IN THE COURT OF THE SPECIAL JUDGE (POCSO): KAMRUP(M), AT GUWAHATI

SESSIONS CASE NO.338/2016

(Under Section u/s 354 of IPC R/W Section 10 of the POCSO Act)

Present: S.P. Moitra,

Special Judge

Kamrup(M), Guwahati

State of Assam

-Vs —

Md. Fazal Ali

.....Accused Person

Appearance for the Parties:

Advocate for the State : Deepa Bujarbaruah, Learned Special Public

Prosecutor

Advocate for the accused : Mohammad Rejam, Bhanita Deka

Learned Defence Counsels

Date of recording evidence: 18.09.2017, 23.11.2017, 19.01.2018,

26.04.2018

Date of Argument : 13.06.2018

Date of Judgment : 27.06.2018

<u>JUDGMENT</u>

- 1. Brief facts of the case of the prosecution, as emanated from the written FIR (Ext.3), are that the informant, along with her two minor daughters resides at Hatigaon, Guwahati. It is alleged that since 23.03.2011, the accused person named above was posted at her residence with a view to look after the security of self and her two minor daughters as her husband was busy on duty at Karbi Anglong. It is alleged that on 06.01.2014, at about 3:20 pm, the informant, leaving her minor elder daughter aged about 12 years at home, went out for some personal work. On the next day, at about 2:30 pm when the informant happened to return to her house, her minor daughter complained that the accused person had attempted to molest her by holding her hand forcibly, but due to restrain put up by her daughter and bravely telling the accused person that she would complain about him before her father about the incident, the accused person quickly left the place threatening her minor daughter that he would commit suicide if her daughter would tell about his attempt of molestation to her father or anyone. It is alleged further that on 07.01.2014 at about 7 pm, the informant dared to call the accused person and asked him about the matter in presence of other persons and also informed the matter to her husband at Unit Hgr, Siloni, Karbi Anglong over phone. It is alleged that the informant instructed the accused person to leave the house and to report at his Unit Hqr. at Siloni.
- 2. On the basis of the said FIR, Hatigaon P.S Case No.38/14 was registered u/s 354/506 of the IPC r/w Section 10 of the POCSO Act, 2012 and was taken up for investigation. During investigation of the case, the statement of the victim was recorded u/s 164 of the Cr.P.C. Medical examination was refused by the victim. After completion of investigation of the case, the I/O submitted charge sheet against accused Md. Fazal Ali u/s 354/506 of the IPC r/w Section 10 of the POCSO Act, 2012.

- 3. The accused person appeared before the Court and prayed for allowing him to release on bail. Accordingly, the accused person was allowed to go on bail. On consideration of charge, charge u/s 354 of the IPC R/w Section 10 of the POCSO Act, 2012 was framed against the accused person. The charge was read over and explained to the accused person to which he pleaded not guilty and stood to face the trial.
- **4.** In course of trial, the prosecution examined, as many as, 6 witnesses on its behalf and also exhibited 6 documents. Defence plea was of complete denial of any guilt. Statement of the accused person was recorded u/s 313 of the Cr.P.C. Defence examined one witness on its behalf.
- **5.** I heard arguments advanced by the Ld. Counsel for the parties.

6. <u>Points for determination</u>

- i. Whether on 06.01.2014, at about 5:30 pm, at Sankar Ajan Path, Hatigaon, accused Md. Fazal Ali assaulted the minor daughter of the informant with an intention to outrage her modesty?
- ii. Whether on the same date, time and place, accused Md. Fazal Ali committed aggravated sexual assault on the minor daughter of the informant, then aged about 12 years?

Decision and Reasons thereof

I have gone carefully through the entire evidence on record and the 7. materials placed before me. PW.4 Alfreza Rahman is the informant of the case and mother of the victim. She testified that victim (name withheld) is her daughter and at the time of occurrence she was aged about 12 years. She added that her daughter was a student of class 6. Her testimony further reveals that accused person was in 23rd IR battalion, then camped at Siloni, Karbi Anglong and her husband was the Commandant of that battalion. She added that accused Fazal Ali was of the rank of Havildar and he was kept in their house, as security quard as her husband used to stay in Karbi Anglong. She also added that accused was in their house for about 2 years or more. The witness further reveals that the occurrence took place on 06.01.2014 and on that day, she went out at about 3:30 p.m. for the purpose of marketing with her driver and came back to the house at about 5:30 p.m. She added that her daughter was alone in the house and accused Fazal Ali was at the ground floor. Her testimony further reveals that when she came back, she saw that her daughter was inside the house, after locking the door from inside and she asked her daughter whether her teacher had not come and in reply her daughter told that the teacher did not come. She added that her daughter was looking a little depressed, but she did not tell her anything. The witness further testified that after sometimes, her daughter told her that she had intended to talk to her teacher and for that purpose she had asked accused Fazal Ali to give her the phone. She added that her daughter also told her that accused Fazal Ali came at the upstairs and first clutched her hand and thereafter also hugged her and kissed her. The witness further testified that her daughter also told her that she pushed accused Fazal Ali away and also threatened him that she would report it to her father and at that time Fazal Ali told her that he would commit suicide. She further testified that hearing the same, she fell scared and informed her husband over phone and on the next day, she called Fazal Ali and asked him why he had done so to her daughter. She added that in reply, the accused told her that if she would intend to do anything, she could file a case against him. She further testified that thereafter, on that day her husband through Reserve

Officer informed the accused to go back to Siloni and to join the battalion, but the accused did not go back. She added that Reserve Officer also tried to contact the accused through Marigaon P.S as his house is situated under Morigaon P.S, but he could not be contacted. She added that after waiting for long to contact the accused, they decided to file a case and as such there was delay in filing of the case. She proved Ext.3 as her F.I.R and Ext.3(1) as her signature. She also proved Ext.4 as the printed form of F.I.R and Ext.4(1) as her signature. Her testimony further reveals that after filing of the case her daughter was sent for medical examination, but hearing the nature of examination she refused to allow her to be examined. She proved Ext.1 as the medical report and Ext.1(2) as her signature. She added that during investigation of the case, police also got the statement of her daughter recorded before a Magistrate and police also seized the original birth certificate of her daughter. She proved Ext.5 as the seizure list. Ext.5(1) as her signature.

8. During cross examination, the witness stated that at that time in their house, there were 4/5 persons – one driver, one cook and two security guards. She added that Hiswanath was doing all the works like marketing etc and Diganta was the driver. She also stated that Iswar Prasad was the cook and Mithinga Buglary and Fazal Ali were the security guards. She further stated Ajay Basfor was the sweeper, but she could not remember whether he was there at that time or not. The witness further stated that on that very night, the incident was reported to her. She admitted that previous to this incident, the accused did not do any other incident with them. She further stated that on that night, she reported the incident to her husband, but she only reported him that accused Fazal Ali had clutched the hand of her daughter. She added that she lodged the F.I.R after coming of her husband. She further testified that on the next day, when she scolded Fazal Ali, driver Diganta Handique, Mithinga Buglary and Hiswanath Basumatary were there. The witness further stated that on the next day when she talked to Fazal Ali, she did not call any of the tenants, nor she report the incident to them. Her testimony further reveals that on the day of incident, the tenants were there in their rented premises. She added that on the

day of incident after going to market, she talked to her daughter over phone twice. She also stated that accused Fazal Ali was deputed as a security guard in their house. She denied the fact that they used to ask the accused to do different works in their house and as he refused to do it, she implicated the accused falsely in this case.

9. PW.3 (name withheld) is the victim of this case. She testified that her father is Superintendent of Police, Vigilance and Anti Corruption. She testified that she knows accused Fazal Ali, who was the Havildar and in charge of the security guard posted in their residence in 2014. She added that there were altogether 3/4 security guards in their residence. The witness further stated that on 06.01.2014, the occurrence took place at about 5 p.m. She added that she was in her house alone and her mother went out for marketing. She also stated that she was in the house because her tuition teacher was supposed to come to the house and as her tuition teacher was late, she intended to contact him over telephone and as such she requested accused Fazal Ali, who was at the ground floor to bring his mobile phone so that she could contact her teacher. She further testified that accordingly, accused Fazal Ali came to the first floor with his mobile phone, but instead of handing over the mobile phone, suddenly the accused person clutched her hand and after dragging her towards him, he hugged her and also forcibly kissed her. She further testified that immediately, she pushed him and told him that she would complain to her father, but the accused requested her not to do that and also threatened that if she would inform her father he would commit suicide. She added that she was afraid and she also did not report her mother immediately after her coming back home and at night, she reported the incident to her mother. The witness further testified that at that time her father was at Karbi Anglong as Superintendent of Police and her mother told her father about the incident over phone and the case was filed after her father came to Guwahati. She added that she was forwarded for medical examination, but after explanation of the nature of examination, she refused to allow the doctor to examine. She proved Ext.1 as the medical report and Ext.1(1) as her signature. She added that she was also produced before a

Magistrate for recording the statement. She proved Ext.2 as her statement and Ext.2(1) and 2(2) as her signatures.

- 10. During cross examination, the witness stated that she cannot remember now the names of other security guards. She added that there was also a driver, namely, Diganta Handique and a cook. She testified that their building was 3 storied and in the ground floor there were 2 other families residing as tenant. She added that they were in the house at the time of occurrence. The witness further stated that she called Fazal Ali by shouting from the first floor and admitted that at the time of occurrence, all the attendant were at the ground floor. She further added that she did not report the incident to anyone. Her testimony further reveals that accused Fazal Ali was there in their house for about 3 years and he did not do anything to her prior to that incident. She further testified that she used to go to school by private car. She added that they had their driver and sometimes Fazal Ali also escorted her. She further added that the car was driven by Diganta Handique and on the next morning, Fazal Ali escorted her to school. She added that her mother went to the market at noon but the exact time, she could not remember. She also stated that her mother time to time talked to her over phone. She admitted that she stated before the Magistrate that her mobile had no balance and as such she asked Fazal Ali to give his mobile and also admitted that she stated before the Magistrate that she reported the incident to her mother on the next date. She denied the suggestion that accused Fazal Ali did not do anything to her.
- PW.1 Diganta Handique was the driver of the informant and he testified that on 06.01.2014, he was posted as Driver, attached to Commandant 23 IRBn, namely, Mujibur Rahman. He testified that he used to work in the house and he knew Alfreza Rahman, who was the wife of the Commandant Mujibur Rahman. He further testified that he does not know much about the occurrence, but stated that the wife of Mujibur Rahman told him subsequently that accused had uttered something evil towards her daughter. During cross examination, the witness stated that there were four other persons along with Fazal Ali working in

the house of the Commandant at the relevant point of time. He further stated that he was working with Fazal Ali in the said house for about one and half year and at that time, he did not hear anything against Fazal Ali.

- **12.** PW.2 Hiswanath Basumatary could not throw any light to the case of the prosecution.
- **13.** PW.5 Bijoya Das is a formal witness who investigated the case and submitted charge sheet against the accused u/s 10 of the POCSO Act. She proved Ext.6 as the Charge sheet wherein Ext.6(1) as her signature.
- 14. PW.6 Mithinga Khugnur Baglari testified that he knew accused Fazal Ali and the occurrence took place about 3/4 years ago. He further testified that at the relevant time, he was performing his duty as security in the house of Sri Mazibur Rahman, Commandant 23rd AP (IR) Bn. He added that they were five deployed for performing the security duty of the said house. He also testified that Driver Diganta Handique, Hiswanath Basumatary, Ishwar Prasad and the accused person were there. His testimony further reveals that the informant is the wife of Mazibur Rahman and she along with her two daughters used to reside there and on the day of occurrence, Madam went for marketing and he went with her along with the driver. He added that the younger daughter of the informant also accompanied the informant and they came back in the evening. He testified that he does not know the exact time and he has no personal knowledge about any occurrence. He added that the informant specifically told him that the accused person uttered obscene words to her daughter. He also testified that the day when the informant reported him the incident, on the very next date, the accused person left the premises. During cross examination, the witness stated that when they went out, only Hiswanath Basumatary was there and at the time of leaving, he did not see the accused person there. He also stated that the daughter of the informant was inside the house. He further stated that the resident of Mazibur Rahman was in three storied building and the informant used to reside in the first floor and at the ground floor, there were tenants. He

further stated that he was working with accused Fazal Ali in that house for about $1 \frac{1}{2}$ years, but he did not notice any of his misbehavior at any time.

15. On a close scrutiny of the entire evidence on record, I find that save and except the victim herself and her mother, no independent witness supported the case of the prosecution. The victim herself testified that she requested accused Fazal Ali to give his mobile phone to her so that she could contact her tuition teacher. She also narrated that accused Fazal Ali came to the first floor with his mobile phone, but instead of handing over the mobile phone suddenly he clutched her hand and dragged her towards him and hugged her and also forcibly kissed her. Now, if her evidence is taken at the face value, the question as to why she had relied upon accused Fazal Ali so much that she called him to give her the mobile phone remained unaswered. She specifically stated during cross examination that she had a mobile phone in the house and her mother time to time contacted her over the said mobile phone. She stated that she called Fazal Ali by shouting from the first floor and also stated that at the time of occurrence, all the attendants were at the ground floor. She stated that she was afraid and did not report the incident to her mother immediately after her return. But she stated that on that night she reported the incident to her mother. However, in her statement, recorded u/s 164 of the Cr.P.C. (Ext.2), she had stated that she reported her mother about the incident on the next date. She stated during cross examination that on the next morning also, the accused person escorted her to school. This very fact creates doubt about the incident. First of all, the person who acted as the perpetrator and tried to molest her, how could she agree to go to the school on being escorted by him. It is more unbelievable because according to her, she reported the incident to her mother on that very night and even then her mother allowed her to be escorted by the same accused person. PW.4 Alfreza Rahman is the mother of the victim and she corroborated all the facts stated by her and further corroborated that she (victim) reported the incident to her on that very night. She went further to state that she fell scared and informed her husband over phone and on the next day, she called Fazal Ali and asked him why he did so to her daughter. She also

could not remember whether on the next date Fazal Ali escorted her daughter to school or not. However, there is clear discrepancy in her testimony, the comparison to her FIR. In her FIR, she had stated that the incident was reported to her on the next day only.

- 16. I have already noted that other persons present in the house did not support the case of the prosecution. None of the tenants residing in the ground floor of the house were taken into confidence by the victim or the mother. Even the I/O did not examine them to ascertain the truth of the occurrence. Their evidence was necessary because the victim stated that she called the name of Fazal Ali from the first floor by shouting and thereafter Fazal Ali went upstairs. Had she shouted the name from the first floor, it was most probable that the tenants might have heard her shouting. PW.1 Diganta Handique was the driver, attached to Commandant 23 IRBn and Commandant Mujibur Rahman kept him in his house for attending the duty of his family. On that day also, he accompanied the informant Alfreza Rahman, wife of the Commandant Mujibur Rahman to the market and he simply stated that the wife of Mujibur Rahman told him subsequently that the accused person had uttered something evil towards her daughter.
- 17. Thus, this witness neither is a eye witness of the occurrence, nor he supported the story of molestation and stated that the informant herself told him that the accused person had uttered some obscene words towards the daughter of Mujibur Rahman. Thus, although there were many other persons in the house, none corroborated the testimony of PW.3, i.e, the victim and PW.4, i.e, the informant. Besides, there was more than one month delay in lodging the FIR which itself is sufficient to create doubt about the occurrence. Of course, it is testified by the victim herself and her mother that the case was filed after Mujibur Rahman came to Guwahati, but it is not believable that even after getting the information of molestation of his daughter by none else than his own security guard, the informant remained seated at the commanding headquarter at Karbi Anglong. It is also seen that without filing any case against said Fazal

Ali, attempt was made by him to secure the arrest of the accused. The explanation given in the FIR regarding the delay in filing of the case does not tally with the explanation given by the informant in her evidence. Thus, the cause of delay has not been proved. The investigation was also not done properly and I/O was probably interested only to complete the investigation and as such she did not examine even all the persons who were present in the house at the time of occurrence. Another important fact, which came to my notice, is that the accused person brought one Ishwar Prasad as DW.1. Evidently, Ishwar Prasad was present in the house at the relevant point of time as cook. He was also a sepoy of 23rd Battalion then located at Karbi Anglong of which Mujibur Rahman was the Commandant. He claimed that they were five, including the driver and sentry, present in the house at the time of the occurrence and stated that at about 5:30 pm, the daughter of Mujibur Rahman asked him to call Fazal Ali at the first floor. He testified that she called Fazal Ali and along with Fazal Ali he himself went to the first floor of the residence. He specifically stated that he was in the stair case and saw the daughter of Mujibur Rahman to ask Fazal Ali to give his mobile so that he could contact her tuition sir. He added that Fazal Ali did not hand over the mobile phone and told her that if the tuition sir had to come, he would have come himself. He added that thereafter both of them came down. He added that he was never asked about the occurrence. He specifically stated that at the time of occurrence, he himself and Fazal Ali were in the house and others were gone out. He also stated that the wife of Mujibur Rahman returned to the house around 6:30 pm and the driver and one sentry also came back with her. The witness stated that on the next day, after coming back from the school when the wife of Mujibur Rahman asked the driver about the occurrence, he was there. But he was not asked anything. He specifically stated that the accused person used to accompany the elder daughter of the informant to the school for last 3 years prior to the occurrence. Thus, this piece of evidence of DW.1 clearly creates doubt about the actual occurrence. He specifically stated that he was present when Fazal Ali was called at the first floor of the house and saw from the stair case that the victim asked Fazal Ali to give her the mobile phone and Fazal Ali denied to give

it. Besides all the witnesses made it specific that Fazal Ali was working there for long 3 years in the said house and they do not find anything to complain against him. It is seen that he was escorting the victim girl for long 3 years and it is not believable that on that very day, he became so passionate that he tried to hug and kiss the young girl of his boss, i.e, Commandant Mujibur Rahman. The entire evidence clearly shows that there remain many rooms for doubt about the commission of the offence of sexual assault by the accused person towards the victim girl and the prosecution failed to bridge the gap and to prove the case removing all shadow of doubt. Once again I like to point out that there was a long delay and the prosecution remained unsuccessful to explain the delay properly. The delay was explained at different point of time differently which creates doubt about the authenticity of the case.

- **18.** In view of the discussions made above, I had no hesitation to hold accused Fazal Ali not guilty of offence punishable u/s 354 of the IPC r/w Section 10 of the POCSO Act, 2012 and accordingly the accused person is acquitted on benefit of doubt. Bail bond furnished on his behalf will remain in force for the next six months.
- **19.** Signed, sealed and delivered in the open court on this 27th day of June, 2018 at Guwahati.

(S.P. Moitra)
Special Judge,
Kamrup(M), Guwahati

Dictated & corrected by me.

(S.P. Moitra)
Special Judge,

Special Judge, Kamrup(M), Guwahati

APENDIX

(A) Prosecution Exhibits:

Ext-1: Medical Report

Ext-2: Statement of the victim recorded u/s 164 of the Cr.P.C

Ext-3: F.I.R

Ext-4: Printed form of F.I.R

Ext-5 : Seizure list Ext-6 : Charge sheet

(B) Defense Exhibit : Nil

(C) Court Exhibit : Nil

(E) Prosecution Witnesses:

PW-1: Diganta Handique

PW-2: Hiswanath Basumatary

PW-3: Aniqa Nawar Rahman

PW-4: Alfreza Rahman

PW-5 : Bijoya Das

PW-6: Mithinga Khugnur Baglari

(F) Defense Witnesses: Nil

(G) Court Witnesses : Nil.

(S.P. Moitra)

Special Judge, Kamrup(M), Guwahati