# CAUSE TITLE POCSO Case No. 51/16

Informant: Smti. Sahida Begum,

W/o- Salam Ali,

R/o- Chandmari Ghat,

PS- Dibrugarh, District- Dibrugarh.

Accused: Akhtar Mahammed,

S/o- Fazal Mahammed, R/o- Graham Bazar, PS- Dibrugarh, District- Dibrugarh.

# **ADVOCATES:-**

For the State: Mrs. Runumi Devi, learned Public Prosecutor.

Mrs. Shahnaz Akhtar, learned Addl. Public Prosecutor.

For the Defence: Mr. S Seal, learned Advocate.

### IN THE COURT OF THE SESSIONS JUDGE: DIBRUGARH

Present: Smti. SP Khaund, (MA Economics, LLB),

Sessions Judge, Dibrugarh.

> POCSO Case No. 51/16 G.R. Case No. 1872/16

> > State of Assam

-Vs-

### Akhtar Mahammed

Charges: Under Section 8 of POCSO Act read with Section 354 IPC.

Date of evidence on : 08-11-16, 07-02-17, 15-03-17 & 22-06-17.

Date of argument : 27-07-17. Date of Judgment : 10-10-17.

#### **JUDGMENT**

- 1) The factual matrix of this case in compendium is that on 14-07-16, at about 12:00 O' clock noon, the victim X who was above eight years of age at that time, went to a scrap yard belonging to Pharid in order to sell one empty tin can which earlier contained mustard oil. At that time, Akhtar Mahammed (hereinafter the accused) pulled the victim towards the room in the scrap yard with malafide intention and drove away the victim's minor friends who accompanied her to the scrap yard at that time. The victim X returned home and informed her mother that the accused removed her panty and attempted to commit rape on her, but when he was unable in his attempt, he urinated on her. The victim's mother immediately informed her neighbhours about the incident and they advised her to inform the police.
- 2) The victim's mother Smti. Sahida Khatoon lodged an ejahar with the police at Borbari Outpost and after registration of GDE No. 356 dtd. 14-07-16, the FIR was forwarded to the Dibrugarh Police station which was registered as Dibrugarh PS Case No. 543/16 under Section 354-A of the Indian Penal Code (IPC in short) read with Section 8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act in short).
- 3) The investigating officer (IO in short) embarked upon the investigation. He went to the place of occurrence and seized the empty oil can. He prepared

the Sketch-Map and recorded the statements of the witnesses. He forwarded the victim to the Magistrate for recording her statement under Section 164 of the Code of Criminal Procedure (CrPC in short) and also forwarded her to the medical officer (MO in short) for medical examination. On finding prima facie materials, the IO submitted Charge-Sheet against the accused under Sections 354-A IPC read with Section 8 of the POCSO Act.

- 4) On appearance of the accused, copies were furnished and after hearing both the sides, a formal charge under Section 8 of the POCSO Act read with Section 354 IPC was framed and read over and explained to the accused. The accused abjured his guilt and claimed innocence.
- 5) To substantiate the stance, the prosecution adduced the evidence of nine witnesses including the MO and the IO. The defence cross-examined the witnesses extensively to refute the charges. The prosecution also exhibited several documents.

# **SUBMNISSIONS:**

6) The learned Public Prosecutor Smti. Runumi Devi and learned Addl. Public Prosecutor Smti. Sehnaz Akhtar laid stress in their arguments that there is clinching evidence against the accused and he deserves stringent punishment. On the contrary, the learned defence counsel strenuously urged that the FIR lodged by the complainant is not similar to her testimony in the Court. Her testimony in the Court is embellished and aggravated form of her statement before the police under Section 161 CrPC. There is a litigation against the aggrieved for theft of scrap materials and to avenge this, a false case was slammed against the accused.

# **POINTS FOR DETERMINATION:**

- 7) To decide the case in its right perspective, the following points are apposite for determination:
  - Whether the accused committed sexual assault on the minor victim X?
  - 2. Whether the accused used criminal force on the minor victim X with the intention to outrage her modesty?

# **DECISION THEREON AND THE REASONS FOR THE DECISION:**

- 8) At this stage, it is necessary to advert to the evidence and delve into the same.
- 9) The victim 'X' testified as PW-1 that on the day of the incident, she along

with five other girls went to the nearby place to sell scrap materials from their house. Then a person who was staying in the place, chased away the other girls stating that he will hurl mud against them and so saying, he took the victim inside a room and made her lie atop a gunny bag filled with bottles. He removed her panty and urinated on her. Then the victim began to cry and she stated that she will inform about the incident to her father and then the accused let her go and she returned to her house and informed her Bor Baba (elder brother of her father) about the incident. After a while, her mother returned to her house and she informed her mother about the incident. On the same day, her mother took her to the police station and she narrated the incident to the police. She was also taken to Assam Medical College & Hospital, Dibrugarh for medical examination. She was forwarded to the Magistrate for recording her statement. Ext. 1 is her statement and Ext. 1(1) to Ext. 1(3) are her signatures.

- 10) In her cross-examination, she stated that the other girls who accompanied her were Jesmin, Khushi, Shehnaz and Jeshi. She admitted that the accused lodged a case against her parents regarding theft of scrap materials. She denied the suggestion of the defence regarding her omission to mention before the police and the Magistrate that the accused pulled down her panty and urinated upon her. She denied the suggestion that her mother foisted this case against the accused, because the accused lodged a case against her parents. The remaining part of her cross-examination is denial of suggestions by the defence.
- 11) Her evidence is corroborated by the evidence of her friend Jesmin Khatoon who testified as PW-6 that on the day of occurrence, they went to Pharid's camp in the tiniali. Three girls went to the camp about a month ago (from 13-03-17). She (Jesmin), X and Khushi went to the camp. She was carrying a tin for sale in the camp. The accused person accosted her and Khushi to go away stating that he would send some money through X. The accused then told X to fetch something from inside and then he took her inside and she and Khushi went to the nearby shop. After some time, while they were in the nearby shop, X informed them that the accused urinated on her frock. X informed her that when she asked the accused to release her, he urinated on her frock. The accused did not allow X to come out, but he allowed her to come out when she stated before him that her father will assault her. PW-6

- Jesmin further testified that she informed her grandmother about the incident. The police came and took the accused to the police station. X was also taken to the police station.
- 12) The evidence of PW-1 & 6 is also corroborated by the evidence of Smti. Khushi Gowalla who testified as PW-7 that the incident took place about ten months ago. On that day, she along with Jesmine and X went to Pharid's camp to sell one tin and then she noticed the accused person in the camp. The accused took X inside and asked her and Khushi to go to the nearby shop assuring them that he would send them some money through X. After some time, X returned crying and when they asked her as to why she was crying, she informed them that the accused urinated on her frock. Then they returned home. The police came and recorded her statement.
- 13) In her cross-examination, PW-7 stated that two persons were present in Pharid's camp. X's father went with them to the Court and he taught them how to make their statements in the Court. X's mother also accompanied them to the Court, but she did not tutor them. She admitted in her cross-examination that she did not state before the police that about ten months ago, she along with X and Jesmine went to Pharid's camp to sell one tin and then she saw the accused in the camp and the accused took X inside and asked them to go to the nearby shop and told them that he would send some money to them through X and after some time, X returned crying and informed them that the accused urinated on her frock. She vehemently denied the suggestion that no incident as described by her took place.
- 14) It is pertinent to mention at this stage that PW-1, 6 & 7 were child witnesses and they were below ten years and so oath was not administered when evidence as recorded in the Court. The evidences of PW-1, 6 & 7 are corroborative. PW-1 was cross-examination, but her evidence could not be contradicted on the cross-examination of the IO. The IO was not questioned regarding any omission by PW-1 to state before him under Section 161 CrPC that the accused did not remove her panty or attempted to commit rape on her or urinated on her body. IO was also not cross-examined about the victim's failure to mention in her statement that the accused made her to lie on a sack filled with bottles inside his room located at the dump yard.
- 15) Although the witnesses PW-1, 6 & 7 were cross-examined regarding their omissions to mention before the IO that the accused urinated on the victim

- PW-1, yet they were not affirmed by cross-examination of the IO. This implies that the evidence of PW-1, 6 & 7 remained unrebutted.
- 16) It is apt to mention at this stage that the witnesses were below ten years of age and several querries were made to the witnesses by this Court. After assessing their answers, it was opined that the minor witnesses could give rational answers. The evidence was thereafter recorded without administering oath.
- 17) It is also apt to mention that it has been formulated in Section 29 of the Act that where an accused is prosecuted for committing or abetting for attempting to commit any offence under Sections 3, 5, 7 & 9 of this Act, the Special Court shall presume that such person has committed the offence, unless the contrary is proved. It is held that the contrary could not be proved in this case.
- 18) Further, it has been envisaged under Section 30 of the Act regarding the culpable mental stage. According to Section 30 of the Act, (1) any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution, (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist-beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

*Explanation.-* In this Section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."

19) In the instant case, the evidence of the eye-witnesses clearly depicts that the accused took the victim to his room in the dump yard. The other witnesses PW-6 & 7 were sent away by the accused. The accused promised to send money to the other witnesses through the victim. Thereafter he took the victim to his room. The evidence of PW-6 clearly depicts that the accused intentionally sent away the other two girls who went together with the victim to the dump yard. Thereafter, he took the victim inside the room and urinated on her frock. The victim is too young to clearly describe the act of the

accused. The act of the accused is indeed an act of sexual harassment, but as the victim is too young, eight years of age, she could not properly describe the actual act of the accused. Mens rea is evident, the accused sent away the other two girls ad took the victim to his room and removed her panty and so on and so forth. This evidence has been proved beyond a reasonable doubt. The defence ingeniously avoided to cross-examine the IO regarding the omission of the statement of PW-1, 6 & 7. There is no contradiction and there is clinching evidence that the accused is complicit.

- 20) Another plea taken by the defence was a very weak plea and the plea remained unsubstantiated. The witness PW-1 admitted in her cross-examination that a case of theft is pending against her for stealing scrap materials for the dump yard. The witnesses PW-3 & 4 have testified that the accused slapped the victim, because she committed theft of scrap articles from the dump yard. No case of theft was exhibited as a defence. The accused stated through his answers under Section 313 CrPC that the victim committed theft of scrap materials from the dump yard and when he caught her, a false case was slammed against him. While assessing the evidence and the statement of the accused, it is clear that a victim of eight years of age will not fancy to steal articles like scrap. Moreover, the plea of the accused appears to be a very weak plea and could not rebut the evidence against him. He failed to prove any false case against him. Moreover, the evidence of other witnesses also remained uncontroverted.
- 21) Smti. Sahida Begum testified as PW-2 that she came to know the accused persons after the incident. The accused used to work in the scrap camp of Pharid. The incident took place about three months ago (from 08-11-16). On the day of the incident, she went to Assam Medical College & Hospital, Dibrugarh along with her younger daughter and her daughter 'X' who was eight years old was in the house. At that time, her father-in-law was sleeping inside the house. She returned home at about 1:00 pm and found her elder daughter X was crying. On being asked, X told her that she went to sell broken tins along with other four girls to the scrap shop and the accused took her inside a room and chased out the other four girls and laid her down on a gunny bag and removed her panty and urinated atop her. When her daughter started shouting, the accused person chased her out. She felt the panty worn by her daughter and noticed that the panty was wet. Then she informed her

elder sister's husband Amir Ali about the incident, who in turn informed the police over phone. After half an hour, the police arrived and arrested the accused as identified by her daughter in the iron scrap shop. Then she narrated the incident to a person near the police station who wrote the FIR and she affixed her signature and lodged it with the police at Borbari Outpost. Ext. 2 is the FIR and Ext. 2(1) is her signature. She took her daughter to the outpost. Police recorded her statement and also her daughter's statement. On the same day, her daughter was forwarded to the Assam Medical College & Hospital, Dibrugarh for medical examination. On the next day, her daughter was forwarded for recording her statement.

- 22) In her cross-examination, she testified that Khushi, Jesmine and Sahana went along with her daughter for selling scrap materials. Her statement about the accused urinating upon her daughter remained uncontroverted and unrebutted by the cross-examination of the IO. She denied about any theft of iron scrap materials.
- 23) In my foregoing discussions, it has already been decided that there is no case of theft against the victim alleged by the accused.
- 24) Smti. Sameli Devi testified as PW-3 that the accused person has a dump yard. She did not know the victim. The incident took place about six months ago. On the day of the incident, she heard that two or three minor girls went to the accused person's dump yard and one minor girl was assaulted by the accused for committing theft of materials from the dump.
- 25) Similarly, Md. Foriad Khan also testified as PW-4 that the accused is his employee. On the day of the incident, he was sitting near the scrap dumping ground and at that time, the victim X and her friends removed some articles from the dump yard. At that time, the accused slapped the victim who was in tears and ran away. After a while, the police came and took away the accused.
- 26) This evidence of PW-3 & 4 is contrary to the testimony of PW-1, 6 & 7. Moreover, the allegation of theft is only against the victim and not other witnesses. The evidence of theft of iron scrap is defective and discrepant and does not at all implicate that the victim committed theft of scrap materials.
- 27) The evidence of the MO could not be taken into account, because the victim did not complain of sexual assault. She testified that the accused urinated upon her.

- 28) Dr. Nibedita Shyam testified as PW-5 that according to her opinion, there was no evidence of sexual intercourse or injury. Ext. 3 is the Medico-legal Report and Ext. 3(1) upto Ext. 3(3) are her signatures. The age of the victim was above eight years and below ten years.
- 29) The IO testified as PW-9 that on 14-07-16, he was posted at Borbari Outpost as Second Officer. On that day, at around 12:00 pm, an unknown person informed over phone that a person Akhtar tried to molest a small girl who went to sell an empty mustard oil can at Chandmari Ghat Dump. A GDE was registered being GDE No. 354 dtd. 14-07-16 and he was endorsed to investigate the case. He certified the extract copy of the GDE to be true copy. He prepared the Sketch-Map. Ext. 5 is the Sketch-Map and Ext. 5(1) is his signature. Sahida Begum lodged a written FIR with the police at Borbari Outpost. Ext. 2 is the FIR which was registered as Dibrugarh PS Case No. 543/16 and he was endorsed to continue the investigation. Ext. 2(2) is the signature of the Officer-in-charge Chandra Kanta Boro which is familiar to him. He seized one mustard oil can covered by Bitumen. Ext. 2 is the Seizure-List and Ext. 6(1) is his signature. He brought the accused and the victim to the outpost and recorded the statement of the victim. He forwarded the victim to the Court for recording her statement under Section 164 CrPC and he also forwarded her to the medical officer. He forwarded the accused to judicial custody. On finding prima facie materials, he submitted Charge-Sheet against the accused under Sections 354-A IPC read with Section 8 of the POCSO Act. Ext. 7 is the Charge-Sheet and Ext. 7(1) is his signature. Material Ext. 1 is the oil can of volume 1 feet x 1 feet x 1.5 feet and the colour is black.
- 30) Learned defence counsel cross-examined the IO in extenso. Through the cross-examination of the IO, the learned defence counsel projected that the victim's frock was not forwarded for FSL examination. Moreover, the seized oil can was not produced and shown to the learned CJM or the learned trial Court. The IO was cross-examined at length regarding the Sketch-Map and the place of occurrence.
- 31) Recapitulating the entire evidence, it is thereby held that the evidence of witnesses PW-1, 6 & 7 clearly depicts that the accused is complicit. Their evidence could not be contradicted by the cross-examination of the IO. The evidence of the complainant could not be contradicted.

- 32) It is true that the Sketch-Map Ext. 5 does not clearly point out the place of occurrence, but it is clear from the evidence that the place of occurrence is a dump yard belonging to Pharid at Chandmarighat. Chandmarighat has been clearly depicted in the Sketch-Map Ext. 5 and Pharid's house has also been depicted as Ext. 'A' in the Sketch-Map. The place of occurrence has been described accurately by the witnesses PW-1, 2, 3, 4, 6 & 7 as the dump yard of Pharid. The victim and her friends accurately described that the accused person's room in the dump yard belonging to Pharid is the place of occurrence.
- 33) In view of my foregoing discussions, it is thereby held that unrebutted evidence of the complainant and the victim and the witnesses PW-6 & 7 clearly depicts that the accused is complicit. The victim described that the accused urinated on her. The accused is charged under Section 8 of the POCSO Act. The description of sexual assault is covered by Section 7 of the POCSO Act which envisaged that-
  - 7. Sexual assault: Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.
- 34) It may be safely held that the accused did not commit sexual assault on the victim. Although not charged under Section 12 of the Act, the accused is held guilty of Section 12 of the POCSO Act, 2012 by virtue of Section 222(2) CrPC. The offence committed by the accused falls under the description of Section 11(i) of the POCSO Act which envisages that if an accused-
  - "(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child." commits sexual harassment.
- 35) In the instant case, the act of the accused falls within the purview of "or such gesture or object or part of the body shall be seen by the child...". In my foregoing discussions, the act of the accused was elaborately discussed and it is as clear as crystal that the accused committed sexual

harassment. Moreover, the accused was also charged under Section 354 IPC. It has been consistently held by Hon'be the Supreme Court of India that the modesty of a minor girl can also be violated. Although the victim is a minor, yet the accused is held guilty of the offence under Section 354 IPC for using criminal force and outraging the modesty of the victim. Both the points taken up for decision are hereby decided.

- 36) I have heard the accused on the question of sentence. The accused has pleaded innocence and has pleaded to be dealt with leniently.
- 37) Considering the facts and circumstances of the case and the age and antecedent of the accused and the also considering the age of the victim, it is thereby held that the accused deserves imprisonment. A case of this nature deserves stringent punishment, because the victim of an impressionable age and the accused who is an adult, ought to have taken into consideration, the impact of his act on the psyche of the victim. He has indeed disturbed her emotionally and he deserves imprisonment.

#### **SENTENCE**:

- 38) The accused Akhtar Mahammed is convicted under Section 12 of the POCSO Act and is sentenced to undergo Rigorous Imprisonment (RI in short) for 1 (one) year and a fine of Rs. 500/- (Rupees Five Hundred) only and in default of payment of fine, to undergo Rigorous Imprisonment for 2 (two) months. He is also convicted under Section 354 IPC to RI for 1 (one) year and also to pay a fine of Rs. 500/- (Rupees Five Hundred) only and in default of payment of find, to undergo RI for 2 (two) months. Both the sentences will run concurrently. The period of detention already undergone by the accused during investigation, and trial is set off with his custodial sentence.
- 39) Furnish free copies of judgment to the accused and to the District Magistrate.
- 40) The victim who has undergone such an ordeal deserves compensation. This case is thereby recommended for compensation to the District Legal Services Authority, Dibrugarh to decide the quantum of compensation to be awarded to the victim under the Victim's Compensation Scheme, 2012.

  Judgment is signed, sealed and delivered in the open Court on the 10<sup>th</sup> day of October, 2017.

# **APPENDIX**

# List of witnesses:

- 1. PW-1 The victim X;
- 2. PW-2 Smti. Sahida Begum;
- 3. PW-3 Smti. Sameli Devi;
- 4. PW-4 Md. Foriad Khan;
- 5. PW-5 Dr. Nibedita Shyam;
- 6. PW-6 Smti. Jesmin Khatoon;
- 7. PW-7 Smti. Khushi Gowalla;
- 8. PW-8 Smti. Rehena Begum; and
- 9. PW-9 SI Dilip Kumar Chutia.

# List of Exhibits:

- 1. Ext. 1 Statement of the victim 'X' recorded under Section 164 CrPC;
- 2. Ext. 2 Ejahar;
- 3. Ext. 3 Medico-legal Report;
- 4. Ext. 4 XXXX;
- 5. Ext. 5 Sketch-Map;
- 6. Ext. 6 Seizure-List; and
- 7. Ext. 7 Charge-Sheet.

List of witnesses and Exhibits for defence- None

Sessions Judge, Dibrugarh

*Transcribed and typed by:*-Bhaskar Jyoti Bora, Steno.