IN THE COURT OF SPECIAL JUDGE ::KOKRAJHAR

Present :- Sri C. Chaturvedy, AJS

SPECIAL CASE NO.17/2019

U/S-8 of POCSO Act

STATE OF ASSAM

Vs

Md. Sirajul Hoque S/O. Md. Saher Ali Vill- Maspara P.S. Bilasipara Dist. Dhubri

...... Accused person.

Appearance: -

Learned Counsel for the State Mr. Manjit Ghose, Special P.P.

Learned Counsel for the defence Ms. Rita Modak

Charge framed on 11.09.2019

Evidence recorded on 16.11.2019; 30.11.2019;

21.12.2019; 17.01.2020.

Argument heard on 11.02.2020 Judgment pronounced on 18.02.2020

JUDGMENT

- 1. The case of the prosecution is that one xxx, the father of the victim, lodged an FIR alleging that on 27.12.2018 at about 3 p.m accused Siraju Hoque committed rape on his minor daughter xxx.
- 2. On receipt of the FIR, a case under Section 4 of POCSO Act was registered and after completion of the investigation, a charge sheet was laid against the accused Md. Sirajul Hoque for commission of offence U/S 4 of POCSO Act.

- 3. The accused person was summoned and on his appearance, copies of the relevant documents were furnished to him. After hearing both sides, charge under Section- 8 of POCSO Act was framed against the accused to which he pleaded not guilty and claimed trial.
- 4. In the course of trial prosecution examined 8 (eight) witnesses. At the closure of prosecution evidence, the accused person was examined U/S 313 of the Cr.P.C. The defence plea is of total denial and the accused declined to adduce any evidence.

POINTS FOR DETERMINATION:-

i) Whether the accused is guilty of the offence under Section 8 of the POCSO Act?

DECISION AND REASONS:

- 6 Pw1 Ms. xxx, deposed that informant is her brother. Accused is her son in law (husband of niece). About 1 year back, Maryam, the wife of accused, called xxx, the victim, to her mother's house. The victim then went to the house of Maryam. Pw 1 deposed that she suspected some foul play hence, after a while, she followed the victim to the residence of Maryam wherein she saw the accused felling the victim on bed and about to commit sexual intercourse. She then slapped the victim and thereafter she left the house of Maryam. She informed her brother and he lodged the FIR.
- 7. In cross examination, Pw1 denied the suggestion that she did not state before the Police that she saw that accused felling the victim on bed and about to commit sexual intercourse and that she slapped Sahiton and that thereafter she left the house of Maryam. Pw 1 also denied the suggestion that she was not present at the residence of Maryam. Pw1 has also denied the suggestion that in her statement under Section 161 CrPC she had stated that through the bamboo walls of the house she had seen accused and victim grabbing each other and dancing.

- 8. Pw2 xxx, the victim, deposed that she knows the accused. About 1 year back, Maryam called her at about 3 p.m to her house. She was reluctant since there was a religious programme in their house but Maryam insisted and took her to their house. In her house, the accused grabbed her and fell her on a bed. Thereafter, he gagged her mouth and touched her lower garments. At this juncture, her Aunt, xxx arrived and she escaped.
- 9. In cross examination, Pw2 has denied the suggestion that she did not state in her statement under Section 161 CrPC that the accused grabbed her and fell her on a bed and that thereafter, he gagged her mouth and touched her lower garments. Pw2 has also denied the suggestion that she stated before the Police that accused kissed her.
- 10. In cross examination Pw2 however admitted that she had not screamed when the accused grabbed her.
- 11. Pw3 xxx, the father of victim, deposed that about 1 year back there was religious function at his house. During the evening hours his sister, xxx, informed that accused had held the hands of his daughter in the house of Maryam. The VDP Secretary informed the police and later he lodged an FIR. He had put thumb impression in the FIR.
- 12. In cross examination of Pw3 deposed that he had not seen the incident. Pw 3 admitted that he did not state before the Police that Jamena Bibi informed him that accused had held the hands of his daughter in the house of Maryam.
- 13. Pw4 Md. Edrish Ali deposed that about 1 year back, in the evening hours, he had seen that villagers have detained the accused and the victim in the residence of xxx, the father of victim. He heard that accused had called the victim in the residence of his wife. He immediately informed the VDP Secretary. The VDP Secretary informed

the police. Police came and after conducting investigation took the accused with them.

- 14. In cross examination, Pw4 deposed that he had personally not seen what happened between accused and the victim inside the house of wife of accused.
- 15. Pw5 Musstt. Morion Bibi deposed that the accused is her husband. About 1 year back her husband was detained by the villagers and beaten up for mis-behaving with victim. She also deposed that victim is the daughter of her paternal uncle. There is a dispute, between her mother and her paternal uncle, over paternal property hence xxx, the father of victim, used the victim to frame the accused in a false case.
- 16. Pw 5 was declared hostile by the learned Special P.P but nothing incriminating could be elicited.
- 17. Pw6 Md. Jalil Sheikh deposed that about 1 year back he was going towards the residence of xxx, the father of victim, for attending a religious function. When he reached near the residence of VDP Secretary he saw the brother of victim, telling the VDP Secretary that a boy has committed rape on his sister. When he reached the residence of xxx, the father of victim, he saw the accused has been held up by the villagers. Thereafter, the villagers asked the victim and her paternal Aunt about the occurrence to which they stated in front of villagers that accused had tried to open the under garments of the victim. Thereafter, the police was informed and accused was handed over to police.
- 18. In cross examination, Pw6 deposed that he had not stated before police that he heard the incident from the Asmot. Pw6 has denied the suggestion that he did not state before police that he was going towards the residence of xxx, the father of victim, for attending a religious function. Pw6 has also denied the suggestion that he did not state before police that the brother of victim had informed that her

sister has been raped by the accused. Pw6 has also denied the suggestion that he did not state before police that Jamina Bibi and the victim had stated before the villagers that accused had tried to open the under garments of the victim.

- 19. Pw7 xxx, the mother of victim deposed that about 1 year back, they were having religious function at their residence. At about 5 PM, her sister-in-law informed her that her daughter is confined in the residence of her other sister-in-law, Abiron Bibi. She immediately went to the residence of Abiron Bibi and saw that her daughter was crying. Her daughter informed her that accused, son-in-law of Abiron Bibi, had taken out her under garments. She caught the accused and shouted for her son. Her son arrived and the accused was apprehended. Later, the villagers handed over the accused to police.
- 20. In cross examination, Pw7 has denied the suggestion that she did not state before police that she had seen her daughter crying. Pw7 has also denied the suggestion that she did not state before police that her daughter informed her that accused, son-in-law of Abiron Bibi had taken out her under garments. Pw7 has also denied the suggestion that she did not state bfore police that her son arrived and the accused was apprehended. Pw7 has also denied the suggestion that there is a property dispute between them and the Abiron Bibi.
- 21. Pw8 Sri Subhash Chandra Koch deposed that on 27.12.2018 he was posted as In-charge at Balajan Police Out Post. On that day he received information that a boy has been kept confined in a village at Duramari. He visited the place of occurrence and apprehended the accused. He also recorded the statement of witnesses. Thereafter, the father of victim lodged a formal FIR in connection with which Kokrajhar P.S. Case No.636/2018 U/S 4 of POCSO Act was registered and investigated. The victim was sent for medical examination but she refused examination. Her statement was recorded U/S 164 of CrPC. Having found sufficient materials against the accused Sirajul Hoque, he submitted charge sheet against the accused for commission of

offence U/S 8 of POCSO Act. Exhibit-2 is the charge sheet and Exhibit-2(1) is his signature. Exhibit-3 is the FIR received by him. Exhibit-3(1) is his endorsement.

- 22. In cross examination Pw8 deposed that PW3 did not state before him that Jamina Bibi informed him that accused had held the hands of his daughter. Victim did not state before him that accused fell her on the bed. PW1 did not state before him that she had seen the accused felling the victim on the bed and attempted to commit sexual intercourse. According to investigation no materials U/S 4 of POCSO Act were found against the accused. There was no eye witness except Jamina Bibi. He had not seized wearing apparel of the victim.
- 23. Coming now to the charge under Section 8 of the POCSO Act, I would like to point that Section 29 of the POCSO Act provides that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit theoffence, as the case may be unless the contrary is proved.
- 24. In Noor Aga v. State of Punjab, (2008) 16 SCC 417 it was held by the Hon'ble Supreme Court that the provision for reverse burden is not only provided for under the special Acts but alsounder the general statutes like the Penal Code. The Evidence Actprovides for such a burden on an accused in certain matters, as, for example, under Sections 113-A and 113-B thereof. It furtherheld that enforcement of law, on the one hand, and protection ofcitizen from operation of injustice in the hands of the lawenforcement machinery, on the other, is, thus, required to bebalanced. The constitutionality of a penal provision placing burdenof proof on an accused, thus, must be tested on the anvil of theState's responsibility to protect innocent citizens. The court mustassess the importance of the right being limited to our society andthis must be weighed against the purpose of the limitation. The purpose of the limitation is the reason for the law or conduct which limits the right.

- 25. The Hon'ble Supreme Court in Noor Aga (supra), added that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. Aninitial burden exists upon the prosecution and only when it standssatisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not ashigh as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused.
- 26. In the present case, a reading of the evidence of pw 2, reproduced above, would clearly show that accused grabbed her and also touched her undergarments. The evidence of pw 1, when seen from the perspective ofher statement, under Section 164 CrPC, as also from the cross examination, indicates that she stood her ground so far as the funamental allegations are concerned.
- 27. Learned defence Counsel argued that the prosecution evidence is not believable because of inherent contradiction in the evidence of witnesses. She argued that the evidence of Investigating officer, Pw8 has established the contradiction appearing in the testimony of principle prosecution witnesses of Pw1 and Pw2.
- 28. I have appreciated the defence argument in the light of evidence adduced.
- 29. The principle prosecution witness is the victim herself who deposed that the accused dragged her and fell her on a bed and thereafter he touched her lower garments.
- 30. Now, so far as the evidence of Pw 8, Investigating officer, is concerned, the defence did not confirm the contradiction, if any, appearing in the testimony of Pw2. It is seen that the testimony of Pw2 remain unimpeached. So being the status of evidence of Pw2 she is found reliable witness. The onus placed on the accused by Section 29

of POCSO Act has not been discharged either by elicting relevant facts from the prosecution evidence or by adducing defence evidence.

31. Now Section 7 of the POCSO Act defined sexual assault as follows:

"Whoever, 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 with involves physical contact without penetration is said to commit sexual assault".

- 32. The act of the accused in grabbing the victim thus amounts to an act with sexual intent involving physical contact without penetration and it is therefore a sexual assault within the meaning of Section 7 made punishable Under Section 8 of the POCSO Act.
- 33. The accused is thus found guilty of the offence under Section 8 of the POCSO Act.
- 34. The point for determination is answered accordingly.
- 35. I have heard the accused on the point of sentence and he having maintained his innocence submitted that he has been framed with the help of fabriciated evidence.
- 36. The maximum punishment for the offence under Section 8 of POCSO Act extends to imprisonment upto 5 years. In view of the facts of this case, I believe a sentence of three years of rigorous imprisonment with fine of Rs 20,000 in default to undergo simple imprisonment for 3 months would meet the ends of justice.

ORDER

Accused Sirajul Hoque is convicted for the offence under Section 8 of the POCSO Act and sentenced to three years of rigorous imprisonment with fine of Rs 20,000 in default to undergo simple imprisonment for 3 months.

A free copy of the judgment be furnished to the convict.

A copy of the judgment be sent to District Magistrate, Kokrajhar

A copy of this judgment be sent to District Legal Services

Authority, Kokrajhar, for considering payment of adequate

compensation to the victim.

Given under the hand and seal of this Court on this 18^{th} day of February,2020.

Dictated by

Special Judge Kokrajhar Special Judge Kokrajhar

<u>Appendix</u>

1. Prosecution Exhibits:-

Exhibit-1 Statement Exhibit-2 Charge sheet

Exhibit-3 FIR

2. <u>Defence Exhibit</u> Nil

3. Prosecution Witness

P.W.1 Ms. Jamena Bibi

P.W.2 xxx victim

P.W.3 xxx, father of victim

P.W.4 Md. Edrish Ali

P.W.5 Musstt. Morion Bibi
P.W.6 Md. Jalil Sheikh

P.W.7 xxx, mother of victim

P.W.8 Sri Subhash Chandra Koch

4.<u>Defence Witness</u> Nil

5. <u>Court witness</u> Nil

Special Judge Kokrajhar