IN THE COURT OF THE SPECIAL JUDGE

CHIRANG, KAJALGAON.



# Special(P) Case No. 3(Basu)/2016

U/S 376(2)(i) IPC R/W Section 4 of POCSO Act.

State of Assam Vs. 

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PRESENT: Sri D.J. Mahanta, Special Judge, Chirang, Kajalgaon.

#### ADVOCATES APPEARED:

For the State

: Sri D. Das, Ld. Public Prosecutor

For the accused

: Sri M.K. Wary, Ld. Advocate

Date of evidence

: 07.03.18, 28.03.18, 26.04.18, 28.05.18

Date of Argument

: 28.06.2018

Date of Judgment

: 12.07.2018

# JUDGMENT AND ORDER

The prosedution case in brief is that on 05.06.2016, the 1. informant Budbari Basumatary lodged an FIR before Basugaon P.S. alleging Special Musical Rajalgañhthat in the year 2015, the accused, an ex-army approached the informant and chirang. made a proposal to bring her daughter Miss 'X' (name is withheld), aged about 12 years, with assurance that he would provide food, lodging and education as well. Relying on the assurance made by the accused and owing to financial crisis, the informant along with her family accepted the proposal. Accordingly, in the month of October, 2015, the accused person brought the daughter of the informant to Tilogaon, Basugaon under Chirang district. It is alleged that the accused person, after bringing the daughter of the informant to his residence, committed sexual intercourse on her against her will and consent on many occasions and he used to give medicine to the daughter of the informant to avoid pregnancy. It is further alleged that when the daughter of the informant narrated the entire incident to the wife of accused, she also brutally beat the victim and the accused also threatened the victim to kill her if she disclose the matter to any third person.

- 2. After receiving the FIR, the O/C of Basugaon P.S. registered a case being numbered as Basugaon P.S. Case No. 45/2016 U/S 376(2)(i)/313/ 323/506 IPC read with Section 4/8 of POCSO Act and the O/C himself investigated the case. Accordingly, the Investigating Officer arrested the accused, visited the place of occurrence, drew sketch map of P.O., recorded the statement of the witnesses, sent the victim for medical examination, got recorded her statement u/s 164 CrPC, collected the medical report and after completion of investigation, submitted charge-sheet against the accused Sri Mohen Ch. Boro U/S 376(2)(f) IPC R/W Section 6/12 of POCSO Act. Later on, accused person was released on bail. After receiving charge sheet, copies of relevant documents were furnished to the accused person. On perusal of entire materials on record and hearing both sides and after having found a prima facie case, my learned predecessor framed charge U/S 376(2)(i) IPC read with Section 4 of POCSO Act against the accused. Charge was read over and explained to the accused to which he denied to plead guilty.
- 3. In support of the case prosecution side examined as many as 8 (eight) witnesses.

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- 4. Following witnesses are examined:-
  - (1) Victim as PW 1
  - (2) Smt. Budhbari Basumatary as PW 2
  - (3) Miss Laxmi Chetri as PW 3
  - (4) Mrs. Damayanti Brahma as PW 4
  - (5) Miss Sumitra Narzary @ Tengna Narzary as PW 5
  - (6) Sri Theman Basumatary as PW 6
  - (7) Dr. Meena Hazarika as PW 7
  - (8) S.I. Sailen Deori (I.O.) as PW 8

- 5. Statement of the victim U/S 164 Cr.P.C. was exhibited as Ext. 1. Medical report was exhibited as Ext. 2. Radiological report was exhibited as Ext. 3. Sketch map was exhibited as Ext. 4, FIR was exhibited as Ext. 5 and charge-sheet was exhibited as Ext. 6.
- 6. Defence plea is of total denial. Defence adduced no evidence.
- 7. Heard argument from both sides.

# 8. Now points for consideration:-

For the offence U/S 376(2)(i) of IPC

1. Whether before 28.05.2016 and after October, 2015, one day, the accused at his house at Tilogaon under Basugaon P.S. committed rape upon Miss 'X' (name is withheld), a woman under age of 16 years?

For the offence U/S 4 of POCSO Act

2. Whether on the same day, time and place, the accused committed penetrative sexual assault upon the victim Miss 'X' (name is withheld), a minor girl under the age of 18 years?

# DISCUSSION, DECISION AND REASONS THEREFOR:-

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- 9. Now, I want to discuss and appreciate the prosecution evidence on record regarding both points simultaneously.
- 10. The allegation made in the FIR is that victim was kept in the house of the accused as maidservant. During her stay in the house of the accused, he sexually assaulted the victim and committed penetrative assault on her. It was stated that at the time of occurrence, victim was a minor girl aged about 12 years.
- 11. In this regard, prosecution examined all total 8 witnesses. Except PW 7 and PW 8, other witnesses heard the incident from the victim.

Therefore, victim is the important witness in this case who was examined as PW 1. She deposed that she was reading upto Class VII. She did not fail in any class. She was working in the house of the accused. On the date of occurrence, she came to bring rice. At that time, accused was lying on a bed. He took her and committed sexual intercourse by gagging with a pillow. She could not remember what she was wearing at that time. Accused was wearing a 'gamocha'. He put off his 'gamocha' and the undergarment of the victim and committed sexual intercourse with the victim on a day. This matter was informed to the wife of the accused but she beat her and after few days, victim along with PW 5 returned to her own house. It is found from the record that PW 5 was also working as maidservant in the house of the accused along with PW 1. Immediately, she reported the matter to her mother, the PW 2 who told the incident to the villagers. Ultimately, she was advised to meet NGO personnel. Accordingly, due to advice from the NGO, villagers and other relatives, the PW 2 lodged FIR after few days.

- During cross-examination of PW 1, learned defence counsel asked her about the date of occurrence but PW 1 failed to remember the date. It is revealed from the cross-examination of PW 1 that she was kept in the house of the accused one day prior to Durga Puja in the year 2015. She could not state the fact that in whose room the bed was lying. She further deposed that matter was informed to PW 5 in the house of the accused after 1 or 2 days from the incident. It is also revealed from the evidence of the PW 1 that when she reported the matter to the wife of the accused, then PW 5 Sumitra was absent. She was washing dishes in another place.
- 13. PW 2 Smt. Budhbari Basumatary is the informant. She deposed that after returning to her home, PW 1 told her that accused had committed sexual intercourse with her. According to this witness, at that time, age of the victim was about 12 years. She had no specific knowledge about the sexual intercourse because she could not say how many days accused committed sexual intercourse with victim. After knowing the incident from her daughter, PW 2 reported the same to the villagers and NGO. According to advice of the NGO and villagers, she lodged FIR. She deposed that prior to keeping her daughter in the house of the accused, she did not know the accused. Learned

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defence counsel during the cross-examination, gave suggestion that PW 2 lodged a false FIR according to ill-advice of NGO but same was denied by the PW 2.

- 14. PW 3 Laxmi Chetri is the worker of Action North-East Trust, Chirang. She knew the fact from one of their members and ultimately she was reported by the informant and victim. According to PW 3, accused committed sexual intercourse often with the victim during her stay in his house. After knowing the incident FIR was written by advocate one Bindu Subedi. The PW 2 put her thumb impression upon FIR which was exhibited as Ext.5 by the Investigating Officer.
- During the time of investigation, victim was brought to the Court for recording her statement. Said statement was exhibited as Ext.1. In her statement before the Magistrate U/S 164 CrPC, the victim stated that she went to bring the rice, then accused caught her and took her to her own bed and committed sexual intercourse with her after removing her undergarment. This fact was reported to the wife of the accused who beat her and ultimately, she was driven out from their house by the wife of the accused.
- 16. PW 4 is another member of NGO, who heard about the incident from the victim. PW 5 is the maidservant who was also working in the house of the accused along with the victim. She heard during her stay in the house of the accused about the incident from the victim. According to her, PW 1 reported her that accused had committed sexual intercourse when she offered water to him. Learned defence counsel during cross-examination of PW 5 pointed out that she did not state before the police that victim reported her that accused committed sexual intercourse with her. These facts were admitted by PW 5. It is found from the evidence of PW 1 and PW 5 that former did not state the actual fact to the PW 5 when they were staying in the house of the accused. This fact was afterthought. Therefore, evidence given by PW 5 in this respect, is not believable.
- 17. PW 6 is another villager, who heard about the incident from PW 2, the mother of the victim. PW 7 is the Medical Officer, who examined the

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victim and sent her for radiological examination. After considering the radiological examination, age of the victim was determined above 16 years but below 18 years. She did not opine whether sexual intercourse committed on victim or not. It is found that victim was medically examined by PW 7 after a gap of long period from the date of incident. Therefore, no evidence was found regarding sexual intercourse. So, medical evidence was insufficient regarding sexual intercourse.

- 18. PW 8 is the Investigating Officer, who investigated the case after filing of the FIR. The Investigating Officer visited the house of the accused and drew sketch map. He seized the bed on which alleged sexual intercourse took place. The sketch map was exhibited as Ext.4. In Ext.4, the bed was shown in the room where victim used to sleep. The room where accused used to reside is contiguous to the room of victim. There was a door by which one can enter from the room of accused to the room of victim. According to sketch map, the bed within the room of victim on which alleged incident took place.
- Learned counsel for accused vehemently argued that the victim contradicted her own statement. According to learned defence counsel, during her statement before police, she had stated that accused took the victim to her own room and committed sexual intercourse on her bed. On the other hand, during her later deposition victim stated that accused committed sexual intercourse within the room of accused. After comparing both the statements, I have found that it was not crystal clear from her deposition that she stated before the Court that accused committed sexual intercourse in his own bed. It is found from her evidence that when she went to bring rice, accused was lying on his own bed. After that he came and took her and committed sexual intercourse on a bed. She did not state clearly that it was done on the bed of the accused. On the other hand, from the evidence of Investigating Officer, it is found that the bed lying within the room of victim was seized and on that bed alleged incident took place. The victim also stated that the accused, after committing the offence, came out. That means he went to the room of the victim and committed sexual intercourse on the bed in which victim used to sleep. It is found from the evidence of PW 1 and PW 5 that after the incident

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matter was reported to wife of the accused. Ultimately, both PW 1 and PW 5 left the house of the accused. The wife of the accused gave them Rs. 2,000/each.

- In this regard, learned defence counsel did not raise any 20. question. No any ground was shown by learned defence counsel as to why both girls left the house of the accused after the incident. It is found from the evidence of PW 1 and PW 5 that victim, the PW 1 was staying prior to PW 5. During her stay actually the accused tried to commit some sexual assault upon her. Within that period, one day, he committed sexual intercourse. The age of the victim was about 12 years. PW 2 clearly stated that the age of the victim was about 12 years. Victim herself stated that she was reading upto Class VII. PW 1 deposed before this Court after about two years from the date of incident for which she failed to recollect all the facts regarding the incident. It is found from her statement that accused tried to commit sexual assault in different way. According to PW 3, accused committed sexual intercourse more than one time as she knew from the version of the victim.
- Learned defence counsel pointed out that the victim failed to 21. state about her wearing apparels on the date of incident. She further failed to discrepancies, learned defence counsel argued that evidence given by PW 1 is not at all trustworthy. She cannot be treated as wholly reliable witness.

  According to learned defence counsel, PW 5 did not corroborate the version of the PW 1. Moreover, PW 5 exaggerated the facts which there has a support to the property of the pw 1. Moreover, PW 5 exaggerated the facts which there has a support to the pw 1. her before police during her statement U/S 161 CrPC.
  - Considering the submission of learned defence counsel, I have 22. found that PW 1 did not state either before the I.O. at the time of investigation or at the time of trial before this Court that she had specifically mentioned the entire incident to PW 5. She stated to her some facts but due to shame, she could not divulge all the facts.
  - In this regard, we must have to consider the age of the victim 23. at the time of the incident. Though Medical Officer opined that age of the

victim was above 16 years but from the evidence of the victim as well as her mother, she was 12 to 14 years. The mother deposed that at the time of incident, victim was reading in L.P. School.

- 24. Learned counsel for the accused submitted that the ocular evidence is not reliable because medial evidence clearly stated that age of the victim was above 16 years but below 18 years.
- 25. On the other hand, learned P.P. objected the submission of learned defence counsel. According to him, medical evidence is not the conclusion regarding the age of the victim.
- 26. It is settled in different cases by Hon'ble Supreme Court that medical evidence is not binding on the ocular evidence. Generally opinion of medical officer is obtained to assist the Court because he is not a witness of fact and the evidence given by medical officer is really of an advisory character and not binding on the witness of fact.
- 27. In the case of <u>Madan Gopal Kakkad v. MANU/SC/0509/</u>

  1992: Naval Dubey and Anr. Hon'ble Supreme Court has considered a similar question and pointed out in paragraph 34 at page SCC 221 as under:

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"34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court."

- In our present case at hand, mother clearly stated that age of the victim was about 12 years. So, in my view, at the time of incident age of the victim was below 16 years. According to witnesses, age was in between 12 to 14 years.
- 29. A 14 years girl naturally forgets some facts which were happened two years ago. She could not recollect all incidents for a long period of stay in the house of the accused. Therefore, victim failed to mention specifically the date of incident. It is revealed from entire evidence on record that victim was kept in the house of the accused during the time of Durga Puja, 2015 and she returned to her home along with PW 5 on the last part of May, 2016. During this period of several months, incident took place. According to learned defence counsel, it was happened in the time of Bohag Bihu. If I believe this fact then also victim returned after more than one month because she returned to her home in the last part of May. After that case was lodged and victim was examined by PW 7. Therefore, no any sign of sexual intercourse was found by the Doctor, PW 7. As all other witnesses heard from the victim and victim was alone at the time of incident, so corroboration from other witnesses does not arise. In the case of sexual assault/rape, evidence of victim is sufficient. On the basis of sole evidence of victim, one can be convicted without any corroboration from the other witnesses if she is found wholly reliable.

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- 30. In present case at hand, I have found that though victim made some discrepancies, but main fact is remained intact.
- 31. Hon'ble Supreme Court in *Dinesh @ Buddha Vs. State of Rajasthan, (2006) 3 SCC 771,* regarding evidence of victim held as follows:
  - "9. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole,

the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery."

32. In the same case, Hon'ble Supreme Court further held as follows:

"11. In the Indian setting, refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracised by society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sexual offence is entitled to great weight, notwithstanding the absence of corroboration. A woman or a girl who is raped is not an accomplice. Corroboration is not the sine qua non for conviction in a rape case. The observations of Vivian Bose, J. in Rameshwar v. State of Rajasthan were: (SCR p. 386)

"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the

judge ....."

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- 33. After going through the entire evidence on record and settled case law, in my view, this is a case of penetrative sexual assault upon a minor. Prosecution established the case against the accused beyond all reasonable doubt. It is also found from all angles that victim was minor at the time of incident. Therefore, Section 4 of POCSO Act is applicable in this case. I have found that age of the victim was below 16 years at the time of incident. According to Section 42 of POCSO Act, accused is found guilty U/S 376(2)(i) IPC also.
- 34. Prosecution established the case U/S 376(2)(i) IPC against the accused. Point No. (i) and (ii) are proved beyond all reasonable doubt.

#### ORDER

- 35. Prosecution proved the case U/S 376(2)(i) IPC R/W Section 4 of POCSO Act against the accused Mohen Ch. Boro beyond all reasonable doubt. Accused is convicted under both sections.
- 36. After comparing the punishment in two Sections, I have found that punishment U/S 376(2)(i) IPC is greater in degree. So, I want to sentence the accused U/S 376(2)(i) IPC instead of Section 4 of POCSO Act.
- 37. Heard the accused and his engaged counsel on point of sentence. The hearing is recorded in separate sheet and kept with the case record.
- 38. The accused stated that he has been suffering from different ailments and he is under treatment. Considering his ill-health condition, accused prayed for mercy of the Court.
- 39. I have considered the mitigating circumstances in this case in favour of the accused. Considering all, I sentence the accused to undergo rigorous imprisonment for a term of 10 (ten) years and to pay fine of Rs. 10,000/- (Rupees Ten Thousand), in default, 6 (six) months R.I.

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- 40. The period already undergone during the time of investigation and trial shall be set off from the sentenced period as per provision of Section 428 CrPC. Accused is committed to the prison forthwith.
- 41. A copy of this Judgment shall be furnished to the accused on free of cost. Another copy of this Judgment shall be given to the District Magistrate, Chirang for information.
- 42. Given under my sign and seal of this Court on this the 12<sup>th</sup> day of July, 2018, at Kajalgaon, Chirang.

(D.J. Mahanta)

Special Judge,

Chirang, Kajalgaou

Dictated and corrected by me,

(D.J. Mahanta) Special Judge, Chirang

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# <u>APPENDIX</u>

#### Prosecution witness:

PW 1 - Victim

PW 2 - Smt. Budhbari Basumatary

PW 3 - Miss Laxmi Chetri

PW 4 – Mrs. Damayanti Brahma

PW 5 - Miss Sumitra Narzary @ Tengna Narzary

PW 6 – Sri Theman Basumatary

PW 7 - Dr. Meena Hazarika (M.O.)

PW 8 – S.I. Sailen Deori (I.O.)

# Exhibit (Prosecution):

Ext-1 Statement of the victim U/S 164 Cr.P.C.

Ext-2 Medical report

Ext-3 Radiological report

Ext-4 Sketch map

Ext-5 FIR

Ext-6 Charge-sheet

# Material Exhibit (Prosecution):

Nil.

#### Defence Witness:

Nil.

#### Defence Exhibit:

Nil.

(D.J. Mahanta)
Special Judge,
Chirang