IN THE COURT OF THE SPECIAL JUDGE, BARPETA

Special POCSO Case No. 63/2018 (Arising out of Barpeta P.S. Case No. 353/2017) U/S 4 of POCSO ACT, 2012

PRESENT: Sri Chatra Bhukhan Gogoi

Special Judge, Barpeta.

Charge framed on: - 08.03.2019

State of Assam

- Vs -

Khurshed Ali....Accused person.

Date of Recording Evidence on – 06.06.2019, 27.06.2019, 09.07.2019, 07.07.2019,

11.09.2019.

Date of Hearing Argument on – 11.09.2019.

Date of Delivering the Judgment on – 17.09.2019.

Appearance:

Advocate for the State-----Mrs. P. Das, Ld. Addl. P.P.

Advocate for the Accused-----Mr. Surat Jamal, Ld. Advocate.

JUDGMENT

FACTS OF THE CASE

1. The Fact of the case, in brief, is that on 23.02.2017 one Rina Parbin lodged an FIR in Barpeta police station alleging inter-alia that on 31.12.2016 at about 12:30 pm accused named in the FIR allegedly took his four years old daughter on his lap with a view to loitering around. Sometime back, his daughter returned home weeping and told that accused took her to the house of Nasimuddin and by removing her pant raped her. It is stated that she was not in a position to urinate and for which she was treated with doctor. Immediately after the incident village head's were informed who assured of a settlement but when nothing is forthcoming some delay has been caused in lodging the FIR. Hence the case.

APPEARANCE & CHARGE

- 2. Receiving the information, police registered a case being Barpeta P.S. case No.353/17 u/s 8 of POCSO Act and investigated the case.
- 3. During the course of investigation, I/O visited the place of occurrence, recorded the statements of the witnesses including the victim girl u/s 161 Cr.P.C. Thereafter, victim girl was forwarded to court for recording her statement before Magistrate u/s 164 Cr.P.C. The victim girl was also sent for medical examination. On conclusion of investigation, police finally laid the charge sheet against accused Khurshed Ali u/s 4 of POCSO Act with a view to stand trial.

4. During the course of time, when accused entered his appearance in court, the then Special Judge, Barpeta vide order dated 18.09.2018 took cognizance of the offence and transferred the case record to this court for disposal. After due compliance of section 207 Cr.P.C., this court having heard the learned lawyers appearing for both sides and perusing the materials available on record, having found a prima facie case framed charge u/s 4 of POCSO Act. The substance of the offence on being read over and explained accused person pleaded not guilty and claimed trial.

EVIDENCE

5. During the course of trial, prosecution, however, examined as many as 8 witnesses including the informant, the alleged victim, the medical officer as well as the investigating officer and also exhibited the FIR as Ext.1, signature of informant as Ext.1(1) and 1(2), statement of the victim girl before Magistrate u/s 164 Cr.P.C. as Ext.2 and Ext.2(1) is the signature of the Magistrate, the sketch Map Ext.3 and Ext.3(1) is the signature of I/O, charge sheet Ext.4 and Ext.4(1) is the signature of I/O, Ext.5 is the medical report and Ext.5(1) is the signature of doctor.

EXAMINATION OF ACCUSED U/S 313 Cr.P.C.

6. On conclusion of prosecution evidence, accused was examined u/s 313 Cr.P.C. but he denied the prosecution evidence as totally false and concocted. On being asked accused however, declined to adduce defence evidence. His plea is total denial of the prosecution case.

7. Now point for determination ;-

1. Whether on 31.12.2016 at about 12:30 pm accused committed penetrating sexual assault on the victim girl (X) as alleged ?

8. <u>Discussion, Decision and reasons for such decision</u>:

I have heard the arduous contention of the learned lawyers appearing for both sides.

- 9. It is to be noted that prosecution altogether examined 8 witnesses out of which PW-2 Anowara Begum expressed her total ignorance about the incident. PW-4 Abdul Jolil is declared hostile. The remaining witnesses are informant, the victim, the investigating officer, the medical officer and one court officials who has been examined touching upon the statement recorded by Magistrate u/s 164 Cr.P.C.
- 10. The learned Addl. P.P. appearing for the state arduously contended that though some delay has been caused in filing the FIR. But the evidence of PW-1 the mother and the victim PW-3 inspires confidence. It is contended that the offence committed by accused is heinous in nature and such offence is usually committed behind the back of people eye. Therefore, it is difficult to find direct evidence in the nature of this case. The court has to rely upon the evidence of the victim corroborated by other prosecution witnesses. In the present case, the victim though minor narrated the story in court in a rational and trustworthy manner and therefore reliance can be placed on her evidence supported by evidence of other witnesses. Though medical officer did not find any injury on her

private part this does not negate the prosecution case as doctor examined the victim relatively after a long gape from the date of incident. Therefore, having not found injury mark on her private part do not vitiate the truthfulness of the prosecution case. Therefore, the learned Addl. P.P. submitted that this is a case wherein accused can be punished adequately to send a signal to others not to commit such heinous crime against the minors in future.

- 11. On the other hand, the learned counsel appearing for the accused vehemently contended that in the present case, prosecution miserably failed to substantiate the charge u/s 4 of POCSO Act against accused for sustaining conviction. According to learned defence counsel prosecution case is totally imaginary and concocted. The case has been filed only to harass the accused person for existing land dispute between the informant and the wife of accused who are sisters. According to the learned counsel the informant used the victim girl as a sword to satisfy her personal grudge. The victim girl is a minor and she has been tutored by her parents. Therefore, no reliance can be placed on her evidence. Informant supported her version blindly only with a view to teach a lesson to the accused. According to learned counsel, PW-4 Abdul Jalil denied the prosecution case for which he has been declared hostile by prosecution. It is submitted that on reading the statement of PW-4 Abdul Jolil recorded by police u/s 161 Cr.P.C., it appears that his evidence consisting of two parts in the first part he stated that informant told him that on the day of incident at about 12:30 pm accused committed rape on her minor daughter in the house of Nasimuddin. In the second part he stated that the girl has been moving freely and he has been asking the informant to examine her by doctor but they did not do so. Moreover, the house of accused is situated at a distance of 1km so he do not believe the accused committed the offence of rape on the minor girl. Therefore, the learned defence counsel stated that Abdul Jolil rightly stated in his evidence in court that he do not know about the incident. He also stated in his cross examination that there was a dispute between the wife of accused and informant who are sisters. The learned counsel for the accused further contended that the victim girl in her evidence stated that accused took her to the house of her aunt Anowara at day time by holding his hand and none were present in the house. Then accused by removing her pant, sexually assaulted her. As a result, she suffered injury in her vagina. She shouted out of pain then accused offered her palm. She then came home weeping and told her mother about the incident. In her cross examination also she stated that there was quarrel between her mother and wife of accused.
- 12. PW-1 Rina Parbin is the informant cum mother of the victim girl. She deposed that on 31.12.2016 her four years daughter was taken by accused on his lap to the house of Nazimuddin and taking advantage of absence of family members committed penetrating sexual assault on her for which her daughter suffers swelling and reddish injury on her private part. The learned counsel submitted that the evidence of victim and PW-1 the mother cannot be relied on in the absence of any corroboration by medical evidence. It is submitted that the evidence of M/O doctor Mamata Devi (PW-8) disclosed that on examination she find no recent sexual intercourse or violence mark or any foreign particles like hair, blood, semen etc. Hymen was also found intact. Therefore, the medical evidence totally negated the prosecution case.

The evidence of other prosecution witnesses are also hearsay in nature so no reliance can be placed on their evidence.

- 13. Having heard the arduous argument of the learned lawyers appearing for both sides this court carefully scanned the entire prosecution evidence available on record and on close scrutiny found force in the contention of the learned counsel appearing for the accused person.
- 14. At the first instance, it is found that the FIR (Ext.1) was lodged only on 23.02.2017 but the alleged incident occurred on 31.12.2016. Therefore, the FIR has been lodged after 54 days of the alleged incident. Though there is an explanation in the FIR that delay has been caused in lodging the FIR in awaiting for a settlement from the society but in her evidence informant nowhere stated before whom she lodged the complaint in the village and where the meeting was held and who were the persons present in the said village meeting. None of such witnesses have been examined by prosecution to show that there was any village meeting held regarding the matter immediately after the incident. Interestingly, PW-2 Anowara Begum expressed her total ignorance about the incident. PW-4 Abdul Jolil also declared hostile. The evidence of another witness Roizuddin (PW-5) is also hearsay in nature he heard about the incident abut 1 & ½ months back though he is the next door neighbour of the informant. He in his cross examination deposed that there was a land dispute between the informant and Rina Parbin, wife of accused for which a meeting was called but no settlement has been arrived at. He also stated that Rina Parbin filed a false case against accused for existing land dispute.
- 15. On careful reading of the evidence of doctor it transpires that there is force in the contention of the learned defence counsel as the doctor did not find any injury mark on the private part of the victim girl. Therefore, the evidence of doctor negated the version of the informant as well as the alleged victim. The doctor also deposed that the hymen of the victim was intact contrary to the evidence of alleged victim, and her mother, that she has been subjected to penetrating sexual assault by accused. Had there been any truth in the evidence of PW-1 and the victim girl, the hymen of the victim girl might have torn but it was intact as per evidence of doctor. Therefore, the evidence of PW-1 and PW-2 appears to be exaggerated and concocted. The independent witnesses namely-PW-2, PW-4 and PW-5 completely negated the prosecution case. In her statement before Magistrate u/s 164 Cr.P.C. (Ext.2) the victim girl stated that she has been taken by accused in the pretext of outing and then by pulling his lungi caused her pain. He also put her mouth shut as a result she felt pain while urinating. She was offered palm by accused but she has not stated where accused did the said acts. On the day of deposing her statement she was minor four years old. So, it is possible that she could be tutored to depose falsely against accused. In her evidence in court she improved her evidence by this time, she become six years old and developed more understanding but to sustain conviction of accused for the offence of a heinous crime court of law must not be swayed by the mere evidence of the alleged victim without corroboration from other prosecution witnesses.
- 16. In the present case, as discussed above, except the mother and victim dou there is no other prosecution witnesses who support the version of the victim even the doctor PW-8 negated the alleged penetrating sexual assault on the victim girl. Therefore, on careful consideration this court

comes to unerring conclusion that the prosecution failed to substantiate the charge with credible and

trustworthy evidence.

17. In Babu Singh Vs- State of Punjab 1964(1) Cri.LJ 566(SC) the Hon'ble Supreme Court has

observed that in a criminal trial the presumption of innocence is a principle of cardinal importance so the guilt of the accused must in every case be proved beyond reasonable doubt. Probabilities,

however strong or suspicion however grave can never take the place of proof.

18. In another case reported in AIR 1957 (SC) 637 (Sarwan Singh Ratan Sing Vs- State of

Punjab it was observed that there may be an element of truth in the prosecution story against accused

considered as a whole and the prosecution story against accused "may be true", but between "may

be true" and "must be true" there is inevitably a long distance to travel and whole of the distance

must be covered, by the prosecution by legal, reliable and unimpeachable evidence before an

accused can be convicted.

19. In the present case, as discussed above threadbare, the prosecution evidence do not lend

confidence in the mind of this court that prosecution has been able to establish the case against

accused beyond all reasonable doubt. There is no evidence of independent witnesses supporting the

prosecution version. The medical evidence also negated the prosecution case. The evidence of I/O

also formal in nature. His evidence is of no help to the prosecution case. Therefore, considering the

entire prosecution case as a whole, this court has come to a definite finding that the prosecution has

miserably failed to bring home the guilt of accused u/s 4 of POCSO Act for sustaining conviction.

20. In the result, accused Khurshed Ali is acquitted from the charge U/S 4 of POCSO Act

forthwith due to insufficient evidence and set him at liberty forthwith.

21. The terms of bail bond of accused person is extended for a period of 6 (six) months from

to-day as provided u/s 437(A) Cr.P.C.

22. Let a copy of the judgment be sent to the learned District Magistrate, Barpeta for his

information as provided in section 365 Cr.P.C.

23. Let the case record be consigned to record room after completing the formalities.

24. Given under my hand and seal of this Court on this 17th day of September, 2019, at Barpeta.

Dictated & Corrected my me

Sd/-

(Sri C. B. Gogoi)

Special Judge, Barpeta.

Sd/-(Sri C. B. Gogoi) Special Judge, Barpeta.

APPENDIX

- 1. The prosecution has examined the following 8 nos. of witnesses:-
 - PW-1 = Rina Parbin,, the informant.
 - PW-2 = Anowara Begum.
 - PW-3 = the victim girl (X).
 - PW-4 = Abdul Jolil.
 - PW-5 = Roizuddin.
 - PW-6 = Sri Utpal Kalita, Bench Asstt. of JMFC, Barpeta.
 - PW-7 = Mantu Ch. Das, I/O.
 - PW-8 = Dr. Mamata Devi, M/O.
- 2. The prosecution exhibited only one document:
 - Ext.1 = is the ejahar.
 - Ext.1(1) & 1(2) = are the signature of informant, Rina Parbin.
 - Ext.2 = is the statement of victim u/s 164 Cr.P.C..
 - Ext.2(1) = is the signatures of Magistrate.
 - Ext.3= is the sketch map.
 - Ext.3(1) = is the signatures of I/O.
 - Ext.4= is the charge sheet.
 - Ext.4(1)= is the signature of I/O.
 - Ext.5= is the medical report.
 - Ext.5(1)- is the signature of M/O.

Sd/-(Sri C. B. Gogoi) Special Judge, Barpeta.