# **IN THE COURT OF SPECIAL JUDGE AT BARPETA**.

Present :- Sri Vinod Kumar Chandak, M.A., M.Com., LL.B.,AJS, Special Judge, Barpeta.

# JUDGMENT IN SPECIAL POCSO CASE NO. 37 OF 2017 (G.R.No.- 605/2017) Tarabari P.S. Case No. 30 of 2017

**State of Assam** 

-versus-

Abdul Kader S/O Late Abdul Baser, Resident of Malipara, P.S. Tarabari, District - Barpeta

...... Accused.

### **APPEARANCES:**

For the State : Mr. Malek Ali Ahmed, learned

Addl. P.P., Barpeta.

For the Accused : Mr. Naba Kumar Ray, learned

Advocate, Barpeta.

# CHARGE FRAMED UNDER SECTION 376 IPC read with Section 4 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT. 2012.

Date of Charge : 09.06.2017

**Date of Prosecution evidence : 25.10.2017;03.01.2018;** 

13.02.2018; 25.04.2018 &

01.04.2019

Date of Statement of accused: 24.04.2019
Date of Argument : 01.06.2019
Date of Judgment : 12.06.2019

# J U D G M E N T

1). The prosecution case, in brief, is that Tarabari P.S. Case No 30 of 2017 under section 4 of the Protection of Children From Sexual

Offences Act, 2012 was registered on the basis of a F.I.R. lodged by Manir Uddin Dewan, father of the victim (hereinafter referred to as 'X').

In the aforesaid **F.I.R**. dated 07.02.2017 **(Exhibit -1)** the informant Manir Uddin Dewan (P.W.1), who is the father of the victim girl, alleged interalia that on 05.02.2017 at about 8:00 AM, the accused person committed penetrative sexual assault on his minor daughter namely Narjima Dewan, aged about 8 years when she alongwith her brother, namely Majirul Dewan went to rice mill which was situated near the house of the accused. It was also alleged that accused lured the victim to the house of one Sarumuddin, where nobody was there. On hearing hue and cry of victim, the wife of Sarumuddin came and rescued the victim, when she was being abused by the accused. As he informed the people of society about the incident, so there has been delay in filing this case.

On receipt of the aforesaid F.I.R. by the Officer-In-charge, Tarabari Police Station, the same was registered as Tarabari P.S. Case No 30/2017 under section 4 of the Protection of Children From Sexual Offences Act, 2012.

During the course of investigation, the victim girl was medically examined by the doctor, her statement under station 164 of CrPC was recorded by the learned Magistrate. Police, on completion of investigation, filed charge sheet, in the case, against the above named accused **Abdul Kader** under Section **4 of the Protection of Children From Sexual Offences Act, 2012** vide charge sheet **No.27/17**, dated **31.03.2017**.

- **2).** My learned Predecessor-in-office received the case record alongwith the case diary of the case. Accused was summoned. On appearance of accused, copy was furnished to him by my learned Predecessor-in-office.
- **3).** Upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of

the learned counsel for the accused and the prosecution in this behalf, charge was framed by the then Sessions Judge, Barpeta against the accused under Section 376 IPC read with Section 4 of the Protection of Children From Sexual Offences Act, 2012, which was read over and explained to the accused, to which, the accused pleaded not guilty and claimed to be tried.

**4).** During the course of trial, **07 [Seven]** number of witnesses including the victim, her parent, the Medical Officer and the I/O were examined on behalf of the prosecution to prove the charge under Section 4 of the Protection of Children From Sexual Offences Act, 2012.

On completion of prosecution evidence, statement of the above named accused was recorded under Section 313 of CrPC. The accused denied all the alleged incriminating materials against him. He claimed himself to be innocent. He also disclosed that informant stole away his 'jute materials' prior to 3 months of this incident. He also stated in his statement that stolen articles were recovered from the house of the informant. Argument also took place for that reason between both side. For this reason, informant has lodged false case against the accused person.

- 5). I have heard Mr. Malek Ali Ahmed, learned Additional Public Prosecutor of Barpeta, for the State as well as Mr. Naba Kumar Ray, learned Defence Counsel for the accused, who is facing trial for commission of offence under Section 376 IPC read with Section 4 of the Protection of Children From Sexual Offences Act, 2012.
- **6).** Now the point for determination before this court are as follows ---
- (i) Whether on 05.02.2017 at about 8.00 AM at Malipara Char, East, within the jurisdiction of Tarabari Police Station, District Barpeta, accused committed rape on Narzima Dewan, aged about 8 years, daughter of Mainir Uddin Dewan by

committing penetrative sexual intercourse and thereby committed an offence punishable under Section 376 IPC read with Section 4 of the Protection of Children From Sexual Offences Act, 2012 ?

### **DISCUSSION, DECISIONS AND REASONS THEREOF:**

**7).** To decide the above point and sections of law, let us examine, analyze and appreciate the evidence of the witnesses alongwith the relevant documents.

Manir Uddin Dewan [P.W.1] who is informant of this case, deposed in his evidence that incident took place, at about 8.00 AM. The age of his victim daughter was 8 years. On that day, victim along with her brother namely Majirul went to Rice Mill of Ramjan Ali. Then, the accused sent her to the house of Sarumuddin to bring something. After that, accused forcibly took her inside the house and forced his male organ into the private part of his minor daughter. He also stated that when the victim raised hullah then accused pressed her neck and later freed his minor girl.

PW1 disclosed that victim told the incident before her mother. He disclosed the matter to people of society and the village people assured him for justice within two days. But the village people did not solve the matter then he filed FIR.

He exhibited the FIR as **Ext.1** and **Ext.1(1)** is his signature.

**During cross-examination** PW1 deposed that his house is situated near 300 meters distance from the house of the accused person and at the same distance from the house of Sarumuddin. He also deposed that there were several houses at the place of occurrence like Manan Ali, Bahadur Ali, Salim Dewan. But he did not discuss about the incident with these people. He also admitted that he did not discuss about the incident with wife of Sarumuddin. PW1 further deposed that he was not at his home when incident took place.

He denied that he did not state before the police that his son Majirul and victim went to the rice mill of Ramjan for grinding paddy.

He denied that he did not state before the I/O that accused sent the victim, to bring something from the house of Sarumuddin; that there was nobody inside the house of Sarumuddin and the victim made hulla, when the accused entered his penis in the private parts of his daughter; that accused pressed her neck and later she disclosed the matter before her mother.

PW1 further stated that accused did not give bichar before the village people about theft of 'jute materials' prior to 6 months of this incident.

8). The victim [P.W.2] deposed in her evidence that on the relevant day, she and her brother namely Manjirul went to rice mill of Ramjan. Then, accused Abdul Kader sent her to the house of Sarumuddin to bring tobacco. She stated that when she reached at the doorstep of Sarumuddin house, then, accused Abdul Kader took her inside the house and opened her panty and committed penetrative sexual assault. PW2 also stated that when the accused inserted his penis into the private part of her then she raised hullah then accused pressed her neck and later freed her. After that, she narrated the whole incident before her mother in her house. She deposed that the incident took place at about 7.30 AM.

PW2 further deposed that after the incident, her mother took her to her aunt's house and then, accused Abdul Kader came and urged to forgive before her mother.

PW2 stated that her father lodged the case after 2 days as the village people could not settle the matter. Police took her to thana and sent her for medical examination and the learned Magistrate recorded her statement. She further deposed that she narrated the same fact before the police.

She exhibited the statement as **Ext.2** and **Ext.2(1)** and **Ext.2(2)** are her signature.

**During her cross-examination**, she stated that she did not remember the month of the incident but she knew the date of the incident which was '5'. She denied that she did not state before the police that she alongwith her brother went to rice mill. She also denied that she did not state before the I/O that accused sent her to bring tobacco from the house of Sarumuddin.

She deposed that she did not state before the police that her mother took her to the house of her aunty and the accused Abdur Kader came and prayed to forgive him.

She also deposed that she knows all the members of the house of Sarumuddin. She further, stated that there was nobody in the house of Sarumuddin and she did not say anything, before them, regarding the incident, later on.

She denied all other suggestion of defence side.

**9). Hajera Khatun [P.W.3]** who is wife of Sarimuddin deposed that she knows the accused person who took the victim to her house.

She was declared hostile by prosecution side. She denied to have stated before the police that "on day before yesterday at about 8-9 AM Kader Ali called the daughter of Maniruddin, aged about 8 years from the rice mill and was talking to her in her house. As I proceeded to the house of my neighboure, I heard the hue and cry of the girl which may be for the reason that accused wanted to do bad work with her. I rushed to her. The accused Kader fled away as soon as I opened the door. Many nearby people gathered on hearing my hue and cry. The victim Nazmina Dewan disclosed that accused Kader did bad work with her. Then, I called the parent of the girl and handed over the girl to them." She denied that she did not depose against the accused Kader to save him.

**In her cross-examination** by defence side, she deposed that informant never asked her regarding the incident. She admitted that she always stay in the house and she closed the door with lock

during her absence.

She further stated that Police did not ask him about the incident. She did not tell before the police as the public prosecutor stated above.

**10). Musstt Rupjan Nessa [PW4]** stated that she knows the informant and the victim. He deposed that the incident occurred about one year ago.

She further stated that she knew the whole incident from the mother of the victim. Victim's mother told her that accused raped her daughter namely Narjima Khatun by taking her to the house of Sarumuddin.

In her cross-examination, she deposed that the informant is her brother-in-law. She deposed that her house is near about <sup>3</sup>/<sub>4</sub> bighas distance from the house of the Sarumuddin. She knows the neighbourers of the house of Sarumuddin. She did not meet Foijuddin and Hajera.

She further deposed that she did not state before the police that neither Narjima's mother nor the victim told her about the incident.

11). Faizuddin (PW5), stated that he knows the informant and the victim. He stated that incident took place about one year ago in the house of Sarumuddin @ Salimuddin. He further stated that a vichar was held in the house of Amin Bhuyan where he heard that Kader did bad works with the daughter of Manir. PW5 stated that he was present in that meeting alongwith Akkash Ali and Nayab Ali Dewan. They asked accused about the incident and the accused Kader admitted that he did bed works with Narjima. As there was delay in the bichar, Maniruddin lodged the case.

He further stated that minutes of the meeting was prepared and the statement of the accused was also written in that bichar. He claimed to have the photocopy of the statement of the accused.

In his **cross-examination**, he deposed that he did not meet police. He admitted that he did not state before the police as he told in his evidence before the court.

12). Dr. Anima Boro [PW6], who is the Medical Officer of this case, deposed in her evidence before the court that on 07.02.2017, she working as Lady Medical Officer at Fakharuddin Ali Ahmed Medical College & Hospital, Barpeta. On that day in connection with Tarabari P.S. case No.30/2017, she examined victim Narjina Dewan, aged about 08 years, daughter of Md. Mohiruddin, of village Chenglirdia, under Tarabari P.S., District Barpeta on being identified by WPC/433 Janani Mochahari and found as follows:

**<u>History</u>**:- History of alleged assault sexually by Kadar Ali, 50 years on last Sunday (05/02/2017) at 7:30 AM.

# **Physical Examination:**

Identification marks:- One black mole on right Chest.

Height :- 124 Cm. Weight:- 25Kg.

Chest girth at nipple level: 57 Cm.

Abdominal girth at navel level :- 59 Cm.

Teeth: 24.

Hairs: Axillary/Body :- Absent.

Breasts :- Not developed.

Puberty(as told by the individual):- Not attained.

Menstruation(as told by the individual):- Not attained.

L.M.P.(as told by the individual):- Not attained.

Mental condition:- Stable

Gait:- Normal

Intelligence:-Average.

Wearing garments and any suspected stains present:- No stain detected.

Bodily injuries:- No body injury detected.

#### Genital Examination:-

Pubic hairs:- Absent.

Vulva(Labia majora & minora):- Normal

Hymen:- Tear

Vagina:- admits 1 finger only.

Cervix and Uterus:- Uterus not palpable per abdominally.

Fourchette and Perineum:-Normal

Vaginal swab collected:-

Result of vaginal swab smear examination:- No Spermatozoa is seen on microscopic examination of vaginal swab slide.

**Result of X-Investigation**: Plate No. MLC 12 Dated-07.02.17

Wrist Joint, Elbow Joint & Shoulder Joint :- Epiphyseal unions are not completed.

Pelvis:-Epiphyseal union is not appeared.

Ultrasonography advised and result: No USG report.

### **Opinion:-**

- 1]. There is no recent sign of sexual intercourse.
- 2]. There is no violence marks on her private parts.
- 3]. There is no foreign body on her body.
- 4]. According to Xray report, her actual age above 7(Seven) years and below 9(Nine) years at present.

PW6 exhibited the **medical report vide Ext.3** wherein **Ext.3(1)** is **her signature** and **Ext.3(2)** is the **signature of Dr.** Manoj Kr. Singha, Associate Professor Department of Forensic Medicine.

Her cross-examination was declined by the defence side.

13). Sri Badan Ch. Boro [PW7], investigation officer of the case, divulged in his testimony that on 07.02.2017 he was wording as sub-Inspector of police at Tarabari PS. He was entrusted with the investigation of the case. During investigation, he examined the complainant on the above said date and he also visited the place of incident. He drew the sketch Map, which he exhibited as Ext.4 wherein Ext.4(1) is his signature and examined the relevant witnesses there. On next day, victim was produced by her father. He examined the victim and sent her for medical examination. He stated that he also got the statement of the victim, recorded by the learned Magistrate under

Section 164 CrPC.

He further stated that accused was arrested on 09.02.2017 and forwarded before the court. He has deposed that he collected the medical report of the victim. On completion of the investigation he submitted the charge sheet against the accused person under section 4 of POCSO Act. Ext.5 is the charge sheet and Ext.5(1) is his signature.

In his cross-examination, PW7 deposed that witness Hajera Khatun (PW3) stated before him that "on that day, at about 8-9 AM, Kader Ali called the daughter of Maniruddin, aged about 8 years from the rice mill and was talking to her in her house. As I proceeded to the house of her neighbour, I heard the hue and cry of the girl which may be for the reason that accused wanted to do bad work with her.

I rushed to her. The accused Kader fled away as soon as I opened the door. Many nearby people gather on hearing her hue and cry. The victim Narjima Dewan disclosed that accused Kader did bad work with her. Then, I called the parent of the girl and handed over the girl to them."

**During cross examination**, he stated that incident took place on 05.02.2017 and FIR was lodged on 07.02.2017. The informant did not tell him the casue of delay in lodging FIR. The place of incident was shown to him by the informant of the case. He admitted that Ext.4 does not mention the name of village as well as the road.

He stated that He found only one house and he has shown only one door. He did not examine Belon Khan, Sarumuddin and Ramjan Mia as they were not present at the time of incident. PW7 further stated that he did not examine the brother of the victim as he was aged only 2-3 years.

PW7 further deposed that witness Maniruddin Dewan (PW1) did not state before him that "accused sent Sarumuddin to bring something from the house; after that Kader also went there; there was none in the house of Sarumuddin; accused took the victim in his lap and took her inside the house and

opened her pent; that he assaulted her prior part of victim and she raised hue and cry; accused caught her by her neck; after some time, she went to her house and disclosed the incident to her mother."

PW 7 stated in his cross-examination that witness Nazima Begum (PW2) did not state before him that "her brother went with her to grind the paddy; that accused told her to bring tobacco and did not find tobacco; that her mother took her the house of aunty and accused Kader made apology to her."

He denied that witness Hajera Khatun (PW3) was not examined by him. PW7 denied that PW3 did not tell him that "on that day, at about 8-9 AM, Kader Ali called the daughter of Maniruddin, aged about 8 years from the rice mill and was talking to her in her house. As I proceeded to the house of her neighbour, I heard the hue and cry of the girl which may be for the reason that accused wanted to do bad work with her.

I rushed to her. The accused Kader fled away as soon as I opened the door. Many nearby people gather on hearing her hue and cry. The victim Narjima Dewan disclosed that accused Kader did bad work with her. Then, I called the parent of the girl and handed over the girl to them."

He further deposed that mother of the victim Narjima told before witness Rupjan Nessa (PW4) about the incident and Narjima aslo disclosed the incident, on being asked by her.

PW7 denied that witness Faijuddin (PW 5) was not examined by him; that he did not give any statement before him.

He (PW7) did not seize any document in this case. He denied that he has not made any investigation in this case.

14). From a close perusal of the evidence, it is seen from the statement of the victim (PW2), who is star witness of this instant case that when she allegedly reached at the door step of Sarumuddin house, the accused took her inside the house and committed penetrative sexual assault upon her. She categorically stated that accused entered his penis into her private part for that she raised hulla.

It is interesting to note here that witness Hajera Khatun (PW.3) who is the wife of Sarumuddin has been declared hostile by defence side and She denied to have stated before the police that "on day before yesterday at about 8-9 AM Kader Ali called the daughter of Maniruddin, aged about 8 years from the rice mill and was talking to her in her house. As I proceeded to the house of my neighboure, I heard the hue and cry of the girl which may be for the reason that accused wanted to do bad work with her. I rushed to her. The accused Kader fled away as soon as I opened the door. Many nearby people gathered on hearing my hue and cry. The victim Nazmina Dewan disclosed that accused Kader did bad work with her. Then, I called the parent of the girl and handed over the girl to them."

The evidence of PW3 is important because accused allegedly raped the victim in her house and she was first person who heard hue and cry of the victim girl, which, according to her "may be for the reason that accused wanted to do bad works with her". But the informant, who did not see the incident, had never asked her regarding the incident. PW3 has stated during her cross-examination by defence side that informant had not asked regarding the incident. Even Police has not asked her anything about the incident, asserted P.W.3 in her evidence. P.W.3 flately refused to have stated before police as per statement read over by learned Public Prosecutor, as said above. She also stated that she reside in her house and put lock on the door of the house, whenever, she goes outside her house. Thus, the version of victim that she was raped by accused in her (PW3) house becomes doubtful more so when her mother, to whom she reported the incident first has not been examined by the prosecution side for the reason best known to it.

The doubt is further strengthened by the fact that Medical Officer of the case, who examined the victim did not find sign of sexual intercourse or violence mark on the private part of the victim (PW2).

PW4 is a reported witness and is related to informant. She admitted that she did not state before Police that either victim nor her

mother told her about the incident.

P.W.5 claimed to be present in a 'Bichar' held after the alleged incident. He was allegedly present in the 'Bichar' held against accused in the village alongwith Akkash Ali and Nayat Ali Dewan. However, no prosecution witness has corroborated the version of P.W.5 to hold that accused admitted his guilt in the 'Bichar' as claimed by P.W.5 in his evidence. Moreover, P.W.5 did not meet Police. He also admitted that he did not state before Police as he had deposed in the Court. Hence his evidence can not be relied at all.

**15).** It is a well settled law that the conviction on the sole evidence of a child witness is permissible, if such witness is found competent to testify and the court, after careful scrutiny of its evidence.

In the case of Dattu Ramrao Sakhare-versus-State of Maharashtra, reported in [1997] 5 SCC 341, the Hon'ble Apex court has held that - "A child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. In other words, even in the absence of oath, the evidence of child witness can be considered under Section 118 of Indian Evidence Act, provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstance of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored".

16). In another case, i.e., Pancchi - versus - State of Uttar Pradesh, AIR 1998 SC 2726, the Hon'ble Apex Court has held that - "It is not the law that if a witness is a child, his/her evidence shall be rejected, even if it is found reliable, The law is that evidence of a child witness must be evaluated more carefully

and with greater circumspection because a child is susceptible to be swayed by what other tell them and his child witness is easy prey to tutoring".

**17).** The ratio as laid down in the above case is that the testimony of a child witness is attributed the same kind of credibility that it attached to the statement any other witness if the testimony is consistent.

In the present case, the victim has not been consistent on the material particulars with regard to the incident **which is not supported vital witness like P.W.3 apart from her own mother**.

18). The Hon'ble Supreme Court in the case of **Assistant**Collector of Central Excise, Calicut - versus - V.P. Sayed

Mohammad, reported in AIR 1983 SC 163 held as follows:

"It is true that the onus of providing the facts essential to the establishment of discharge against an accused lies upon the prosecution and the evidence must be such as to exclude every reasonable doubt about the guilt of the accused. An accused can not be convicted of an offence on the basis of conjectures or suspicions. If reasonable doubt arises in the mind of the court after taking into consideration the entire material before it regarding the complicity of the accused the benefit of such doubt should be given to the accused but the reasonable doubt should be a real and substantial one and a well founded actual doubt arising out of the evidence existing after consideration of all the evidence".

19). Keeping in mind the above rational as laid down by the Hon'ble Apex Court, I am constrained to hold that the evidence adduced by the prosecution in support of its case is nothing shorter than mere conjectures and suspicion. Consequently, the charge under Sections 376 of IPC as well as under Section 4 of the Protection of Children from Sexual Offences Act, 2012 is held to be not proved

against the accused Abdul Kader beyond all reasonable doubt. Accordingly, the accused is found entitled to get benefit of doubt, for which, the accused Abdul Kader is acquitted on benefit of doubt under Section 376 of IPC as well as under Section 4 of the Protection of Children from Sexual Offences Act, 2012.

- 20. On scrutiny of the evidence on record, it is seen that no case has been made out against the accused Abdul Kader to warrant his conviction under Section 376 IPC read with Section 4 of The Protection of Children From Sexual Offences Act, 2012 beyond all reasonable doubt, for which, I am of the opinion that the accused is entitled to acquittal on benefit of doubt, which I accordingly do.
- 21. In the result, accused **Abdul Kader** is **acquitted** of the charge under Section 376 IPC read with Section 4 of The Protection of Children From Sexual Offences Act, 2012, levelled against him, on benefit of doubt.
- 22. Given under my hand and seal of this Court on this 12<sup>th</sup> day of June, 2019.

Dictated & corrected by me.

Sd/-Special Judge, Barpeta.

# A P P E N D I X

# (A) **Prosecution witnesses**:

P.W.1 = Maniruddin Dewan, the informant, P.W.2 = Miss Narjima Begum, the victim, P.W.3 = Msstt Hajera Khatun, P.W.4 = Msstt Rupjan Nessa,

P.W.5 = Faijuddin

P.W.6 = Dr. Anima Boro, the M.O., P.W.7 = Badan Ch. Boro, the I.O.,

# (B) **Prosecution Exhibits**:

Ext.1 = FIR,

Ext.1(1) = Signature of Maniruddin, Ext.2 = Statement of the victim.

Ext.2(1) & 2(2) = Signature of Narjima Dewan,

Ext.3 = Medical Report,

= Signature Dr. Anima Boro Ext.3(1)

Ext.3(2) = Signature of Dr. Manoj Kr, Singha, Associate Professor, Department of Forensic Medicine,

= Sketch Map, Ext.4

= Signature of SI Badon Ch. Boro, Ext.4(1)

= Charge-sheet, Ext.5

Ext.5(1) = Signature of SI. Badan Ch. Boro.

- (C) **Defence witnesses**:Nil.
- (D) **Defence Exhibits**: Nil.
- (E) Court witnesses:Nil
- (F) **Court Exhibits**: Nil.

Sd/-

Special Judge, Barpeta.