IN THE COURT OF THE SPECIAL JUDGE, MORIGAON

Special Sessions (POCSO) Case No. 11/2015 U/S 376, 376(2)(i) IPC r/w Section 4 of the POCSO Act

Present: Mr. P. Das

Special Judge, Morigaon, Assam.

State of Assam

-VS-

Md. Babul Hussain Accused

Date of Charge : 13.08.2014, 25.06.2015.

Date of Argument : 04.12.2018, 19.01.2019.

Date of Judgment : 15.03.2019.

Appearance for the Parties

Advocate for the State : Mr. A. Kalam, Ld. P.P.

Advocate for the Accused: Mr. P. R. Bora, Ld. Advocate.

Mr. A. Salam, Ld. Advocate.

JUDGMENT

- 1. The prosecution case in brief is that an ejahar dated 04.09.2013, was lodged before the Laharighat Police Station by Musstt. Afia Begum alleging interalia that the accused Babul Hussain, a Pan shop owner seduced the 10 years old daughter of the informant and committed rape upon her. On the basis of the ejahar, Laharighat PS Case No. 209/2013, was registered under Section 376 IPC r/w Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter POCSO Act) and investigation started.
- **2.** After completion of investigation, charge sheet was submitted against the accused, Babul Hussain u/s 376 IPC r/w Section 6 of the POCSO Act. Subsequently, charges were framed against the accused u/s 376 IPC and thereafter u/s 376(2)(i) IPC r/w Section 4 of the POCSO Act, 2012, by this Court

through my learned Predecessor. The charges upon being denied by the accused led to commencement of the trial.

3. At the trial, prosecution side examined as many as 13 witnesses. Thereafter, the accused was duly examined u/s 313 Cr.PC. Defence did not adduce any evidence.

4. **POINTS FOR DETERMINATION**

Whether the accused Babul Hussain committed rape/ penetrative sexual assault upon the prosecutrix stated to be a minor and guilty of committing an offence punishable u/s 376/376(2)(i) IPC r/w Section 4 of the POCSO Act, 2012?

DISCUSSION, DECISION AND REASONS THEREOF

- **5.** I have perused the evidence on record and other relevant materials available. Heard learned public prosecutor for the State and Mr. P. R. Bora, the learned defence counsel for the accused person and considered rival submissions. I have perused the documents exhibited, including the medical report and the Forensic report.
- **6.** The learned defence counsel has raised the contention that the trial has been vitiated because the learned Assistant Sessions Judge, Morigaon has recorded depositions of the witnesses though the case has been charged under the provisions of POCSO Act, 2012. For the purpose of adjudicating his contention, I have carefully perused the case record and the relevant materials.
- **7.** Vide order dated 13.08.2014, charge u/s 376 IPC was framed against the accused by learned Assistant Sessions Judge, Morigaon and recording of evidence started. Subsequently, vide order dated 01.04.2015, the case record was transferred to the Sessions Court for further proceeding in the context of finding materials under POCSO Act, 2012. Thereafter, vide order dated 25.06.2015, passed by this Special Court, charges were framed against the accused u/s 376(2)(i) IPC r/w Section 4 of the POCSO Act, 2012.
- **8.** In this context, I have perused the order dated 20.03.2017, passed by this Court as Special Court through my learned predecessor. It is stated that the

charge under the POCSO Act was framed after deposition of most of the witnesses and thereafter, PW-1, the informant cum mother of the prosecutrix and PW-2/ prosecutrix were summoned again for re-cross-examination and they were discharged after defence duly re-cross-examined these two witnesses. It is further stated in the order dated 20.03.2017, that after re-cross-examination of PW-1 and PW-2, learned defence counsel, Mr. P. R. Bora declined to re-cross-examine the other witnesses who have already been examined, and as such, prosecution evidence was closed at that stage.

- **9.** In the context of the aforesaid situation, after addition of charge including charge under POCSO Act, 2012, it was necessary for the defence to get an opportunity to cross-examine the prosecution witnesses and the defence was duly given such opportunity. The defence re-cross-examined the informant and the prosecutrix and did not consider re-cross-examining the other witnesses and therefore, declined to do so, whereupon, the prosecution evidence was closed. In the context of the same, since defence was given due opportunity to re-cross-examine the prosecution witnesses afresh, which they availed with regard to the most vital prosecution witnesses and declined to do so with regard to the rest, I am of the considered view and finding that the procedure has been followed and that the trial is not vitiated. Therefore, I do not find force in the contention of the learned defence and the same stands repelled.
- **10.** Now, I come to the prosecution evidence and first I look at the testimony of the prosecutrix who adduced evidence as PW-2. In her evidence, she stated that on the day of incident, at about 3 PM, she had gone to the shop of the accused at Tinisukia bazaar to buy betel nut. Then the accused told that his wife was not at home and took her to his house and asked her to wash utensils. Thereafter, the accused gagged her mouth and committed rape upon her.

In cross-examination, she reiterated that the accused had called her to his house and committed rape upon her and denied that she deposed falsely. She also stated in cross-examination that near the shop of the accused are located the shops of Ruhul Amin, Fakaruddin and Safigul Islam etc.

During trial, the prosecutrix as PW-2 proved the Ext. 1, her statement recorded before the learned Magistrate during investigation and her signatures thereon as Ext. 1(1) and 1(2).

I find that the testimony of the prosecutrix remained unshaken during cross-examination regarding the incident.

11. Before proceeding further, it would be crucial to peruse the statement of the prosecutrix which she had given before the Magistrate during investigation. In the said statement, Ext. 1, she stated that on the day of the incident she returned from the school and had gone to the house of the accused to do work and that since they are poor, she and her mother used to work in the houses of others. She stated that she previously worked at the house of the accused. PW-2 further stated in her statement that after washing utensils when she was about to come out, the accused gagged her mouth and took her inside the house. Thereafter, with one hand he gagged her mouth and with the other hand removed her pant. Then he put his one leg over her one leg and committed rape upon her, whereupon, she cried loudly and the accused ran away. Since the house of the accused located near the market, people assembled there upon hearing her cry and she told the people that accused had committed bad act upon her.

From the above, I find that narration of the incident made by the prosecutrix as PW-2 during trial tallies with her narration in her Section 164 Cr.PC statement, thereby, lending significant credibility to her evidence.

12. Sh. Rebat Chandra Baruah who had conducted investigation into the case adduced evidence as PW-13 during which he stated that after lodging of the case, he examined the victim girl on the same day and also seized the inner garments which she was wearing at the relevant time of the occurrence. He exhibited the seizure list as Ext. 5, and his signature thereon as Ext. 5(1). Upon perusal of the seizure list, I find mention of one under garment colour check white of the victim girl which was produced by her mother. PW-3 further stated that the said seized garment was sent to the FSL for examination and he collected the FSL report during the course of investigation. He proved the FSL report as Ext. 6, and the report reveals presence of human semen and blood in

the under garment. I have perused the FSL report and I found mention of Exh No. Sero 3240/A having given positive result for human blood and semen. On earlier part of the report it is stated that the said sample was received in connection with Laharighat PS Case No. 209/2013. The testimony of PW-13 has also remained unshaken.

- **13.** After addition of charge under POCSO Act, the prosecutrix and the informant were re-called by the prosecution for evidence and they were examined and duly cross-examined by defence. In her re-cross-examination, the prosecutrix denied that she stated falsely against the accused.
- 14. The mother of the prosecutrix who is the informant of the case adduced evidence as PW-1 in which she stated that on the date of the incident, in the afternoon, prosecutrix had gone to the shop of the accused to buy betel nut and subsequently, she got information that something had happened to her daughter and then she went to the Tinisukia bazaar and saw that the public were preparing to take her to the Police Station. She also went to the Police Station and lodged the case. She stated that at Tinisukia bazaar the accused had committed rape upon her daughter and at the time of incident her daughter was aged 10 years.

In cross-examination, she reiterated that the accused committed rape upon her daughter and denied that she deposed falsely. She stated that she had not seen the occurrence.

- **15.** The testimony of the informant/PW-1 lends support to the testimony of the prosecutrix, the Investigating Officer and the Forensic evidence.
- **16.** One Fakaruddin whom the prosecutrix mentioned in her evidence adduced evidence as PW-4 in which he stated that on the date of the incident, upon hearing about the incident, at Tinisukia bazaar, he went there and saw collection of people at the place. He further stated that one girl was asked by the people as to what had happened and she replied that the accused had committed bad act upon her.

17. Similarly, one Safiqul Islam, whom the prosecutrix stated in her testimony adduced evidence as PW-5 in which he stated that on the date of the incident he was playing carom at the back side of the shop of the accused and upon seeing collection of people he came out. He saw that some people were asking a girl as to whether someone had committed bad act upon her and the girl replied that the accused had committed bad act upon her.

He reiterated in his cross-examination that the girl told before the people that accused had committed bad act upon her.

18. One Ruhul Amin whom the prosecutrix also mentioned in her testimony adduced evidence as PW-6 in which he stated that on the date of the incident, in the evening, while coming to his shop, he saw collection of people. He asked and was told that the accused had committed rape upon the prosecutrix. He also stated that upon asking the prosecutrix, she told that the accused committed rape upon her.

He denied in cross-examination that he had deposed against the accused due to any business rivalry and denied that he instigated the mother of the prosecutrix to lodge a false case.

19. During investigation, the prosecutrix was forwarded for medical examination and she was examined by the Medical Officer, Dr. Jaya Prava Boro who deposed evidence as PW-10 during the trial. During testimony, she stated that on 04.09.2013, she conducted medical examination upon the prosecutrix and her important findings are as follows;

Vaginal hymen was open and no injury seen; no definite sign of recent sexual intercourse; no teeth marks or nail marks seen in any part of the body, clinically the age of the girl was between 11 to 13 years. She proved the medical report as Ext. 2 ad her signature thereupon as Ext. 2(1).

20. Similarly, one Abdul Jabbar as PW-7 stated that on the date of incident he was at his house and upon hearing hue and cry in Tinisukia bazaar, he came out and saw an assemblage of person. Upon asking the people, he was told that the accused had committed bad act upon a girl.

- **21.** PW-3, Harun Al Rashid stated in his evidence that on the date of the incident upon hearing hue and cry near his pharmacy at Tinisukia bazaar, he went there and upon asking the boys present there they told that the accused had committed bad act upon a girl and he found both the accused and the girl and upon asking the girl she told him that the accused did not commit bad act upon her.
- **22.** One Moinul Hoque adduced evidence as PW-8 in which he stated that at the time of the incident, there was hue and cry and collection of people in front of the shop of the accused. A girl was waiting in front of the shop of the accused and upon his asking the girl she stated that nothing happened.
- **23.** Similarly, one Abbas Ali adduced evidence as PW-9 who stated that on the date of the incident, while having tea at Tinisukia bazaar, he heard people discussing that one false case was lodged against the shop keeper Babul with regard to commission of bad act upon a girl.
- **24.** One Abdul Malek adduced his evidence as PW-11 in which he stated that on the date of the incident, in the afternoon, he heard hue and cry in the hotel of Ruhul Amin located near the shop of the accused. He went there and upon asking the people they told that the accused had committed rape upon the prosecutrix. He further stated that upon asking the girl she stated that the accused had not raped her.

In cross-examination, he stated that the girl told him that shopkeeper Ruhul Amin tutored her to say that the accused had committed rape upon her.

- **25.** I find that the evidence of PW-3 Harun Al Rashid, PW-8 Moinul Haque, PW-9 Abbas Ali and PW-11 Abdul Malek might apparently seem to indicate an alternate view with regard to guilt of the accused.
- **26.** However, the testimony of the prosecutrix during trial, her statements before the Magistrate during investigation, the evidence of the Investigating Officer, seizure list and the Forensic evidence have overwhelmingly supported the prosecution case regarding the nature of the incident narrated by the prosecutrix.

- **27.** Further, the evidence of PW-4 Fakaruddin, PW-5 Safiqul Islam, PW-6 Ruhul Amin, all of whom were mentioned by the prosecutrix in her evidence, have supported the case of the prosecutrix regarding the incident. In fact, the evidence of these witnesses are almost in the nature of resgestae with regard to the alleged incident of penetrative sexual assault upon the prosecutrix by the accused and lends considerable support and credence to the testimony of the prosecutrix, her Section 164 Cr.PC statement, the evidence of PW-13, the seizure list and the Forensic evidence.
- **28.** The testimony of the mother of the prosecutrix as informant has also supported the aforesaid evidence and further fortifies it. Despite the nature of the medical evidence regarding the findings with regard to sexual act and the testimony of PW-3, PW-8, PW-9 and PW-11, the solid testimony of the prosecutrix both during trial and her statement before the Magistrate coupled with the forensic evidence of finding blood stain and semen in her under garment seized by the Investigating Officer, PW-13 vide Ext. 5 (seizure list) along with testimony of PW-13 (Investigating Officer) simply cannot be overlooked and brushed aside.
- **29.** It is well settled that in a criminal trial when two views are possible, the one in favour of the accused is to be preferred. However, in this case, apparently it may seem that evidence of some of the witnesses raises an alternative view requiring granting of benefit of doubt to the accused, but the other parts of the prosecution evidence as narrated above, including the crucial testimony of the prosecutrix, Investigating Officer, the forensic evidence and rest of the corroborating evidence is overwhelming and effectively nails the accused, ruling out the possibility of any alternative view.
- **30.** Therefore, on the basis of the evidence and relevant materials on record, I come to the considered finding that the prosecution has able to prove beyond reasonable doubt that on the day of the incident, the accused Babul Hussain committed penetrative sexual assault upon the prosecutrix.

- **31.** Now, the question to be determined on the basis of the approximate age of the prosecutrix is whether the penetrative sexual assault is aggravated or not. The mother of the prosecutrix has testified that her daughter was aged 10 years at the time of the incident but also stated that she had not submitted any certificate in support of the same. The prosecutrix in her evidence as PW-2 has stated that she does not know exactly her age. The medical report shows the age of the prosecutrix in between 11 to 13 years.
- **32.** In the context of the evidence on record, I am of the considered view that it is not absolutely sure as to whether the prosecutrix was aged below 12 years at the time of the incident for making the act of the accused an act of aggravated penetrative sexual assault.
- **33.** Further, from the evidence and materials on record, it is quite clear that the prosecutrix was a minor aged below 18 years and therefore, a child within the meaning of POCSO Act, 2012. In the medical evidence also, the age of the prosecutrix is indicated to be 11 to 13 years. Therefore, on the basis of the evidence on record, one can safely come to the finding that the prosecutrix was aged less than 16 years on the date of the incident.
- **34.** It may be mentioned herein that Section 376(2)(i) IPC brought in by the 2013 Amendment is with effect from 03.02.2013. In this case, the date of incident is 04.09.2013.
- **35.** In the entire facts and circumstances, on the basis of the evidence on record and in view of above discussion, I come to the considered finding that the accused is guilty of committing penetrative sexual assault upon the prosecutrix aged below 16 years. Accordingly, the accused is convicted u/s 376(2)(i) IPC r/w Section 4 of the POCSO Act, 2012.

ORDER ON SENTENCE

36. Heard the accused and the learned defence counsel on the point of sentence. The accused has prayed for leniency.

- **37.** Section 4 of the POCSO Act, 2012 punishes the offence of penetrative sexual assault with imprisonment for a term not less than 7 years but may extend to life imprisonment and fine. However, Section 376(2)(i) IPC punishes the offence of commission of rape upon a child below 16 years of age with rigorous imprisonment not less than 10 years and which may also extend to life imprisonment, which shall mean imprisonment for the remainder of that person's natural life and shall also be liable to fine.
- **38.** Section 42 of the POCSO Act, 2012 provides that, "where an act or omission constitutes an offence punishable under this Act and also under Sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or Section 509 of the India Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the India Penal Code as provides for punishment which is greater in degree."
- **39.** Thus, for conviction u/s 376(2)(i) IPC and Section 4 of the POCSO Act, 2012, the convict will have to be imposed with sentence under that penal provision which provides punishment greater in degree.
- **40.** In the context of the above and in the facts and circumstances, the accused is hereby sentenced to undergo rigorous imprisonment for 10 (Ten) years and to pay fine of Rs. 2000/- (in default, undergo further rigorous imprisonment for two months) for his conviction under section 376(2)(i) IPC r/w Section 4 of the POCSO Act, 2012.
- **41.** As stated above, in terms of mandate of Section 42 of the POCSO Act, 2012, punishment greater in degree has been chosen.
- **42.** Any period of detention undergone by the convict during investigation/trial shall be set off as against the substantive sentence in compliance with section 428 of the Cr.P.C.
- **43.** His bail bond is cancelled and sureties stand discharged.

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- **44.** The convict shall be given a copy of this judgment free of cost.
- **45.** A copy of this judgment and order shall also be sent to the learned District Magistrate Morigaon in compliance with Section 365 of the Cr.P.C.
- **46.** Further, in exercise of power under Section 357-A Cr.P.C. and the Assam Victim Compensation Scheme, the District Legal Service Authority, Morigaon shall award adequate and suitable victim compensation to the prosecutrix who is the victim of the crime, for her rehabilitation. For this purpose, a copy of this judgment and order shall be sent to the learned Secretary, District Legal Service Authority, Morigaon for doing the needful.
- **47.** The instant Special Sessions case stands disposed of on the aforesaid terms.
- **48.** Given under my hand and seal on this the 15th day of March, 2019.

Dictated and corrected by me

(P. Das) Special Judge Morigaon, Assam

(P. Das) Special Judge Morigaon, Assam

APPENDIX

Prosecution Witnesses:

PW-1 : Musstt. Afia Begum.

PW-2 : Prosecutrix.

PW-3 : Md. Harun Al Rashid.

PW-4 : Md. Fakar Uddin.

PW-5 : Md. Safikul Islam.

PW-6 : Md. Ruhul Amin.

PW-7 : Md. Abdul Jabbar.

PW-8 : Md. Moinul Hoque.

PW-9 : Md. Abbas Ali.

PW-10 : Dr. Jaya Prava Bora.

PW-11 : Md. Abdul Malek.

PW-12 : ASI. Abdul Khalek.

PW-13 : Sh. Rebat Ch. Baruah.

Defence Witness:

Nil.

Prosecution Exhibits:

1. Ext. 1 : Section 164 Cr.PC statement of the prosecutrix.

2. Ext. 2 : Medical Report.

3. Ext. 3 : Ejahar.

4. Ext. 4 : Sketch map.

5. Ext. 5 : Seizure list.

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6. Ext. 6 : FSL Report.

7. Ext. 6 : Charge sheet.

Defence Exhibits:

Nil.

Dictated and corrected by me

(P. Das) Special Judge Morigaon, Assam

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