IN THE COURT OF THE SPECIAL JUDGE SONITPUR:: TEZPUR SPECIAL POCSO CASE NO. 04 of 2019

Under section 376(2) (I) of IPC and 8 of POCSO Act IPC. (Arising out of Dhekiajuli PS Case No. 62/19)

State of Assam

-Vs-

Abdul Seikh ... Accused Person

Present : Smti I. Barman,AJS, Special Judge, Sonitpur, Tezpur.

For the State : Mr. M.C. Baruah,

Special Public Prosecutor

For the accused : Mr. B. Kotoki, Advocate

Date of Argument : 05-08-2019 & 19-08-2019

Date of Judgment : 22-08 -2019.

JUDGMENT

- The prosecution case against the accused person as projected in the FIR (Ext. 2), in brief, is that on several occasions prior to filing the FIR dated 28-01-2019, accused Abdul Seikh committed rape on the victim girl, aged about 17 years who was mentally disable to some extent and lastly on 27-01-2019 at around 8.30 p.m. when the accused Abdul Seikh attempted to commit her rape, he was caught red handed by victim's sister but then the accused by assaulting the victim, fled away.
- 2. On receipt of the FIR **(Ext.2)** on 28-01-2019 from the informant (PW 1), Dhekiajuli P.S. Case No. 62/19 u/s 376 of IPC read with section 4/6 of

POCSO Act was registered and launched investigation of the case. During investigation, the Investigating Officer (PW 7) recorded the statement of the witnesses, sent the victim for medical examination, got her statement recorded u/s 164 Cr.P.C. and on completion of investigation having found materials, laid charge sheet against the accused Abdul Seikh u/s 376 of the IPC read with Section 4/6 of POCSO Act. .

- **3.** On producing the accused person from Jail, after furnishing the copies of the documents as required u/s 207 of Cr.P.C. and having heard both parties, charge u/s 376 (2) (I) of IPC and section 6 of POCSO Act was framed against the accused Abdul Seikh and particulars of the charge on being read over and explained to the accused person, he pleaded not guilty and claimed for trial.
- 4. To substantiate the case, prosecution examined as many as eight witnesses. On closure of the prosecution evidence, statement of the accused was recorded u/s 313 Cr.P.C. wherein the accused denying all the incriminating evidence that emerged against him pleaded that on the night he after consuming liquor with the victim's father proceeded together towards the house of the victim but before reaching home, in nature's call the victim's father asking the accused to enter into his house, went to the back side and accordingly, when the accused entered into his house, finding him in drunken state, victim's sister rebuked him, hence the accused went out and on next morning when he went to the house of the victim to ask the reason of abusing him on the previous night, an altercation took place between them and then the neighboring people by assaulting him, filed the false case.
- **5.** The points for decision in this case is that -
 - (1) Whether the accused Abdul Seikh, on several occasions prior to 27-01-2019 and on 27-01-2019 at around 8.30 p.m. at Matikhunda gaon under Dhekiajuli police station committed rape on the victim Miss X, who has been suffering from mental disability and thereby committed an offence punishable under section 376(2) (1) of the iPC.
 - (ii) Whether the accused Abdul Seikh on the same dates committed aggravated penetrative sexual assault on several occasions on the minor

victim Miss "X" who is mentally disable and thereby committed an offence punishable under section 6 of POCSO Act?

Reasons, Decisions and reason for decision.

- **6.** Mr. M.C. Baruah, learned Special Public Prosecutor strenuously argued that the materials on record particularly the evidence of the victim undoubtedly project a case of penetrative sexual assault and the evidence of the victim is enough to convict the accused person.
- **7.** Against the submissions, Mr. B. Kotoki, the learned counsel appearing for the accused person submitted that the prosecution failed to ascertain the age of the victim and in view of the evidence of the victim and her aunty (PW 1) and the medical evidence, it cannot be inferred that the victim was a minor at the relevant time. The learned counsel also vehemently argued that with the discrepancies in the evidence of witnesses, prosecution failed to establish the case against the accused beyond all reasonable doubt and he is entitled to benefit of doubt.
- **8.** In view of the rival submissions advanced by the learned counsel appearing for the parties, it would be apposite to have a bird's view of the evidence on record.
- 9. PW 1, the aunty of the victim, deposed that on the day of the incident at around 8/9 p.m., the victim after watching TV in the house of one Krishna returned home and at around 9 p.m. when she (PW 1) went to bed, hearing cry of the victim, she proceeded towards the room of the victim with a torch light and entering into the room had seen the victim and accused under a cloth lying on bed. At that time, the door of the room was opened to some extent. Seeing the victim and the accused in that position as soon as she removed the cloth, the accused by pushing her, fled away. Then on being asked, the victim told her that when she was in the bed, accused came and slapped on her cheek, had assaulted over thigh and touched her body. The victim also told her that on one earlier occasion, in her (PW1's) absence, the accused coming to their house inserted his penis in her vagina. She further deposed that she had seen the victim with her wearing apparels. Seeing the incident she raised hulla and lodged the FIR.

During cross, she stated that she had not seen the accused committing rape on the victim girl and when she raised hulla, sister of the victim reached. She admitted that she had not seen the victim in naked condition.

10. PW 2 is the victim herself. The victim being a Nepali, her evidence was recorded with the help of interpreter, the stenographer of the Office of the Chief Judicial Magistrate, Soniptur, Tezpur whose mother tongue is also Nepali. She administered oath to interpret the evidence correctly. The victim deposed that accused Abdul Seikh coming to her house at night, slapped her, assaulted her over leg, made her lay upon the bed and caught hold her breast and thigh. He also removed the chain of her neck and on being assaulted by the accused, she ran away and called her aunty PW 1.

During cross, she stated that accused did not commit any bad act to her and on earlier occasion also he did nothing.

- **11. PW 3,** the daughter of PW 1 as well cousin sister of the victim, deposed that at the relevant night her mother over phone told her that accused Abdul Seikh entering into the house of the victim, committed bad act with her and she (PW 1) found the accused with the victim under a cloth. Hearing the incident in the next morning, she came to her mother's house and on being asked, the victim narrated her that the accused laid upon her body and tried to commit bad act with her. During cross, she stated that she had not seen the incident.
- **12. PW 4** the father of the victim testified that on the day at around 8 p.m. hearing alarm of his victim daughter as soon as the wife of his elder brother i.e. PW 1 came forward, the accused pushing his elder brother's wife ran away. Then on being called by PW 1, he came out when PW 1 reported him that the accused entered into his kitchen where his two daughters were sleeping. He used to sleep in the verandah. He also deposed that PW 1 reported him that the accused Abdul Seikh entering into the kitchen, laid upon the body of his victim daughter and committed her rape.

During cross he admitted that he had not seen the incident and did not know what happened between his daughter and the accused. He admitted that the fact of reporting him by PW 1 that accused Abdul Seikh entering into his kitchen laid upon the body of his daughter and committing her rape was not stated before police.

- 13. The evidence of PW 5, Lakhi Limbu, the neighbour of the accused is that in the next morning at around 6 a.m. he was informed that accused Abdul Seikh entering into the house of the victim, attempted to commit rape on the victim and seeing the incident when the elder sister of the victim attempted to catch the accused, the accused by assaulting her fled away there-from. He also stated that on earlier occasions also accused attempted to commit rape of another girl of their village.
- **14. PW 6** Dr. Rika Ingtipi, the Medical Officer deposed that on 29-01-2019 she examined the victim. The informant, the aunty of the victim gave history of sexual assault on 27-01-2019 by one elderly person Abdul Seikh, who often used to visit her house and hearing screaming of the victim when PW 1 went there had seen the accused and the victim on bed. PW 1 also stated that one and half months back also once the accused sexually assaulted the victim when she was alone at home. On examination, the Medical Officer found no sign of recent sexual intercourse or injury mark on the body of her person, however found old healed hymeneal tear at 3 O'clock position and as per X-ray report she is above 17 years and below 20 years . The doctor proved the medical report as Ext.1. In cross-examination the doctor admitted that the age may vary two years on either side.
- **15.** PW 7, SI Bipul Biswas, the Investigating Officer deposed that on being endorsed to investigate the case, he visited the place of occurrence, drew the sketch map (Ext. 3) of the place of occurrence, recorded the statement of the victim and other witnesses, sent the victim for medical examination and got recorded the statement of the victim u/s 164 Cr.P.C. The accused was apprehended by the neighbours and handed over to him. Accordingly, he arrested the accused and on completion of investigation, submitted chargesheet against the accused u/s 376 of IPC read with section 4/6 of POCSO Act vide Ext. 6. In cross-examination, he confirmed that PW 3 the cousin sister of the victim did not state before him that the accused laid upon the body of the victim and tried to commit bad act with her. He also confirmed that the fact of reporting to PW 4 by the victim (PW 2) that the

accused entering into the kitchen laid upon her body and committed her rape was not stated by him in statement u/s 161 Cr.P.C.

- **16.** PW 8 Miss Juhi Gogoi, the learned Judicial Magistrate, 1st class, Tezpur, recorded the statement of the victim u/s 164 Cr.P.C. in connection with Dhekiajuli PS Case No. 69/19 u/s 376 of the IPC r/w section 4/6 of POCSO Act with the help of interpreter Swarup Nirala, the LD Assistant of establishment of CJM, Sonitpur, Tezpur as the victim's mother tongue is Nepali. She proved the statement of the victim as Ext. 5 and her order dated 28-01-2019 as Ext. 6.
- 17. In the present case, the victim claimed her age as 17 years. Victim's father remained silent regarding age of the victim. On the other hand, the medical evidence shows that she is above 17 years and below 20 years. The Apex Court in the case of **Jayamala Vs. Home Secretary** reported in **AIR** 1982 SC 1297, observed that margin of error in age ascertained by radiological examination is two years on either side. In the above evidence regarding age, in absence of any other documents coupled with the medical evidence, I find that the prosecution failed to prove that the victim was below 18 years at the time of incident. Therefore let us see the facts and circumstances of the case.
- 18. In the case at hand, coming to the evidence of the victim, it is found that in examination-in-chief she stated that the accused coming to her house at night, slapped over her cheek, assaulted over leg and thereafter laying upon her body, caught hold her breast and thigh but during cross she clearly stated that the accused did not commit any bad act and earlier occasions also he did nothing. PW1, the victim's aunty, the informant of this case, stated that hearing cry of the victim she entering into the room through the door, had seen both the victim and the accused under a cloth lying on bed. So, as per her evidence she had witnessed the accused and the victim under one cloth. But in the FIR, Ext.2, she alleged that the sister of the victim caught hold the accused red handed when he tried to commit rape on the victim. In FIR, the informant claimed the victim as her daughter whereas in deposition she stated that the victim is her niece. The victim's father PW 4, made another version

that at the time of incident when he was sleeping in the verandah, PW 1 calling him told that the accused entered into the kitchen where his two daughters were sleeping and laying upon the body of his daughter committed her rape. But PW 1 herself had not stated that the accused committed rape on the victim girl. She only stated that she had seen both of them under a cloth. Moreover, if his another daughter was sleeping with the victim, she certainly had witnessed the incident or knew well about the incident but she was not examined in this case. Withholding of such material witness creates doubt about the truthfulness of the prosecution version. It is also unbelievable that in presence of sister and father, one would take risk of committing sexual assault on a girl. On the other hand, the victim's father himself stated that he did not know what happened between his daughter and the accused. It is really surprising that a father, would not know if any incident of sexual assault occurred to his daughter. PW 5, the neighbour made another version that the accused Abdul Seikh entering into the house of the victim, while attempted to commit her rape, the sister of the victim seeing the incident tried to catch the accused and then by assaulting her, the accused fled away. So, this witness did not state that PW 1 had seen the alleged incident rather stated that the victim's sister witnessed the accused trying to commit her rape. Further evidence of the informant that hearing cry, when she entered into the house of the victim had seen the accused and the victim under a cloth clearly contradicts by the victim herself stating that on being assaulted by the accused, she ran away from the room and called her aunty- PW1. So, the most material witnesses PW 1 and PW 2, the aunty and the victim made contradictory statement on material particular of the alleged incident. Though as per the FIR, the victim is a foolish one to some extent and PW 5, the accused's neighbour stated the victim is an abnormal girl to a bit but during deposition PW 1 the informant, father and cousin sister, the close relatives of the victim, did not made any single whisper that she is a foolish one. The victim gave clear statement in court at the time of recording deposition.

19. The FIR, Ext. 2 reflects that since many days the accused committed rape on the victim girl and on 27-01-2019 he was caught red handed while committing rape but none of the witnesses deposed that prior to 27-01-2019

the accused committed her rape since many days. That apart, the alleged last rape was committed on 27-01-2019 at night and she was examined on 29-01-2019. The medical evidence does not suggestive of any recent sexual intercourse except old healed hymeneal tear. Though the informant stated that the victim told her that on one earlier occasion also the accused committed her rape but the victim herself clearly negates the same stated that he did nothing to her on earlier occasion. In the present case, the evidence of the PWs taken as a whole as discussed above, creates doubt about the veracity of the prosecution version.

20. The accused during examination u/s 313 Cr.P.C. pleaded that on the night he after consuming liquor with the victim's father proceeded together towards the house of the victim and before reaching home, the victim's father asking the accused to enter into his house, went to the back side to attend nature's call and accordingly, when the accused entered into his house, finding him in drunken state, victim's sister rebuked him, hence the accused went out and on next morning when he went to the house of the victim to ask the reason of abusing him on the previous night, an altercation took place between them and then the neighboring people by assaulting him, filed the false case. Though his statement is not supported by victim's father himself and his pleadings is not acceptable in a case of heinous crime such as rape or sexual assault but it is a cardinal principle of law that prosecution is to prove the charge beyond reasonable doubt by producing credible evidence against the accused and prosecution is to stand on its own legs, not on the lapse of the defence story. Though the law permits that the testimony of the prosecutrix can be accepted without any corroboration, from she has to be placed on a higher pedestal than on injured witness, but in the present case the evidence of the witnesses including the victim suffers from inconsistencies and contradictions in material particulars. Situated thus, the evidence given by PW 1 to PW 5 is highly unreliable, even if their evidence is not rejected outright as wholly unreliable, their evidence will fall at the most, in the category of those witnesses, who are neither wholly reliable nor wholly unreliable.

- **21.** On scanning the evidence of the prosecution witnesses, it has been clear that there are some vital contradictions on the evidence adduced by the prosecution witnesses, in as much as, the victim specifically stated that the accused did not commit any bad act to her and on earlier occasion also, he did nothing. The cumulative effects of all evidence on the record is that the prosecution case remains doubtful.
- **22.** Considering the evidence of prosecution witnesses in totality particularly the evidence of the victim and her aunty and father as discussed above, it is clear that the allegation against the accused Md. Abdul Seikh has not been established beyond all reasonable doubt and the accused is entitled to benefit of doubt.
- **23.** Accordingly, accused Md. Abdul Seikh is acquitted on benefit of doubt from the charge u/s 376(2) (I) of IPC and section 6 of POCSO Act and set him at liberty forthwith. His bail bond shall remain in force till next six months.
- **24.** Judgement is pronounced and delivered in open court under the Seal and signature of this Court on the **22nd day of August, 2019.**

(I.Barman) Special Judge, Sonitpur,Tezpur.

Dictated and corrected by me.

(I.Barman) Special Judge, Sonitpur,Tezpur.

APPENDIX

Prosecution witnesses.

1. PW 1 : Aunty of the victim

2. PW 2 : Victim

3. PW 3 : cousin sister of the victim

4. PW 4 : father of the victim

5. PW 5 : Lakhi Limbu

6. PW 6 : Dr. Rika Ingtipi,(M.O.) 7. PW 7 : I.O. SI Bipul Biswas,

8. PW 8 : Miss J. Gogoi, Judl. Magistrate, 1st class.

Exhibits.

Ext. 1 : Medico legal report.

Ext. 2 : FIR

Ext. 3 : Sketch map

Ext. 4 : Chargesheet.

Ext. 5 : statement of the victim u/s 164 Cr.P.C.

Ext. 6 : Order dated 28-01-2019 of PW 8.

(I.Barman) Special Judge, SONITPUR: TEZPUR