IN THE COURT OF THE SPECIAL JUDGE AT JORHAT

Present:- Sri Vinod Kumar Chandak, M.A., M.Com, LL.B., AJS Special Judge, Jorhat

JUDGMENT IN SPECIAL CASE NO. 39 OF 2017 (G.R. Case No. 1470 of 2017) Jorhat P.S. Case No. 1060 of 2017

Transmitting Magistrate:-

Smt. Rani Boro, Chief Judicial Magistrate, Jorhat District

State of Assam

-Versus-

Sri Narayan Das, Son of Late Kanram Das, Resident of Macharhat Garhchuk, P.S. Kolai Gaon, District-Udalguri.

.... Accused

APPEARANCES:

For the State : Sri Muhidhar Dutta, Learned Special P.P., Jorhat

For the Accused: Sri Bhabani Prasad Baruah,

Learned State Defence Advocate, Jorhat

CHARGE FRAMED UNDER SECTION 376 [1] OF INDIAN PENAL CODE READ WITH SECTION 4 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

Date of Charge : 21-07-2017

Date of prosecution evidence: 16-08-2017; 20-11-2017 & 05-10-2018

Statement of Accused

Recorded on : 17-12-2018

Date of Argument : 19-01-2019

Date of Conviction : 25-01-2019

Date of Sentence Hearing & Judgment: 28-01-2019

JUDGMENT

1). The prosecution story, in brief, is that Jorhat P.S. Case No. 1060/2017 under Section 4 of The Protection of Children From Sexual Offences Act, 2012 was registered on the basis of a F.I.R. lodged by Sri Adhir Nama Das, father of the victim girl [hereinafter referred to as 'X'].

In the aforesaid **F.I.R.** dated 22/05/2017 **[Exhibit-2]** the informant Sri Adhir Nama Das [PW-3] who is the father of the victim girl alleged, *inter-alia*, that on 10/05/2017, accused arrived at the house of the informant in his absence as well as absence of his wife and thereafter committed rape upon her minor daughter, aged about ten years, who was living alone at that time. Further, the informant stated that the accused threatened his minor daughter with dire consequence. It is further alleged by the informant that due to the said assault caused by the accused upon his minor daughter, she could not urinate. When he and his wife asked his minor daughter about the same, to their query, his minor daughter divulged that on the date of incident the accused came and raped her. Thereafter, the accused threatened her with dire consequence and told her not to divulge the fact to anyone.

On receipt of the aforesaid F.I.R. by the Officer-in-charge, Jorhat P.S., the same was registered vide Jorhat P.S. Case No. 1060/2017 under Section 4 of The Protection of Children From Sexual Offences Act, 2012.

During the course of investigation, the victim girl was medically examined by the doctor, her statement under Section 164 of Cr.P.C. was recorded. Police, on completion of investigation, filed charge-sheet in the case vide Exhibit-6 against the above named accused Sri Narayan Das u/S. 4 of The Protection of Children From Sexual Offences Act, 2012, vide Charge-sheet No. 416/2017 dated 30-06-2017.

- **2).** The learned Chief Judicial Magistrate, Jorhat, transmitted the case to this Court for trial. Copy was furnished to accused in due course.
- **3).** Upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of the accused and the prosecution in this behalf, I found ground for presuming that the accused has

committed offences under Section 376 [1] of IPC read with Section 4 of The Protection of Children From Sexual Offences Act, 2012/511 of IPC. Accordingly, the charges were framed by me. The charges were read over and explained to the accused, to which, the accused pleaded not guilty and claimed to be tried.

4). During the course of trial, **05** [five] witnesses including the victim, her parent, Medical Officer and the I.O. were examined on behalf of the prosecution to prove the charge u/S. 376 [1] of IPC read with Section 4 of The Protection of Children From Sexual Offences Act, 2012 against the accused.

On completion of prosecution evidence, statement of above named accused was recorded u/S. 313 of Cr.P.C. The accused stated that he does not know anything about the incident. He has got three children and further stated that he did not do any bad work with the victim, as alleged by prosecution witnesses. The accused pleaded innocence. No witness was adduced by the accused in defence.

- I have heard Sri Muhidhar Dutta, the learned Special Public Prosecutor for the State as well as Sri Bhabani Prasad Baruah, learned Counsel for the accused who is facing trial for commission of offence u/S. 376 [1] of IPC read with Section 4 of The Protection of Children From Sexual Offences Act, 2012.
- **6).** Now the points for determination before this Court are as follows:-
- 1) Whether on 10/05/2017 at about 1.00 P.M. (before filing the ejahar by the informant Sri Adhir Nama Das, father of the victim girl, on 22/05/2017), the accused named-above committed rape on the victim girl and thereby committed an offence punishable under Section 376 [1] of IPC?
- 2) Whether on the date of occurrence the accused named above committed penetrative sexual assault upon the victim girl and thereby committed an offence punishable under Section 4 of The Protection of Children From Sexual Offences Act, 2012?

DISCUSSION, DECISIONS AND REASONS THEREOF:

7). To decide the above points we will have to examine, analyze and appreciate the evidence of the witnesses alongwith the documents.

PW-1 is the victim girl, who during her deposition in Court stated that she knows the accused from before and address the later as 'Das Khura'. On the relevant day, she alongwith her mother went to a nearby house where a person took a new house and he was throwing a party for the said purpose. She told her mother that she wanted to return back home to relieve herself. Accordingly, she returned back home and wanted to change her dress. At that time, the accused arrived at her house and caught her from behind, pressed her towards the room, undressed her and made her lie on the bed. Thereafter, the later, did bad work with her. The accused also looked at her private part. It is further stated by the victim that the accused told her that his 'Nati', i.e., grandchildren who is of her age does not cry. Further version of the victim is that the accused also threatened her that if she tells someone about the incident then he will put child in her stomach. The accused also kissed her vagina. The victim stated that the accused tried to insert his penis into her vagina, for which, she felt pain. She somehow released from accused's clutches and thereafter fled away to her mother. She narrated the incident before her mother after one week of incident as she felt irritation in her private part. Her mother went to the house of accused. Her father lodged ejahar before police. Police recorded her statement, took her before a doctor for medico legal check-up and then she was produced before the Magistrate for recording statement under Section 164 Cr.P.C. which she exhibited as Exhibit-1 and her signatures thereon as Exhibit-1 [1] to Exhibit-1 [4].

During cross-examination, she stated that there is field in the eastern side of her house and the owner used to stay towards the western side. Accused used to visit their house sometime before the incident. The victim further stated that as accused threatened her to put child in her stomach so she did not narrate the incident before her mother.

8). PW-2 is Smt. Pinki Nama Das who is the mother of the victim girl. This witness during her testimony stated almost alike as that of her daughter [PW-1]. It is her further version that after two days of incident her daughter divulged that she does not want to go to school as her private part was itching. But she directed her daughter to go to school. Then she found that her daughter had used her ointment which she used after her operation. Then she looked at her private part and noticed injury. On her repeated request her daughter divulged before her that the accused kissed her private part. She then went to the residence of accused where the wife of accused requested her not to lodge case before police. The accused also confessed his guilt before her and assured that he will not repeat such offence in future. Later on, her husband lodged ejahar before police.

During cross-examination by defence side, this witness stated that she came to know about the incident after 8/9 days of incident. The victim used her ointment before she disclosed the incident before her. She denied defence suggestion that she did not state before police that accused did not confess before her and assured that he will not repeat the offence in future.

9). The evidence of **Sri Adhir Nama Das [PW-3]** who is the father of the victim as well as informant of the instant case is in the same line as that of his ejahar. He was informed about the incident by his wife [PW-2]. His wife disclosed to him that his minor daughter used to use her ointment which was given to her after the appendix operation. He then lodged ejahar before police vide Exhibit-2 wherein Exhibit-2 [1] is his signature. It is further version of this witness that he handed over the photocopy of the birth certificate of his daughter before police.

This witness during cross-examination stated that he did not ask the victim about the incident. He lodged ejahar before police as he heard the incident from his wife. He denied defence suggestion that he had previous enmity with the accused and hence he had lodged false case against the accused.

the routine steps taken by him during investigation of the case. The I.O. stated that he recorded statement of the victim, sent the victim before a doctor for medical examination and thereafter she was produced before the court where the learned Magistrate recorded statement of victim as per provision of Section 164 Cr.P.C. It is further version of the I.O. that the accused was brought by the informant at Jorhat P.S. The accused was arrested in connection with the case. Thereafter, he recorded statement of informant and visited the place of occurrence, prepared Sketch Map of the site of occurrence with index vide Exhibit-3 wherein Exhibit-3 [1] is his signature. After collecting medico-legal report of victim he submitted charge-sheet against the accused vide Exhib it-4 wherein Exhibit-4 [1] is his signature.

The I.O. during cross-examination by defence side stated that he went to the place of occurrence on the same day itself. He found houses of four persons near the place of occurrence but he did not record their statement as they were not willing to give evidence in connection with the case.

11). Dr. Ritu Saikia [**PW-5**] who was the then Lady Medical Officer on Duty, Jorhat Medical College & Hospital on 22/05/2017 examined the victim as per police requisition. On examination, she opined that victim was above 10 years and below 12 years; evidence of recent sexual intercourse was not detected on the person of victim; there was no sign of injury and pregnancy on the body of victim. She exhibited her report as Exhibit-5 and her relevant signatures thereon as Exhibit-5 [1] to Exhibit-5 [3].

Defence side cross-examined the doctor. During cross-examination the doctor stated that no injury can be caused due to application of medicine.

12). From the statement of the victim [PW-1] recorded by the learned Magistrate, it is seen that she gave statement before the Magistrate that on earlier occasion also the accused had inserted his penis in her private part and when she cried then the accused threatened her that he will put child in her stomach/womb and thereafter assaulted her.

The victim [PW-1] during her evidence before the court stated that she knows the accused from before and address the later as 'Das Khura'. On the relevant day, she alongwith her mother went to a nearby house where a person took a new house and he was throwing a party for the said purpose. She told her mother that she wanted to return back home to relieve herself. Accordingly, she returned back home and wanted to change her dress. At that time, the accused arrived at her house and caught her from behind, pressed her towards the room, undressed her and made her lie on the bed. Thereafter, the later kissed her vagina. The accused also looked at her private part. It is further stated by the victim that the accused told her that his 'Nati', i.e., grandchildren who is of her age does not cry. Further version of the victim is that the accused also threatened her that if she tells someone about the incident then he will put child in her stomach. The accused also kissed her vagina. The victim stated that the accused tried to insert his penis into her vagina, for which, she felt pain. She somehow released from accused's clutches and thereafter fled away to her mother. She narrated the incident before her mother after one week of incident as she felt irritation in her private part. Her mother went to the house of accused. Her father lodged ejahar before police. Police recorded her statement, took her before a doctor for medico legal check-up and then she was produced before the Magistrate for recording statement under Section 164 Cr.P.C. which she exhibited as Exhibit-1 and her signatures thereon as Exhibit-1 [1] to Exhibit-1 [4].

The victim further stated that as accused threatened her to put child in her stomach so she did not narrate the incident before her mother.

evidence stated that after two days of incident her daughter divulged that she does not want to go to school as her private part was itching. But she directed her daughter to go to school. Then she found that her daughter had used her ointment which she used after her operation. Then she looked at her private part and noticed injury. On her repeated request her daughter divulged before her that the accused kissed her private part. She then went to the residence of accused where the wife of accused requested her not to lodge case before

police. The accused also confessed his guilt before her and assured that he will not repeat such offence in future. Later on, her husband lodged ejahar before police.

During cross-examination by defence side, this witness stated that she came to know about the incident after 8/9 days of incident. The victim used her ointment before she disclosed the incident before her.

- 14). The informant Sri Adhir Nama Das [PW-3] who is the father of victim stated that he was informed about the incident by his wife [PW-2]. His wife disclosed to him that his minor daughter used to use her ointment which was given to her after the appendix operation. He then lodged ejahar before police vide Exhibit-2 wherein Exhibit-2 [1] is his signature.
- **15).** It is a well settled law that the conviction on the sole evidence of a child witness is permissible, if such witness is found competent to testify and the court, after careful scrutiny of its evidence.

In the case of *Datttu Ramrao Sakhare-versus-State of Maharashtra*, reported in [1997] 5 SCC 341, the Hon'ble Apex Court has held that — "A child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. In other words, even in the absence of oath, the evidence of a child witness can be considered under Section 118 of Indian Evidence Act, provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstance of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored".

16). In another case, i.e., *Pancchi –versus- State of Uttar Pradesh,*AIR 1998 SC 2726, the Hon'ble Apex Court has held that – "It is not the law that if a witness is a child, his/her evidence shall be rejected, even if it

is found reliable, The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and this child witness is easy prey to tutoring".

- 17). From the evidence of doctor [PW-5] it is seen that she opined that victim was above 10 years and below 12 years; evidence of recent sexual intercourse was not detected on the person of victim; there was no sign of injury and pregnancy on the body of victim. She exhibited her report as Exhibit-5 and her relevant signatures thereon as Exhibit-5 [1] to Exhibit-5 [3].
- 18). In this case, victim was examined by the Medical Officer on 21/05/2017, whereas the alleged incident took place on "Buddha Purnima", i.e., on 10/05/2017 after twelve days of incident. Hence there cannot be any injury as accused only allegedly kissed and bitten her vagina.
- **19).** The accused Narayan Das during his statement under Section 313 Cr.P.C. stated that he does not know anything about the incident. He has got three daughters. Lastly, the accused stated that he did not do any bad work with the victim, as alleged by the victim.

In the light of the evidence of the victim [PW-1] as well as her mother [PW-2], this court can presume under Section 29 of The Prevention of Children From Sexual Offences Act, 2012 that it was the accused, who had committed penetrative sexual assault upon the victim. It was for the accused to rebut the presumption that he had not committed the offence by proving to the contrary. No evidence was led by the accused in his defence to prove his innocence. On the contrary, the defence put forwarded by the accused in this case is not consistent and therefore, same is required to be disbelieved.

20). In view of the above discussion, I am of the considered view that prosecution has considerably been able to prove the case against accused Sri Narayan Das under Section 8 of The Protection of Children From Sexual Offences Act, 2012. Hence the accused is convicted there under.

However, on scrutinizing the evidence on record it is seen that no case has been made out against accused Narayan Das to warrant his conviction under Section 376 [1] IPC. Prosecution has not been able to make out a case against the accused Narayan Das under the aforesaid section of law beyond reasonable doubt, for which, I am of the opinion that the accused is entitled to acquittal under benefit of doubt which I accordingly do.

Special Judge, Jorhat

DATE: - 28/01/2019

SENTENCE HEARING

- **21).** Accused Sri Narayan Das is heard on the point of sentence. The accused has submitted that he has his wife and three girl children, and there is none to look after them in his absence. He further submitted that if he is sent to jail hajot, then his family will face great financial hardship as he is the sole bread earner of his family. Hence, the accused prayed for leniency.
- **22).** I have heard Sri Bhabani Prasad Baruah, learned State Defence Counsel for the accused as well as Sri Muhidhar Dutta, learned Special Public Prosecutor, Jorhat.

Considering the nature of offence the accused **Sri Narayan Das** is sentenced to undergo **RIGOROUS IMPRISONMENT** FOR **04** [four] years and also to pay a fine of **Rs. 10,000/-** [Rupees Ten Thousand], in-default of payment of fine, to suffer further **RIGOROUS IMPRISONMENT** for **3** [three] months under Section 8 of The Protection of Children From Sexual Offences Act, 2012.

The period of detention already undergone by the accused during investigation and trial shall be set off from the period of imprisonment imposed on him.

The accused is acquitted from the charge under Section 376 [1] of IPC, as said, hereinbefore.

23). Now coming to the aspect of compensation to the victim, who is a minor girl, the Hon'ble Apex Court has time to time observed that subordinate courts trying the offences of sexual assault have the jurisdiction to award the compensation to the victims being an offence against the basic human right and violative of Article 21 of the Indian Constitution.

In the case of **Bodhisattwa Gautam –versus- Subhra Chakraborty, AIR 1996 SC 922,** it has been held by the Hon'ble Apex Court that the jurisdiction to pay compensation has to be treated to be a part of the overall jurisdiction of the courts trying the offences of rape, which is an offence against basic human rights as also the Fundamental Rights of Personal Liberty & Life.

- **24).** Therefore, in order to provide restorative and compensatory justice to the victim, I hereby direct the learned **Secretary, District Legal Services Authority, Jorhat,** to grant adequate compensation to the victim. The said compensation amount shall be used for welfare of the victim.
- **25).** Free copy of the judgment be furnished to the accused immediately. Another copy of this judgment be sent to the learned District Magistrate, Jorhat, as well as to the learned Secretary, D.L.S.A., Jorhat, for information.
- **26).** Given under my hand and seal of this Court on this **28th** day of **January 2019**.

Special Judge, Jorhat

Continued to Page No:-12

ANNEXURES:-

PROSECUTION WITNESSES:-

PW-1	Victim girl.
PW-2	Smt. Pinky Nama Das, mother of the victim.
PW-3	Sri Ajit Nama Das, father of the victim-cum-informant of the case.
PW-4	Sri Uttam Borah, I.O. of the case.
PW-5	Dr. Ritu Saikia who examined the victim girl.

COURT WITNESS:- NIL

EXHIBITS FOR THE PROSECUTION:-

Exhibit-1	Statement of the victim recorded by the Magistrate under Section 164 Cr.P.C.
Exhibit-2	Ejahar
Exhibit-3	Sketch Map of the site of occurrence with index
Exhibit-4	Charge-sheet
Exhibit-5	Medico-legal report of victim

DEFENCE WITNESSES:- NONE

Special Judge, Jorhat.

Typed & transcribed by:

Sri Mrinal Jyoti Bora, (Stenographer Grade-I)