IN THE COURT OF THE SPECIAL JUDGE :::::: NALBARI

Present: Smti S. Bhuyan

Special Judge Nalbari.

Special (P) Case No: 8/16

u/s- 448/354(A)/376 IPC and section 4 of the POCSO Act.

State of Assam

-Vs-

Bhaskarjyoti Barman

S/O-Bharat Barman

R/o, Vill-Bhojkuchi

PS-Tihu, Dist-NalbariAccused person

Appearance :-

For the prosecution : Mr. K. Sarma, Special PP

For the defence : Mr. A. U. Choudhury, Advocate.

Mr. M.Kalita, Advocate.

Date of evidence : 22/07/16, 05/09/16, 06/09/16,

07/01/17, 04/01/17, 15/07/17,

27/06/19

Statement of accused recorded: 08/08/19

Date of Argument: 04/12/19

Judgment Delivered: 17/12/19

<u>JUDGMENT</u>

1. The case of the prosecution as revealed from the ejahar lodged by informant vide Ext- 4 is that on 19/03/16 at about 6.30 pm, accused persons coming from backside, pulled down her daughter on ground by pulling her hair, torn her cloths and tortured her minor daughter Miss 'X' victim of the case (name changed as the case has been registered under POCSO Act) and

after discussion with the family members informant lodged the ejahar.

- 2. O/C Tihu PS on receipt of the ejahar, registered Tihu PS case No. 34/16 u/s-448/376 IPC read with section-4 of the POCSO Act and lynched investigation. He recorded the statement of victim and informant at the police station. Thereafter, he sent the victim to SMK Civil Hospital for her medical examination and produced the victim before the learned Magistrate to record her statement u/s-164 CrPC. He visited the place of occurrence, drawn sketch map of the place of occurrence, recorded statement of other witnesses, seized birth certificate of the victim girl, seized some items and collected the medical report of victim. Accused Bhaskarjyoti Barman surrendered before the IO and arrested him and produued the accused before the court and after completion of investigation laid charge sheet against the accused Bhaskar Jyoti Barman u/s-448/354(A) IPC and section 4 of the POCSO Act vide Ext-10.
- 3. On receipt of the charge sheet my then learned predecessor took cognizance and after furnishing copies to the accused, framed charge u/s-448/354(A)/376 IPC and 4 of the POCSO Act against the accused Bhaskarjyoti Barman vide order dated 24/05/16 and when charges are read over and explained to the accused, he pleaded not guilty and stood for trial and granted bail.
- 4. In order to prove the charge against the accused person, prosecution altogether adduces evidence of 7 no's of witnesses including the informant, victim, M/O and I/O of the case and exhibited 10 no's of documents. PW-1, Dr. Bandana Deka (M/O), PW-2, Anita Barman (informant), PW-3, Miss 'X' (victim), PW-4, Anjan Barman, PW-5, Dwipen Barman, PW-6, Ani Barman and PW-7, Bhaskar Kalita (I/O). Ext-1, Medical report, Ext-2, X-ray report, Ext-3 laboratory report of vaginal swab, Ext-4 Ejahar, Ext-5 Seizure list of chappal, Ext-6 statement of victim u/s-164 CrPC; Ext-7, Seizure list of cloth; Ext-8, Seizure list of birth certificate of victim;

Ext-9, sketch map of the place of occurrence; Ext-10 charge-sheet. After closures of the evidence of the prosecution, statement of the accused Bhaskarjyoti Barman recorded u/s-313 Cr.P.C and accused plea is of total denial however, he declined to adduce evidence in support of his plea of denial.

POINTS FOR DETERMINATIONS ARE:-

- (i) Whether accused Bhaskarjyoti Barman committed house trespass by entering into the house of Dwipen Barman with intent to commit sexual harassment and rape upon Miss 'X'?
- (ii) Whether accused Bhaskarjyoti Barman committed sexual harassment upon Miss 'X' ?
- (iii) Whether accused Bhaskarjyoti Barman committed rape upon Miss 'X' ?
- (iv) Whether accused committed penetrative sexual assault upon Miss 'X' ?

Argument

- 5. I have heard argument of learned counsel for both sides. It has been argued by learned Special PP that prosecution beyond all reasonable doubt established the case of the prosecution and victim is below 18 years of age.
- 6. It has been argued by learned defence counsel that ejahar was lodged after three days of the incident and evidence pointed that ejahar was the outcome of after thought story after having discussion and therefore the prosecution case is not believable and delay being not explained by the informant is fatal for the prosecution. He further submitted that there is no whispering of the word rape in the ejahar and ejahar was lodged as per statement of the victim. Therefore, it is revealed that the statement made in the evidence is untrue and when whole prosecution case is based on false statement the case of the prosecution against the accused Bhaskarjyoti Barman does not

stand. Learned counsel further submitted that the statement of the uncle (khura) and other PWs are not believable as because their statement pointed they exaggerated the facts and statement of the victim pointed that she knows accused prior to the incident and statement of uncle and victim pointed the boy came to meet the girl and when family members came out the boy run away. He further submitted that uncle of the victim Ani and Anjan improve their statement and their piece of evidence is not a safe piece to used against the accused. He pointed that the victim started her case with false statement of stating her age as 14 years. Radiological estimated age is above 16 years and below 18 years and radiological estimated age is not the accurate age of victim. Learned counsel again submitted that the victim being a minor so there is every chance to tutor her and seized dress were not produced before the magistrate and seized articles even not produced before the court at the time of adducing evidence to proof the relevancy of dress with the prosecution charge of rape against the accused. He further submitted that as the original birth certificate is not produced, so radiological estimated age will comes to play and prosecution failed to bring home the charge of section 4 of the POCSO Act against the accused person. He submitted accused was 22 years old at the time of incident. In support of his plea relied upon the decision of Abhijit Dutta versus State of Assam and anr, 2019(1) GLT 17; Lalhmingchhuanga versus State of Mizoram, 2011 GLT (Crl.) 841.

DISCUSSION, DECISION AND REASON THEREOF:

7. PW-1 is the doctor who had examined victim of the case on 29/03/16. As per Ext-4 ejahar incident took place on 19/03/16 that means she had examined the victim after 10 days i.e 11th day of the incident. At the time of examination she found victim was wearing fresh cloth, washed her genitalia, mouth, anal canal after the incident, no injuries were seen, external genitalia normal, hymen intact and laboratory report of vaginal swab gave result of no spermatozoa. Ext-1 is the medical report of victim girl and as Special (P) Case No:8/16

per radiological evidence, age of the victim is estimated above 16 years and below 18 years.

- 8. PW-2 the informant in ejahar Ext-4 stated that on 19/03/16 at about 6.30 pm when her 14 years old minor daughter Miss 'X' was present alone at home accused Bhaskar Barman entering from backside pulled down her daughter on ground and jumping into her body torn her dress and outraged her modesty. In the ejahar, PW-2 stated that accused outraged the modesty of her daughter by jumping on her body, tearing clothes of her daughter and pulling down her daughter on ground by pulling her hair and incident took place at about 6.30 pm. While adducing her evidence she stated that native village of her husband is at Bhojkuchi under Tihu PS and she and her husband with their daughter stayed at Mendikhata and at the time of incident, her whole family came to husband's native village Bhojkuchi under Tihu PS because of Tihu sabha. She stated on the date of incident she went to Barama at about 10 am and her victim daughter stayed in the house of her grandfather at Bhojkuchi village. At about 5 pm, when she returned to Bhojkuchi she noticed gathering of huge people in the compound of her husband and noticed Miss 'X' was crying inside the room. On asking Ani Barman, khura of her husband told her that they found Miss 'X' with accused Bhaskar in the cowshed belonging to bardeuta of her daughter present near her father-in-law's house. Thereafter, they beat victim and she also beat her daughter. She deposed when she noticed her daughter she found her dresses are torn and on asking her daughter she did not disclose anything. She stated her daughter was 14 years old at the time of incident. Her cross pointed she does not know accused and not seen him earlier. Bhubaneswar Barman is her father in-law.
- 9. PW-3 is the victim. Her evidence is that she knows accused Bhaskar Barman. Few day prior to the incident, she visits the house of her paternal grandfather, Bhubaneswar Barman along with her parents and on the date of incident her mother visits

house of her mahi at Barama and she and her grandfather was present at home. Incident took place at about 5 pm. She came backside and was picking the dry cloths and accused coming from her backside dragged her towards cowshed present on the backside of the house of her grandfather's house. Thereafter, he holds her after tearing her cloths, he pressed on her chest. When she wanted to shout accused gagged her mouth with his hands. He assaulted on her neck and chest. After pulling down in the cowshed, he torn her top and pant and raped her. When she shouted her grandfather and uncle came and when her grandfather and uncle came accused ran away and grandfather found her lying on the ground. From there she was taken to the house of her grandfather. Thereafter, villagers went for the search of accused but he was not found, people gathered and restrained them to lodge the case. She disclosed whole incident that took place with her to Bhanita, her pehi but out of shyness she could not disclosed the incident to her mother. She was taken to doctor after three days who examined her. Police produced her before Magistrate where she made statement.

10. Her cross pointed she met accused in the village sabha for the 1st time and this was her 1st visit to her grandfather's house. The place of incident is present at her bardeuta house. House of her bardeuta reach first where her bardeuta live with her barma and then house of her grandfather present and two other house stand in between her bardeuta and grandfather's house. There was no cowshed present in the courtyard of her grandfather and one gravel road passes by the side of her grandfather's house and field is present on the backside of her grandfather's house. The cowshed of her bardeuta present in front of his main house and there is a road in front of the cowshed at a little distance and there is open space in between cowshed and road. House of Nikita, whom she met for first time, reached first then house of her grandfather if one goes by taking Bhojkuchi road. She again in cross stated she and accused Bhaskar posed for a photograph but she does not remember who shoot the said photo. She stated she Special (P) Case No:8/16

was picking cloths facing towards the field and at that time her grandfather was on road and she went to pick up the cloths talking with her grandfather. At that time of incident the construction of the house of her bardetua Samarendra was just started and only fencing of the cowshed finished. In cross she stated accused dragged her using his two hands and she again stated accused dragged her by using his one hand and gagged her mouth by other hand. She tried to freed herself from the grip of the accused and accused dragged her into the courtyard assaulted her on her face and chest, then she shouted but her grandfather did not come as he has hearing problem. Accused torn her jeans dress, her own 'koka' did not come to the place of occurrence, cowshed and only Ani Koka came.

- 11. PW-6 is Ani Barman, his evidence is that in the evening of the day of occurrence, he went to the backside of cowshed of house of victim in search of his cow and noticed accused and victim inside the cowshed. While he shouted who is there accused ran away leaving his chappal. He chased him but accused fled away leaving his bike and on the next day, bike was handed over to father of accused. In cross he stated PW-3 sometimes used to visit the village house prior to the incident.
- 12. Statement of PW-4 Anjan Barman is that on the date of incident while he came out from his house for walking, he heard hue and cry in the house of Bhubaneswar Barman and then he and Anil Barman ran and noticed Miss 'X' in the cowshed of Samarendra in naked condition and lying on the cowshed, accused run away leaving his bike and pair of chappal. Bike was parked in the courtyard of Bhubaneswar Barman. Police seized chappal vide Ext-5, Ext-5(2) is his signature. He noticed accused doing 'beya kam' (indecent work) with the girl. In cross stated parents of the accused took the bike. The cowshed is present on the East side of the house of Bhubaneswar Barman and there is a road on the west side of the cowshed. House of Bhubaneswar is after the house of Samarendra, thereafter, house of one of their khura is present,

after that his house, then house of Krishna Barman, Dimbeswar and all of them are relative and all the houses present on East side of the road. There is field on the back side of the house of Bhubaneswar. He noticed 4/5 other persons when reached in front of the house of Bhubaneswar Barman hearing hue and cry of the people. Later on, other person arrived and they heard hue and cry coming from the side of cowshed. He, Anil, Bhubaneswar and Dwipen ran towards the cowshed.

- 13. PW-5 is the father of Miss 'X' the alleged victim of the case, his evidence is that his original house is at village Bhojkuchi and he reside at Goalpara and at the time of incident he, his wife and his daughter Miss 'X' came to Bhojkuchi on the occasion of sabha. He stated at that time he was staying in a house adjacent to house his father's house and when he was returning from market his father Bhubaneswar Barman and uncle Ani called him. At that moment, he noticed accused running away from his house. His uncle asked him to catch accused, he chased him but could not catch him. His uncle Ani told him that accused committed bad works with his daughter. After half an hour later his wife came, and his sister Bhanita and his wife inquired Miss 'X' and Miss 'X' reported that accused did bad work with her and his sister and wife report him the said fact.
- 14. PW-7 IO of the case. He deposed on 21/03/16 he received an ejahar from informant and registered Tihu PS case No. 34/16 u/s-448/376 IPC read with section-4 of the POCSO Act and lynched investigation. He recorded the statement of victim and informant at the police station. Thereafter, he sent the victim to SMK Civil Hospital for her medical examination and produced the victim before the learned Magistrate to record her statement u/s-164 CrPC. He visited the place of occurrence, drawn sketch map of the place of occurrence vide Ext-9, recorded statement of other witnesses, seized birth certificate of the victim girl vide Ext-7, seized hawai chappal vide Ext-5 and collected the medical report of victim. Accused Bhaskarjyoti Barman surrendered before the IO

and arrested him and produced the accused before the court and after completion of investigation laid charge sheet against the accused Bhaskar Jyoti Barman u/s-448/354(A) IPC and section 4 of the POCSO Act vide Ext-10. In cross stated Miss 'X' did not disclose before him that she was dragged to the cowshed, torn her cloths and pressed her breast and accused committed rape upon her.

- 15. On scrutiny of the statement of PW-3, it is seen that she did not disclose incident to her mother and father. Her mother PW-2 also stated her daughter did not disclose incident to her. But her father stated his daughter narrated incident to his wife that is mother and his wife narrated incident to him. The piece of statement of PW-5 that his daughter disclosed incident to his wife and his wife disclosed the incident to him is not a believable evidence because this fact has not been stated by his wife and daughter. PW-5 stated he was called by his father and uncle Ani but Ani barman who is examined as PW-6 did not say that he called PW-5. PW-6 not stated he came along with other persons, Anjan Barman or any other persons as stated by witness Anjan Barman or he disclosed incident to PW-5 that accused did bad work with daughter of PW-5. Therefore, the statement of PW-4, that Ani Barman came walking along with him and both of them came to the place of occurrence hearing hue and cry and that PW-6 told PW-5 that accused did 'beya kam' with Miss 'X' and PW-6 called PW-5 does not derive confidence as this statement are not made by PW-6 while adducing his evidence.
- 16. The statement of PW-2 and PW-5 pointed that they did not witness the incident and PW-2 evidence pointed she did not hear any incident from her daughter. PW-3 Miss 'X' the alleged victim stated out of shyness she could not disclose incident to her mother, so under such circumstances, she disclosed incident to her father when she did not made statement before the court that she disclosed incident to her father, the statement of PW-5 that his daughter disclosed incident to him is not believable.

- 17. PW-6 stated he noticed accused in the cowshed. PW-5 deposed he noticed accused coming from their house. Victim's evidence is that the place of occurrence, cowshed was not present in the courtyard of her grandfather Bhubaneswar Barman. It was present in the compound of Samarendra, her bardeuta, her statement further pointed her bardeuta Samarendra just started construction of the house and only fencing of the cowshed was given where incident took place and statement of PW-3 Miss 'X' pointed she was picking dry cloths on the courtyard of her grandfather Bhubaneswar Barman and house of her grandfather and her bardeuta Samarendra are different and another two house is present in between house of her grandfather and Samarendra. The statement of PW-3 further pointed her grandfather was present on road and she went to pick the cloths talking with her grandfather. If this piece of statement of PW-3 is taken into consideration, then her grandfather Bhubaneswar Barman would have noticed accused dragging her towards the cowshed of Samarendra which is present on a separate campus and in between, there are other two houses present. She stated that accused assaulted on her face, chest but her medical report even not shown any old injury at the time of medical examination.
- 18. PW-6 did not state that accused did 'beya kam' and/or rape the victim. Her hymen was intact as per medical report. There is no mark of injury or violence on her body, even old scar not present. Therefore, the statement of the alleged victim that she was raped by accused does not derive confidence.
- 19. The statement of PW-3 pointed she met the accused at the sabha, both have posed for a photograph. PW-7 stated he seized wearing dress of the victim at the time of incident. But those were not sent to FSL to find out presence of semen. Those dress were even not produced before the doctors who had examined victim. The prosecution also not produced the dress before the court for identification.

- 20. The victim in her evidence once stated accused dragged her to backside of her grandfather's house where there is a cowshed and again stated she was taken to the cowshed of her bardeuta Samarendra and said cowshed is present in front of the house of her bardeuta and road passes near the cowshed. Her evidence further pointed that there is no cowshed present in the compound of her grandfather. Thus dragging of the victim on the backside of the house of grandfather of the victim does not stand as her own evidence pointed there is no cowshed in the compound of her grandfather. Grandfather who was present with PW-3 has not been examined by IO and prosecution. His evidence is withhold so, accused entitled benefit u/s-114(g) of the Evidence Act.
- 21. The statement of PW-2 pointed the family members beat her daughter and she also beat her. If the accused raped her daughter then the question of beating Miss 'X' does not arise. The statement of PW-4, pointed that bike was present in the courtyard of Bhubaneswar Barman, grandfather of the victim and incident according to PW-3 took place in the cowshed of her bardeuta Samarendra which is different compound. PW-4 and PW-5 made statement that bike and chappal was returned back on next day to the mother of the accused. Therefore, the seizure of the green colour hawai chappal of accused at the place of occurrence vide Ext-5 by IO does not pointed that said chappal belonged to accused. If chappal and bike already returned to mother of accused as per statement of PW-4 and PW-5, then seizure of the chappal at the place of occurrence does not derive connect and establish that it was accused chappal.
- 22. In view of the aforesaid discussion, I come to my definite finding that statement of PW-3 Miss 'X' is not safe piece of evidence to hold accused guilty and her evidence does not derive confidence and I find from the evidence on record that prosecution evidence is not sufficient enough to hold accused Bhaskarjyoti Barman guilty of committing of offence u/s-448/354(A)/376 IPC and 4 of the POCSO Act and I am constraint to hold that

prosecution failed to bring home the charge u/s-448/354(A)/376 IPC and 4 of the POCSO Act beyond all reasonable doubt and accused entitled benefit of doubt.

23. Accordingly, accused Bhaskarjyoti Barman is acquitted from the charge of section 448/354(A)/376 IPC and 4 of the POCSO Act and is set at liberty.

24. However, his bail bonds remain stands for next 6 (six) months u/s-437-A CrPC.

Judgment is given under my hand and seal of this court on this the 17th day of December, 2019.

(Smti S. Bhuyan) Special Judge, Nalbari

Dictated & corrected by me

(Smti S. Bhuyan) Special Judge, Nalbari

Typed by: Biswajit Bhattacharjya Copyist

APPENDIX

A. <u>Prosecution witnesses</u>

PW-1, Dr. Bandana Deka (M/O),

PW-2, Anita Barman (informant),

PW-3, Miss 'X' (victim),

PW-4, Anjan Barman,

PW-5, Dwipen Barman,

PW-6, Ani Barman,

PW-7, Bhaskar Kalita (I/O).

B. Defence witness

NIL

C. Prosecution Exhibits

Ext-1, Medical report,

Ext-2, X-ray report,

Ext-3 laboratory report of vaginal swab,

Ext-4 Ejahar,

Ext-5 Seizure list of chappal,

Ext-6 statement of victim u/s-164 CrPC;

Ext-7, Seizure list of cloth;

Ext-8, Seizure list of birth certificate of victim;

Ext-9, sketch map of the place of occurrence;

Ext-10 charge-sheet.

D. Defence Exhibit

Nil.

(Smti S. Bhuyan) Special Judge, Nalbari