant has a betel-nut shop and also sells tea. Mother of the victim requested the accused to sell liquor at his shop, but the accused declined. In cross-examination she stated that the victim often visited the house of the accused appellant to play with his son and she do not know anything about the occurrence as she was not present on that day.

15. Assailing the judgment and conviction the learned counsel for the appellant, Mr. U.K. Das, in his argument raised the contention that the learned trial court failed to appreciate the evidence on record and since there was no eye witness and no independent witness except the relatives who were interested witnesses, the impugned judgment and order is not tenable. It is also contended that the conviction of the accused was based basically on the evidence of victim child who in her cross-examination admitted that she was tutored by her informant mother, as to what is to be stated in the court at the time of giving evidence and as such the judgment and order is liable to be quashed and set aside. Non-examination of wife of accused is also stated to be crucial, who happened to rescue the child/victim and medical evidence also not suggestive of any sexual assault. Lastly, it has been contended that the learned trial court failed to appreciate the plea of animosity between the two families taken by defence side.

16. The learned Addl. P.P., Mr. B. Sarma and Mrs. R.Dutta, learned legal aid counsel for informant/respondent No.2 has, however, strongly opposed such contention raised by the appellant and has submitted that there is nothing to disbelieve the statement of victim which is supported by the witnesses. There being no independent eye witness to the occurrence the prosecution has to rely upon the evidence of the witnesses to whom the victim reported the incident. The evidence of PW 2 and PW 3 cannot be discarded merely because they are relatives of the victim as well as informant. It has also been pointed out that the evidence of victim girl about such sexual assault is also suggested by the evidence of M.O./PW 8 who on genital examination (hymen) found redness and tenderness over the hymeneal area around the orifice. Regarding plea of animosity taken by the appellant, it is stated to be nothing but to resist the prosecution case and the appellant failed to prove the aforesaid plea in requisite manner. Accordingly, it has been submitted by the learned counsel for the respondent that the learned trial court has appreciated all such aspects in proper perspective of law and facts and there is nothing to interfere with the impugned order.

17. I have given due consideration to the respective submissions of the

learned counsel for the parties and carefully gone through the evidence on record as discussed above.

18. So far as the case of prosecution it reveals that the son of the accused appellant, Raj Pratim was the classmate of victim girl/PW 5 and as such she went to the house of accused as usual and at that time the accused called her and took her in his lap and indulges sexual activity as describe above. The aforesaid affair has also been accepted by the accused while giving statement under section 313, Cr.PC that the victim used to go their house but rest of the allegation has been denied. Moreover, it is to be noted that the accused appellant while giving statement under section 313, Cr.PC has stated that the family of the victim girl was running a liquor shop which was broken down by the people of the locality and as such they tried to sell liquor through his shop and as he was not agreed to the same so this false case has been filed.

a
b
c

19. It is to be noted that the above statement of the accused is quite different to that of his earlier plea and the evidence adduced on his behalf through DW1. Suggestion was given to the informant and her witnesses that as they could not run their paan shop smoothly due to having a paan shop by the accused appellant so this false accusation has been made against him only to compel him to vacate his paan shop. But the evidence adduced by DW1 is quite different, who has stated in her evidence that the informant family run a liquor shop which was dismantled by the people of the locality. Such a defence evidence which is inconsistent with the plea itself indicative of falsity of plea and nothing else. Moreover the accused appellant choose not to prefer to examine himself as a defence witness to such vital issue nor any other person of the locality to prove his plea. Although prosecution cannot succeed on the weakness of the defence plea and evidence but while there is specific defence plea then, the defence is required to prove the same. In the given circumstances the learned trial court has rightly rejected the defence plea of animosity as has been raised.

d
e
f

20. Obviously this is a sexual offence relating to a minor child aged about 7 years, who happens to be a friend of the son of the accused. There is nothing emerges from the evidence on record so as to falsely implicate the accused neither on the part of the minor child nor on the part of the informant and her family. We have discussed above that there is no authenticity as about plea of animosity. The conduct of the victim girl is also found natural who reported the matter to her mother after the occurrence while she was disturbed by the pain at her private parts. Such a minor girl aged about 7 years cannot assess implication and consequences of the conduct of the accused appellant and as such she returned to her house and only when she find it difficult to urinate

g
h

a then she reported the matter to her mother/informant PW 1 who in
turn returned the same to PW 2 and PW 3 and immediately thereafter
on being asked victim reported the matter to her two grandmothers
PW 2 and PW 3. We are also aware that such a matter of sexual assault is
generally not discussed to all in the society in the fear of shame and
insecurity and social stigma to the child. However, it is found that FIR
in this case was filed instantly without any delay to raise doubt for any
deliberation and afterthought. That apart, there is no pleasure on the
part of a woman in the context of Indian society to lodge a false FIR by
projecting a minor child at the peril of her future and social stigma at
large. The contention about non-examination of wife of accused-appellant
has no substance, as no wife will give evidence against her husband.

c **21.** It is also discernible from the facts and circumstances of the case that
there cannot be any eye witness to the occurrence as the occurrence
took place inside the house of accused and as such evidence of family of
victim will be the best natural witness and accordingly the evidence of
PW1 to PW3 cannot be discarded only because they are relatives to the
victim. The evidence of those witnesses does not suffer from any sort of
material omission and contradiction, nor was any effective cross-
examination made so as to destroy the credibility of those witnesses.
Accordingly, there is nothing to disbelieve the witnesses.

e **22.** On the next, it has been contended by the appellant that as the victim
girl has stated in her cross-examination that she has given the deposition
as tutored by her mother so her evidence cannot be acted upon.
However, this court is not agreeable to such a contention raised by the
appellant, being alive to the facts situation that we are dealing with a
case of a minor that too aged about 7 years, who neither have any
prosecution about the sexual conduct of a person nor could gauge the
animosity if any. The testimony of the victim girl remained consistent
while giving statement under section 161, Cr.PC before I.O. and under
section 164, Cr.PC before Magistrate and even before the court of trial.
She made her first statement after the incident on 20.1.2013 and before
the Magistrate on 21.1.2013 and she gave deposition before the court as
on 17.12.2013 and by this time around 12 months have elapsed and it is
quite natural that her memory is to be refreshed by her mother while
coming to the court after a long lapse as to what to say in the court.
Though the court while recording evidence in English has used the word
'tutored' but the same was perhaps not the exact word stated by the
victim in vernacular. Thus, the word tutor has no necessary implication
that the victim girl was persuaded to give false evidence.

h Findings of M/O also have a bearing in the facts in issue, who found
redness and tenderness in the surface of hymen, which is sufficient to

support the contention of the victim, about insertion of finger into her private parts. There is no other findings that victim might have sustained such injury, in other way.

23. The present case relates to an offence to a minor child aged about 7 years and it is seen that though the learned trial court has given an opinion that a child has level of understanding and could answer the question put to her, so her evidence was recorded, but, however, considering her age no oath was administer to her. But, however, the learned trial court has made no query to the said witness as to what was tutored by her mother, while she replied to the defence in cross-examination that she was tutored by her mother. It does not reflect that while examining the minor witness, the parents or any guardian of the witness was also present with her.

24. Having regard to the issue it is necessary to discuss some important facets relating to the examination of a child witness. We must bear in mind that every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. It is noteworthy that on many occasions' jurisdiction and power conferred by the Legislature upon the court as well as other directions/ guidelines in binding pronouncement of the Apex Court is not followed, resulting serious consequences in criminal justice delivery system. The court room environment is unfriendly and would definitely unfamiliar to a child who appeared as a witness and a child get nervous in such unfriendly atmosphere and taking such advantage such testimony often torn by skilled defence lawyer. As such, the treatment of child witness who is victim of sexual assault needs adequate consideration.

25. As per section 118 of the Evidence Act all persons shall be competent to testify unless the court considers that they are prevented, understanding the question put to them or giving rational answers to those questions by tender years extreme old age decease whether body or mind or any other cause of the same kind. So far as the competency of the witness the Legislature has emphasised the basic requirement of a person understands of the obligation to speak the truth and to give an acute impression and possession of mental capacity at the time of occurrence. This would be more so if the witness is a child of tender years. An assessment by the court of competency of the child who appears as a witness is essential.

26. In *Surya Narayana v. State of Karnataka*, 2001 CrLJ; (2001) 9 SCC 129, it has been held that if it is satisfied that a testimony of a child is voluntary expression of what transpire and is an accurate impression of the same

a
b
c
d
e
f
g
h

a no corroboration of testimony is required and conviction can be based
on the basis of such evidence of child witness. It is only as a rule of
caution and prudence that the court may require that it would be
desirable to have corroboration from other dependable evidence. In the
b given case the testimony of the victim girl has been corroborated by the
other witnesses and only the fact that the victim has stated in the cross-
examination that she has given the statement as tutored by her mother.
The said aspect has already been discussed above, however, it will be
useful to discuss certain aspect as to the duty of a presiding officer while
recording evidence of a child witness.

c **27.** In *Ram Chander v. State of Haryana, 1981 CrL LJ 609*, the hon'ble Supreme
Court has criticised the silence of trial Judges who have permitted trials
to develop into a contest between the prosecution and the defence
resulting the contradictions entered into the trial. Certain portion of the
observation is reproduced below :

d "The adversary system of trial being what is there is an unfortunate tendency
for a judge presiding over a trial to assume the role of a referee or an
umpire and to allow the trial to develop into a contest between the prosecution
and the defence with the inevitable distortions flowing from combative and
competitive element entering into the trial procedure. If a criminal court is to
be an effective instrument in dispensing justice, the presiding judge must
cease to be a spectator and a mere recording machine. He must become a
participant in the trial by evincing intelligent active interest by putting
e questions to witnesses in order to ascertain the truth."

28. The power of the trial court has been discussed and emphasised by
the Apex Court in *State of Rajasthan v. Ani @ Hanif and Ors., (1997) 6 SCC*
162 with the following words –

f "We are unable to appreciate the above criticism. Section 165 of the Evidence
Act confers vast and unrestricted powers to the trial court to put any question
he pleases, in any form, at any time, of any witness, or of the parties, about
any fact relevant or irrelevant, in order to discover relevant fact. The said
section was framed by the Legislature lavishly studying it with the word
g 'any' which could only have been inspired by the legislative intent to confer
unbridled power under trial court to use the power whenever it deems it
necessary to elicit truth. Even if such question crosses into irrelevancy the
same would not transgress beyond the control of power of court. This is clear
from the word "relevant or irrelevant" in section 165 – neither party has any
right to raise any objection to such question.

h Reticence may be good in many circumstances, but a judge remaining mute
during trial is not an ideal situation. A taciturn judge may be the model
caricatured in public mind. But there is nothing wrong in his becoming
active or dynamic during trial so that criminal justice being the end could be

achieved. Criminal trial should not turn out to be about or combat between two rival sides with the judge performing the role only for a spectator or even an umpire to pronounce finally who won the race. A judge is expected of actively participate in the trial, elicit necessary materials from witnesses at the appropriate context which he felt necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or cross-examination or even during re-examination to elicit truth. The corollary of it is that if a judge felt that a witness has committed an error or a slip it is the duty of the judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence collecting process. It is a useful exercise for trial judge to remain active and alert so that errors can be minimised."

a

b

29. In *Zahira Habibulla H Seikh and Another v. State of Gujarat*, (2004) 4 SCC 158, the hon'ble Supreme Court has described the role of Court with better exposition with the following words at paragraphs 43 and 44 :

c

"43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code or section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceeding in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective, i.e., truth is arrived at. This becomes more necessary the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

d

e

f

44. The power of the court under section 165 of the Evidence Act is in a way complementary to its power under section 311 of the Code. The section consists of two parts, i.e., (i) giving a discretion to the court to examine the witness at any stage, and (ii) the mandatory portion which compels the court to examine a witness if his evidence appears to be essential to the just decision of the court. Though the discretion given to the court is very wide, the very width requires a corresponding caution."

g

h

30. Another important aspect while recording the testimony of a child witness is about the vocabulary used by the child. This assumes much importance inasmuch as the same word have different connotation and

meanings in different language and the different regions. It is to be noted that at some time the concerned Magistrate recorded statement under section 164, Cr.PC and the learned trial court in course of trial while recording the evidence used the word stated by the witness as stated by them without implicating the meaning of the word say so by the victim and at some time it resulted in acquittal because of such words which reflect no actual as well as legal meaning which will obviously result in miscarriage of justice, because of unmindness of the court concerned while recording such evidence.

31. As per the mandate of law that has been pronounced by the aforesaid decisions it can be summed up that the learned trial court as well as the Magistrate concerned should follow the few guidelines while recording the statement of child witness –

- (i) A child friendly environment should be created prior to recording of statement of such witnesses and the witness should be at ease so as to improve upon the quality of her evidence and enable her to shed hesitancy to depose frankly.
- (ii) The court should be satisfied that a victim is not scared and he/she is able to reveal what has happened to her when she is subjected an examination during recording her evidence. The court must ensure that the child is not concealing any portion of evidence for the reason that she was ashamed of what happened to her.
- (iii) Question should be put to the victim or the child witness which are not connected with the case to make the witness comfortable and to depose without fear and pressure.
- (iv) The trial judge may allow, if desirable, to have a social worker or other friendly independent or neutral adult to whom the child has confidence at the time of such giving testimony.
- (v) The court should ensure that the victim should not be allowed to put any question in cross-examination only to embarrass or confuse such victim of sexual abuse.
- (vi) The examination and cross-examination of the child witness should be carefully monitored by the presiding judge to avoid any such harassment or intimidation to the child witness.
- (vii) It is the duty of the court to arrive at the truth and court have to take participatory role in the trial but not as a mere spectator in a manner so that something which is not relevant is unnecessarily brought on record. Even if the prosecutor is remiss the court can control the proceeding effectively to elicit the truth.
- (viii) The court should ascertain the spoken language of the witness as well as range of vocabulary before recording the deposing. In making the

record of the evidence court should avoid use of innuendos or such expressions which may be variably construed. For instance “bad works” or “any colloquial language” have no definite meaning. Therefore, even if it is necessary to record the words of the prosecutrix, it is essential that those words mean to her and what is intended to be conveyed are sensitively brought out.

a

(ix) The court should ensure that there is no use of aggressive, sarcastic language or a gruelling or sexually explicit examination or cross-examination of the victim or child witness. The court should come down with heavily to discourage efforts to promote specifics and/or illustrations by any of the means offending acts which would traumatise the victim or child witness and effect their testimony. The court to ensure that no element of vulgarity is introduced into the court room by any person or the record of the proceedings. No humiliation of the witness should be permitted either in the examination-in-chief or the cross-examination.

b

c

(x) In order to elicit complete evidence, a child witness may use gestures. The courts must carefully translate such explanation or description into written record.

(xi) The police and the judge must ascertain the language with which the child is conversant and make every effort to put questions in such language. If the language is not known to the court, efforts to join an independent translator in the proceedings, especially at the stage of deposition, should be made.

d

(xii) The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of “Ascertaining voluntary nature of statement” unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.

e

32. In the instant case the victim girl has been subjected to such sexual conduct by the accused appellant which is vulnerable to the society at large and the Special Act for Protection of Children from Sexual Offences Act, 2012 has been enacted for tackling the problem of child abuse. It has identified and criminalised a range of unacceptable sexual behaviour that pose a threat to the children and recognising such seriousness of the offence relating to minor the Act has provided severe punishment to a person who indulge such unacceptable sexual behaviour to minor. In the instant case, the learned trial court has appreciated all the necessary aspect of the evidence and has rightly convicted the accused person and inflicted the statutory punishment to the accused appellant which cannot be reduced or altered and accordingly, same is upheld. Appeal is devoid of any merit and, hence, dismissed.

f

g

h

Return the LCR forthwith.

a

.....

(2017) 2 GAUHATI LAW REPORTS 135

AJIT SINGH, CJ AND MANOJIT BHUYAN, J

b

ARABIAN MURMU

Appellant

Versus

STATE OF ASSAM

Respondent

Criminal Appeal No.76(J) of 2013 decided on 20.9.2016

c

Indian Penal Code, 1860, S.302 – Appellant allegedly killed the deceased whose corpse was found in a decomposed state in the house of the appellant – Neighbour of the appellant informed the Village Defence Party as well as the Gaon Burah of the village as a foul smell was emanating from the house of the appellant – Gaonburah accompanied by Village Defence Party went to the appellant’s house and saw the dead body of an unidentified person lying on the floor inside appellant’s house – Weapon of offence produced from inside the house by the appellant and while doing so appellant also confessed that he had used it in the occurrence – No explanation given by the appellant as to how the dead body was found lying in his house – No evidence to show that even when he discovered the body in his house, he did not inform the matter to anybody and/or to the police – No clear explanation by the appellant in his statement under section 313, Cr.PC demonstrating his defence and/or how the dead body came to be found in his house – Statement of the witnesses even after cross-examination remained unshakene as to the extra judicial confession made by the appellant – Guilt of the appellant established cogently and firmly from the circumstances surrounding the case – Conviction and sentence upheld – Appeal dismissed [Paras 7 and 9].

d

e

f

g

Advocates who appeared in the case :

Mr. K. Goswami for the appellant.

Ms. S. Jahan for the respondent.

JUDGMENT AND ORDER

h

MANOJIT BHUYAN, J

1. The appellant Sri Arabian Murmo @ Raising Murmo has been convicted under section 302 of the Indian Penal Code and sentenced to rigorous