BEFORE THE SPECIAL JUDGE :::::: DHUBRI

Special Case No.31/2015

U/s. 447/354B IPC & Sec. 8 of POCSO Act, 2012

G.R 4712/2013

State of Assam

- Vs –

Abdullah Sk.

Present : Sri Rajib Goswami, AJS

Special Judge, Dhubri

Sri M. Zaman, Public Prosecutor, Dhubri for the State. Sri Islam Uddin Ahmed, Advocate for the defence.

Date of Evidence : 25-02-2016, 22-03-2016, 16-06-2016 & 12-07-2016.

Argument Heard : 15-09-2016 Date of Judgment : 30-09-2016

<u>J U D G M E N T</u>

The prosecution case in brief is that one Ismile Uddin Sk. on 28-12-2013 had lodged a FIR at Golakganj P.S. to the effect that on 27-12-2013 at around 2 p.m. at his house at village West Gaikhowa under Golakganj P.S. the accused Abdullah Sk. had come and asked his daughter about a mobile battery that the informant is supposed to have taken from the accused. When his daughter denied having knowledge about it, the accused suddenly caught hold of his daughter and pulled her inside into a room. In the process of taking his daughter inside the accused had almost stripped his daughter of all her clothes. Then the accused threw her on the floor and pinned her to the ground and attempted to commit rape upon her. His daughter cried out for help. His wife, who had gone out to graze the cattle in the nearby field had heard her daughter's cries. His wife came running to the house. Both mother and daughter attempted to resist the accused by catching hold of his wearing apparel. However, the accused managed to flee and in the process had left behind his T-Shirt, his sandals and mobile phone.

- 2. Upon the FIR a case was registered by the O.C, Golakganj P.S. vide Golakganj P.S. Case No.1107/2013 u/s.323/354(B) of IPC, R/W Section 8 of POCSO Act against the accused Abdullah Sk. After investigation charge sheet was filed u/s.447/354B of IPC and Section 8 of POCSO Act against the accused person.
- 3. Accused person appeared before the Court. Charges U/s.447/354B of IPC and Section 8 of POCSO of IPC had been framed against the accused. Charges had been read over, explained and interpreted to accused to which accused pleaded not guilty and claimed to be tried.
- 4. The prosecution had examined as many as 8 (eight) witnesses including the I.O. Accused Abdullah Sk. was examined generally on the circumstances coming up against him in the evidence of P.Ws u/s.313 of Cr.PC. The accused person pleaded total denial and declined to adduce any evidence in his defence.

5. <u>POINTS FOR DETERMINATION</u>

- 1. Whether the accused on 27-12-2013 at around 2 p.m at village West Gaikhowa under Golakganj P.S. committed the offence of criminal trespassed by illegally entering into the house premise of the informant?
- 2. Whether the accused on the same day time and place had assaulted the victim with the intention of disrobing or compelling her to be naked and thereby committed an offence u/s.354 (B) of IPC?
- 3. Whether on the same day, time and place accused had committed sexual assault on victim and thereby committed an offence punishable u/s.8 of POCSO Act?

DECISIONS AND REASONS THEREON

6. PW-1, Ismile Uddin Sk. is the informant and the father of the victim. According to PW-1 on 27-12-2013 at around 2 p.m. he had gone to the daily market and his wife had gone out to graze the cattle. His daughter, the

victim was inside the house. The accused Abdulla Sk. had come to his house and on the pretext of asking for a mobile battery that PW-1 supposed to have brought from him suddenly caught hold of his daughter's hand and had dragged her inside the house and in the process his daughter's clothes had been torn. His daughter cried out for help. Hearing her daughter crying out, his wife came running to the house and had seen the accused assaulting his daughter. Both his wife and daughter caught hold of the accused and in the scuffle that followed, the accused was forced to remove his T-Shirt and leaving behind his mobile and sandals had fled away.

In his cross-examination PW-1 admitted not having seen the incident since he was not present inside his house at the relevant point of time.

7. PW-2, Surat Zamal Mondal is known to both complainant, victim and the accused. He is the immediate neighbour of the complainant. He had suddenly heard informant's daughter crying out loudly. Having heard cries of complainant's daughter he had arrived at the house of the complainant and had seen the accused assaulting the daughter of the complainant and had seen the accused throwing her on the floor. In the meantime, the mother of the victim arrived at the place of occurrence. A scuffle had followed between the accused, victim and her mother. Accused managed to flee leaving behind his mobile, sandals and a T-Shirt.

In his cross-examination PW-2 reiterated having seen the accused assaulting the victim and mother of the victim joining later. He had not noticed clothes of the victim torn.

8. PW-3, Motleb Ali, a resident in the immediate neighborhood of the complainant deposed that on the day of the alleged occurrence at around 2 p.m. he had heard daughter of the informant crying out loudly. He had immediately arrived at the house of the informant and had seen the accused and daughter of the informant engaged in a scuffle. On seeing him the accused had fled away.

PW-3 in his cross-examination he had shifted from his earlier version of only seeing the victim engaged in a scuffle with the accused and had stated that he had seen the mother of the victim along with her daughter engaged in a scuffle with the accused.

9. PW-4 Jahanuddin Sk. is known to complainant, victim and the accused. According to him on the day of the alleged occurrence at about 2 p.m. he was on his way to Nalia daily market and on the way he had heard commotion at the house of the informant. Having arrived at the place, he had seen the victim and her mother engaged in a scuffle with the accused. On seeing him the accused had fled away through the rear exit of the house of the informant.

In his cross-examination he denied the defence suggestion that he had not told the I.O. about coming to the house of the complainant and hearing the victim crying out for help. He denied further defence suggestion that he had not told the I.O. having arrived at the house of the complainant and seeing both victim and her mother engaged in a scuffle with the accused and on seeing him accused fleeing the place of occurrence.

10. PW-5 is the victim and according to PW-5 the accused had come to their house at 2 p.m. on 27-12-2013. Her father had gone out to daily market and her mother had gone taking out the goat for grazing in the field. The accused had come to their house through their rear exit. Initially the accused on the pretext of asking for the mobile battery that PW-5's father supposed to have brought from the accused. When PW-5 had said that she was not aware, the accused tried to make a forced entry into their house and PW-5 had resisted the accused from entering into their house. In the process the accused attempted to strip PW-5 of her wearing apparel and attempted to commit rape on her. The victim raised alarm. Hearing her cries her mother had come to the house and caught hold of the accused's singlet. However, the accused managed to get himself freed and in the process had left behind his singlet, sandals and mobile. PW-5 in her examination-in-chief had further deposed that ext-1 is the photocopy of her birth certificate (proved in original). Ext-2 is the statement she had given before the Magistrate bearing his signature ext-2 (1).

In her cross-examination PW-5 denied the defence suggestion that whatever she had stated in examination-in-chief, she had not disclosed the same to the I.O. According to PW-5 accused had come to their house for the first time on the day of the alleged occurrence. The incident had taken place at the

entrance of their house. She had talked to the accused about for 5 minutes immediately before the incident. PW-5 reiterated with regard to the accused trying to strip her of her clothes and she tried to resist the accused and pleaded with him not to strip her. Then she started raising alarm. Having heard her cries Surjan Mulla had come to her house and had seen her without clothes. Thereafter, she had gone inside and covered her body with cloth. None of other inmates of the house tried to resist the accused. Her younger sister was 7 years old at the relevant point of time. Thereafter elder to her is Ashikuz Zaman Sk. Sohel Sk. is elder to Ashikuz Zaman Sk. Aminul Islam Sk. is elder to Sohel Sk. and she is the eldest in the family. She reiterated about ext-1, birth certificate having been issued at the time of her birth. She had submitted the said certificate to the police. She denied the suggestion that there had been a clash between the accused and her father and in that clash the accused was badly beaten up and in order that accused does not file a case against them, he had been framed in a false case.

11. PW-6 Aminal Bibi is the mother of the victim and according to PW-6 she had taken out the goats for grazing in the field nearby and having heard her daughter raising alarm, she came to her house and had seen accused trying to strip her daughter of her clothes and she had immediately caught hold of the accused by the vest he was wearing. However the accused managed to flee the place of occurrence leaving behind his mobile, sandals and vest. Motleb Sk, Jahanuddin and Surat Zaman had seen the occurrence.

In her cross-examination PW-6 said that the victim was born 1 ½ years of the marriage and 2 years later her second issue, Aminul Sk. was born. The age of the youngest is 5 years. She is the mother of seven children. She was not aware whether her other children had been present at the place of occurrence or not. Motleb Sk. is her immediate neighbor and public road is located 10 ft. away from her house. The accused was known to her and there was no previous enmity with the accused. But she had no visiting terms with them. Her husband had never borrowed any mobile battery from the accused. PW-6 reiterated about Motleb, Surat Zaman and Md. Jananuddin Sk. seeing her daughter getting into a clash with the accused person. She had come later. By the time she had come her daughter's body was covered with a single piece of

cloth. She denied the suggestion that her husband had a clash with the accused and had beaten the accused. She denied the suggestion that in order that the accused does not file a case, he had been framed in a false case of alleged rape.

12. P.W-7, S.I. Jamir Ali, I.O. in the case stated about having received the FIR on 28-12-2013. He had prepared a seizure list in respect of one under garment one churidar, one T-Shirt and one yellow half pant, one Nokia handset and a pair of sandals recovered from the house of the victim. Ext-3 is the seizure list bearing his signature ext-3 (1). He had drawn the sketch map of the place of occurrence, ext-4 bearing his signature ext-4 (1). Then he had got the statement of the victim recorded u/s.164 of Cr.PC.

In his cross-examination PW-7 had stated that he had sent the victim for medical examination on 28-12-2013. The attention of the I.O. was brought to the evidence of PW-4, Jahanuddin Sk. and according to PW-7 Jahanuddin in his interrogation had stated about seeing the mother and the victim getting into a scuffle with the accused. Further when the attention of the I.O. was brought to the part of the victim, the I.O. stated that the victim did not state about accused trying to strip her of her wearing apparel. PW-7 stated about not having taken any steps for determination of the minority of the victim.

13. PW-8 SI Upen Ch. Barman had filed the charge sheet against the accused u/s.447/354 (B) of IPC R/W Sec. 8 of the POCSO Act. Ext-5 is the charge sheet bearing his signature ext-5 (1). He had not collected any certificates/documents with regard to the minority of the victim during investigation.

Above is the threadbare discussion on the evidence on record.

14. Now before going into the evidence on record, I find from the evidence of PW-7, S.I. Jamir Ali that he had not collected the birth certificate of the victim neither had seized any of the school leaving certificate for determination of age of the victim. Neither PW-8 had done any investigation with regard to the determination of the minority of the victim. The FIR reveals that on the day of the alleged occurrence, the victim was 16 years old. The victim in her statement u/s.164 of Cr.PC had stated her age to be 16 years. As PW-5 the

victim had produced the birth certificate in the Court that was exhibited in evidence as ext-1. Now having gone through the ext-1, I find that the same had been issued by the Registrar of Birth and Death, Golakganj, PHC. So far evidentiary value of ext-1 is concerned, same being a public document, no formal proof of genuineness is required though it was not seized by the I.O during investigation. Further coming to the statement of the victim u/s.164 of Cr.PC, the victim had stated her age to be 16 years and the statement had been recorded three days after the alleged occurrence. In the FIR the age of the victim had been mentioned as 16 years on the day of the alleged occurrence. Both these 164 Cr.PC. statement and ext-1 had been proved in evidence by PWs. Though the statement u/s.164 of Cr.PC and ext-1 are not substantive evidence but then evidence of the victim, PW-5 and the evidence of PW-1, father of the victim, who had lodged the FIR corroborated each other in support of the prosecution case as laid down in the FIR and also in 164 Cr.PC. Thus there is least scope for raising any suspicion as to the genuineness of ext-1 and same not belonging to the victim. Thus the victim is proved to be a minor for the purpose of POCSO Act, 2012.

15. Now coming to the evidence of other PWs, PW-1 Ismile Uddin Sk. though had not been present at the time of the alleged occurrence his evidence to the extent of date of occurrence, 27-12-2013 and time of occurrence and the age of the victim appears wholly reliable since he was the informant of the case and had proved its contents. In his evidence he has stated the age of his daughter as 16 years and the date of occurrence as 27-12-2013. PW-1 has been corroborated by other PWs. Now it appears from the evidence of PW-1 that he had never taken any mobile battery from the accused. Neither any of the PWs had supported the alleged fact. Thus the accused having come to the house of the victim asking for his mobile battery was a pretense. PW-5, the victim had asked the accused to come later to take the battery but the accused tried to make a forced entry into the house and PW-5 tried to put up resistance. But the accused managed to strip her of her clothes and intended to have sexual relation with PW-5. It is evident from the evidence of the victim that had she not cried out for help the accused would have been successful in his act. Now the assessment of evidence of a witness when the witness happened to be a victim is to be considered wholly reliable. Besides in her statement under section 164 of Cr.PC,ext-2, the victim had specifically implicated the accused of throwing her down on the floor and attempted to rape her by stripping her of all clothes and had stated her age to be 16 years. In her statement to the IO, ext-4 also, recorded on 28-12-2013 the victim had stated that the accused stripped her of her clothes and had thrown her on the floor before attempting to commit rape on her. No material contradiction in the evidence of the victim, PW-5 with regard to her earlier statement made to the I.O. is evident from the evidence of the IO, PW-7. Further the evidence of PW-5 had been corroborated by her mother PW-6, PW-2, Surat Zamal, PW-3, Abdul Motleb and PW-4, Jahanuddin three neighbours of the victim, who had immediately come to the place of occurrence and had seen the accused engaged in a scuffle with PW-5, the victim. On seeing them the accused had fled away from the place of occurrence. Except for minor contradiction proved with regard to the earlier statement of PWs, no material contradictions or material omissions in the evidence of above PWs are evident in the evidence of PW-7, I.O. Considering the evidence of the PW-5 there is little doubt that the seized articles belonged to the accused since the fact of the accused leaving behind his mobile, sandals and the singlet had been related to by both PW-5 and PW-6. According to these two witnesses, while trying to keep a hold on the accused by holding the vest of the accused the accused managed to get himself freed. Those three PWs PW-2, PW-3 & PW-4 who had immediately come to the place of occurrence had seen the mother and daughter engaged in a scuffle with the accused and the accused fleeing thereafter the P.O. The defence failed to assail this fact. Besides none of the PWs had shifted from their stand in examination in chief in the cross examination. Since no previous enmity of the accused person with the family of the victim or for that matter the accused person's closeness to the victim's family earlier being evident in the evidence of PWs, it is indicative of the fact that the accused had come with the ulterior motive to have sexual relation with the victim. Had it not been so he would have returned once the victim told him that her father was not there at the house. The act of the victim proved brings it within the definition of offence of sexual assault as envisages in Sec. 7 of the POCSO Act. Section 7 of the POCSO Act envisages that whenever, 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. Considering the victim is proved to be below the age of 18 years, the accused is proved to have committed the offence of sexual assault u/s.8 of the POCSO Act, punitive section.

- 16. Now Hon'ble Supreme Court observed in Ranvir Vs state of Punjab as reported in 1973 Cri LJ 1120 that there is hardly a witness whose evidence does not contain a grain of untruth or exaggeration embroidery, embellishment etc. If remaining evidence is trustworthy and substratum of the prosecution, case remains intact, then the Court should uphold the prosecution case, to the extent it is considered safe.
- 17. Thus in the light of the discussion of the evidence on record, the prosecution appears to have been able to establish the charges u/s.447 of IPC and Section 8 of the POCSO Act as against the accused Abdullah Sk. beyond all reasonable doubt. The accused is accordingly convicted u/s.447 of IPC and Section 8 of the POCSO Act. The accused is acquitted of charge u/s.354B of IPC in the light of Section 71 of IPC.
- 18. Section 71 of the IPC provides for limit of punishment of offence made up of several offences Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

Where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences.

19. The punishment provided for sexual assault in Section 8 of POCSO Act is less severe than what is provided in 354 B of IPC though minimum punishment provided for both these offences is same. Thus in the light of

Section 71 of IPC that has already been described above, the accused is convicted under Section 8 of POCSO Act only since the part of ingredients constituting an offence under section 354B themselves constitute an offence

under section 8 of POCSO Act.

20. Heard the convict accused on the point of sentence. The convict

Abdullah Sk. pleaded for leniency. Considering the nature of offence proved to

have been committed by the accused, I do not find it a fit case for releasing the

accused person on Probation of Good Conduct under Probation of Offenders Act,

1958. However, taking into consideration the plea of leniency, the accused is

sentenced to S.I. for 3 (three) years u/s.8 of POCSO Act and fine of Rs.500/- I/D

S.I. for two months. The accused is further sentenced to fine of Rs.500/- only

u/s. 447 of IPC. i/d to S.I. for 1 (one) month.

21. The accused be given a copy of judgment free of cost u/s.363 of

Cr.PC. The earlier detention of the convicted accused Abdullah Sk. if any, in the

judicial custody to be set off against the sentence of imprisonment u/s.428 of

Cr.P.C. A copy of the judgment be given to the District Magistrate, Dhubri

u/s.365 of Cr.PC. The victim is recommended for receipt of compensation

u/s.357A of Cr.PC. A copy of the judgment be sent to the DLSA, Dhubri for

determination of quantum of compensation to be paid to the victim. Since the

seized articles remained unclaimed, same be disposed of in due course of law.

Given under my hand and seal of the Court on this 30th day of

September, 2016.

Dictated & Corrected by me

Special Judge, Dhubri

Special Judge, Dhubri.

APPENDIX

A. **Prosecution Witness.**

P.W-1 - Md. Ismail Uddin Sk.
P.W-2 - Md. Surat Zamal Mondal
P.W-3 - Md. Motleb Ali
P.W-4 - Md. Jahanuddin Sk.
PW-5 - Mustt. Eaminara Ahmed
PW-6 - Mustt. Amina Bibi
PW-7 - S.I. Jamir Ali

PW-8 - SI Upen Ch. Barman

B. **Court Witness**

Nil.

C. **Defence Witness**

Nil

D. **Prosecution Exhibits.**

Ext-1 - Birth Certificate

Ext-2 - Statement of the victim u/s.164 Cr.PC

Ext-3 - Seizure list Ext-4 - Sketch map Ext-5 - Charge sheet.

D. **Defence Exhibit**

Nil

Special Judge, Dhubri