

IN THE COURT OF THE SPECIAL JUDGE, DHEMAJI.

Present: **Shri S. Das, A.J.S.,**
 Special Judge,
 Dhemaji,

JUDGMENT IN SPL.(POCSO) CASE NO. 1 / 2015.

U/S 8 of POCSO Act.

(G.R. Case No.356/2015 (SLP), Silapathar P.S. Case No.109/2015 Under Section 376(F) of IPC, read with Sec. 8 of POCSO Act)

The State of Assam

- Versus -

Shri Kandowa Mali,Accused Person
 S/O Lt. Dhanbir Mali,
 R/O Mechu Chutia Gaon,
 P.S. Silapathar,
 Dist.- Dhemaji.

Special Judge,
 Dhemaji.
 18/8/2018

Appearance:

Shri A. Fogla,
 Public ProsecutorFor the State

Shri K.C. Sonowal, AdvocateFor the Accused

Date of prosecution evidence : 07-10-2015, 22-03-2016, 16-06-2016,
 28-09-2016, 28-03-2017, 20-05-2017,
 22-06-2017 and 20-09-2017.

Date of arguments : 06-08-2018

Date of Judgment : 18-08-2018.

JUDGMENT

1. The prosecution case in brief is that on 19-04-2015 complainant- Shri Tulan Saikia lodged an ejahar at Sissiborgaon Police Out Post under Silapathar Police Station alleging interalia that on 11-04-2015 at about 3 PM in the afternoon while he and his wife were absent at home, accused-Kandowa Mali called his minor daughter-Miss 'X' aged about 10 years to his house to send her to shop to bring tobacco for him. At his house accused committed rape on complainant's daughter.

2. On receipt of the ejahar, the I/C, Jalaluddin Ahmed, Sissiborgaon Police Out Post made G.D. Entry vide No.297 dated 19-04-2015 and forwarded the same to O/C, Silapathar Police Station for registering a case under proper section of law. He (I/C) entrusted S.I. Lalit Saikia to investigate the case. In the meantime, O/C, Silapathar Police Station, Abdul Hannan registered the case vide Silapathar P.S. Case No. 109/2015 u/s 376(F) IPC r/w Sec. 4 of POCSO Act. On completion of investigation I/O Lalit Saikia submitted Charge-sheet against the accused-Kandowa Mali u/s 354 of IPC R/W section 4 of the POCSO Act.

3. On receipt of the case record and on appearance of the accused, this Court considered the materials on record and upon hearing both the sides, framed charges u/s 8 of POCSO Act and read-over and explained to him to which he pleaded not guilty. The prosecution, in order to prove its case, examined 10 witnesses including the I/O and M/O. After closure of the prosecution evidence statement of the accused was recorded

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u/s 313 Cr.PC. Defence plea is of total denial. However, the defence adduced no evidence in support of his case.

4. Point for determination:

(1) That you, on 11-04-2015 committed sexual assault on Miss 'X', a minor girl aged about 10 years inside your house at Mechutia Chutia Gaon under Silapathar Police Station and thereby you committed an offence punishable u/s 8 of the POCSO Act.

5. I have gone through the evidence on record and heard arguments of both sides.

Discussion, Decision and Reasons thereof :

6. **PW1** Shri Tulan Saikia stated that Exhibit-1 is the ejahar filed by him. At the time of occurrence, he was not present at his home. His daughter-Miss 'X' was playing in their courtyard at that time. Accused-Kandowa Mali came to their house and called his daughter to send her to shop to bring tobacco for him and also asked her to eat sweet in his house. At that time, there was none at his home. Accused forcibly committed rape on his daughter by closing the door of his house. His (PW1) wife informed him about the matter/incident. On being asked to his daughter, she told him that accused committed rape on her removing her panty. Then he filed complaint at the Police Station. First, he informed the matter to the Gaonburha who assured him to settle the matter. So, there was delay in filing the complaint. Police recorded his statement. The victim Miss 'X' was examined medically. Magistrate also recorded her statement. At the relevant time of occurrence, the victim 'X' was aged 10 years.

In cross-examination PW1 denied the defence suggestion that he did not state before police that his wife did not state about the occurrence

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to him. He denied that he did not state before police that the accused called his daughter to his house in order to bring tobacco and to give money to the victim for eating sweets. He also denied that in order to drive him (accused) away from his living place, he has filed false case and given false evidence. He also denied that the accused did not commit rape on his daughter.

7. **PW2** Smt. Pratibha Saikia stated that she knows the accused. Complainant is her husband. Occurrence took place in the last year. On the day of occurrence, she went to the house of Thane Mali to attend a '*Hakam*' (religious function). Her husband was not present at home. Her daughter was playing with her friends. Then the accused called the victim 'X' to his house to send her to shop to bring tobacco for him. Her daughter told him that accused inserted his penis into her vagina by removing her panty. In the meantime, her husband came and she told him about the incident. Knowing about the matter, her neighbours also came to their house. After the occurrence, the accused fled away from his house. As the family members of accused assured that they will bring the accused, so they did not inform the police. As they (family members of accused) failed to bring back the accused her husband filed complaint at police station. At the time of occurrence the victim 'X' was 10 years old and she was reading in Class-V.

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In cross PW2 stated that police recorded her statement and while she gave statement before police, she did not state before them that the victim 'X' told her that accused inserted his penis into her private part (vagina). She stated only before police that the accused fulfilled his ill motive (sexual desire). She denied the suggestion that no occurrence took place as stated by her. She also denied that she has given false evidence against the accused.

8. **PW3** the victim Miss 'X' stated that on the day of occurrence she was playing with her friends/companions. Then accused called her to his

house to bring tobacco worth Rs.5/- . Accused removed her panty in his room and laid her down on the bed. Thereafter, accused penetrated his penis into her vagina. The children who were playing with her, came to his (accused) house and knocked at the door and then he released her and opened the door. She told that she has returned the five rupees to his (accused) son which was given to her by the accused for buying tobacco. On the day of occurrence, accused's family members went to attend a religious function. After coming to her home, she first informed about the occurrence to her aunt-Putu and she (Putu) informed about this fact to her (victim) mother. She felt pain in her private part. She had got bath by her mother. Magistrate asked her about the occurrence. Police recorded her statement.

In cross PW3 stated that accused committed bad thing with her by pressing her on the wall. She denied that she did not state before police and Magistrate that accused committed rape on her by pressing her on the wall. She also denied that she did not state before Police and Magistrate that the accused inserted his male organ into her vagina. She admitted that she did not stated about the occurrence to her mother. It is also denied that the accused did not brought her to his house. She denied that she has given evidence as tutored by her mother.

9. **PW4** Smt. Dipsikha Dutta stated that she knows the accused. She also knows the complainant-Tulan Saikia and his daughter- Miss 'X'. Occurrence took place in the last year. On the day of occurrence victim was playing with her friends/companions. Victim told her that the accused on the pretext of bringing tobacco from the shop, called her to his house and committed rape on her by removing her panty. Thereafter, father of the victim filed complaint at police station. Police came for investigation and recorded her statement.

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In cross-examination PW4 denied the defence suggestion that she did not state before police while recording her statement that accused committed bad thing with the victim by removing her panty. She denied that the victim 'X' did not tell about the occurrence. She also denied that she has given false evidence against the accused.

10. **PW5** Smti Sabita Saikia stated that she knows the accused. Complainant-Tulan Saikia is her '*Barjana*'(husband's elder brother). Victim is the daughter of the complainant. Occurrence took place about one year ago (from the date of her recording evidence). In absence of the complainant and his wife at home, accused called the victim 'X' to his house to bring tobacco from a shop. Father of the victim told her that accused closed the door of his house after taking the victim to his house and committed bad act with her removing her panty. It was also stated by the complainant to her that the accused touched his penis into her private part. After filing the complaint at police station by the complainant, police took his statement.

In cross-examination PW5 admitted that she did not state before police that the victim and her father told her about the occurrence. She also denied the defence suggestion that the accused did not do bad thing with the victim.

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11. **PW6** Shri Pradip Senapati stated that Accused-Kandowa Mali and the informant-Tulan Saikia are known to him. Victim 'X' is the daughter of Tulan Saikia. Occurrence took place about two years ago (from the date of her recording evidence). Police had come as he was on his way to the shop. Then they called him to Tulan's house. He went there. He had heard that Kandowa had raped the victim 'X'.

In cross PW6 stated that he got to know about the incident from the police only.

12. **PW7** Shri Babul Saikia stated that the accused Kandowa Mali is known to him. He also knows the informant-Tulan Saikia. The victim 'X' is the daughter of Tulan Saikia. At the time of occurrence he was not present at his home. Occurrence took place about one year ago. He (PW7) heard that accused did bad thing with the victim girl. He heard about the occurrence from his family members. He did not go there but after 3 days when police came and did not find the accused, they (police) took his signature.

In cross PW7 stated that he cannot say from whom he had heard about the incident.

13. **PW8** Dr. Khanikar Gogoi stated that on 20-04-2015 he examined the victim Miss 'X' aged 10 years, D/O Tulan Saikia vide ML.130/15 at Dhemaji Civil Hospital. On examination, he found no any sign of injury on her body at the time of examination. Patient was advised X-Ray for determination of age. As per the X-Ray Report, age of the victim was below 15 years. He opined that it is an old case (10 days old).No recent intercourse was detected on her genital parts. What do you have to say.

Defence declined to cross-examine the Doctor.

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14. **PW9** Sumnath Bhuyan stated that he knows the accused as well as the informant-Tulan Saikia and his daughter Miss 'X'. One day, in the month of April/2015 complainant-Tulan Saikia came to his house and told him that the accused sexually assaulted her (victim) inside his house and fled away from the house. As he (witness-Sumnath Bhuyan) is the Gaonburha, he went to the house of Tulan Saikia. Some other persons also gathered there. He went to his (accused) house. Accused's family members told him that they do not know anything. Accused's family members informed that accused fled away from the house. They asked to wait for 2/4 days. When the accused will come home then they will settle the matter. As the accused did not come to

his home after 10/12 days, Tulan Saikia filed complaint at the police station. Police recorded his statement. After filing the case at the police station, accused came home. On being asked the accused about the occurrence, he told that false allegation has been brought against him He (PW-Sumnath Bhuyan) stated that when he handed-over you at police station, accused's family members were with him.

In cross-examination PW9 denied the defence suggestion that he did not state before police that Tulan Saikia stated before him about committing bad act with the victim girl inside his (accused) house. He also denied that accused-Kandowa Mali did not go away from his house.

15. **PW** Lalit Saikia stated that on 19-04-2015 he was at Sissiborgaon Police Out Post as Attached Officer. On that day, I/C Jalaluddin Ahmed, on receipt of an ejahar filed by Shri Tulan Saikia, made G.D. Entry No.297 dated 19-08-2015 and entrusted him with the investigation of the case, and the ejahar was forwarded to O/C, Silapathar Police Station for registering a case. During the course of investigation, he recorded statement of the complainant and his wife-Pratibha Saikia and the victim girl at the Out Post. On 20-04-2015 he sent the victim to Dhemaji Civil Hospital for medical examination. He went to the place of occurrence and drew a sketch map of the P.O. The place of occurrence is the accused's house. Accused was absent at home at that time. He recorded statements of witnesses- Dip Sikhas Dutta, Sabita Saikia, Pradip Senapati at the P.O. In the meantime, O/C, Silapathar Police Station registered the case vide Silapathar P.S. Case No. 109/2015 u/s 376(1) read with sec. 4 of the POCSO Act. On 21-04-2015 he forwarded the victim to the Court for recording her statement u/s 164 of Cr.P.C. On that day, he again went to the P.O. in search of the accused but he did not find him. On that day also he recorded statement of Sumnath Bhuyan (Gaonburha), Babul Saikia, Keshab Dutta. On 4-5-2015, he arrested the

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accused in his house and brought to the police station. On completion of investigation, he submitted charge-sheet against the accused u/s 354 of IPC read with sec. 4 of POCSO Act.

Defenbce declined to cross-examine PW-10.

Appreciation of evidence :

16. From the discussion of the evidence on record it appears that PW1 is the complainant as well as father of the victim and PW2 is the mother of victim. According to PW1 and PW2 on the date of occurrence accused Kandowa Mali came to their house and called his daughter to his house to send her to bring tobacco from shop and also asked her to eat sweet in his house and at his house accused committed rape on their daughter. Victim has been examined as PW3. As per version of PW3 accused called her to his house to bring tobacco and at his house accused removed her panty and laid her down on the bed and thereafter inserted his penis in to her vagina. It is also in her evidence is that she was playing with her friends before coming to the house of the accused and her friends came to accused's house and knocked on the door of accused's house and she came out. Other non-official PWs- PW2, PW5 also supported the version of the victim stating that the accused called victim to his house on the pretext of sending her to bring tobacco for him, committed rape on her. Evidence of PW6 and PW7 is not very significant.

17. Further from the evidence of PW1 and PW2 it appears that at the relevant time the victim was reading in class V and she was aged about 10 years.

18. Now looking of the MO (PW8) it appears that doctor examined the victim on 20-04-2015 about 10 days after the occurrence. The MO in his report mentioned that he did not find any sign of sexual intercourse on the

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genital part of the victim and also mentioned that there was no external injury mark found on the body of the victim. According to PW8 age of the victim is below 15 years of age.

19. From the above analysis of evidence of vital witnesses including the victim we find that they have corroborated one another with respect to the fact that on the date of occurrence accused called victim to his house. It may be noted here that PW3 in her statement u/s 164 Cr.PC stated that accused removed her panty and touched her back/buttock. So, even though the victim in her evidence spoke that the accused inserted his penis into her vagina, on careful examination of the evidence of victim as well as the evidence of MO it can be inferred that the accused touched the anus/buttock of the victim with sexual intent. In her cross also victim stated that the accused did bad act with her by making her lean on a wall.

20. At this stage it would be appropriate to look at the provisions of section 7 of POCSO Act as follows:-

Section 7 sexual assault – ‘Whoever, with sexual intent touches 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.’

21. I have given my thoughtful consideration to the evidence on record. I find that the evidence of PWs particularly of victim inspires confidence and there is absolutely no material contradiction to discard her evidence.

22. In view of my discussion and reasons above I find that prosecution has been able to prove charge u/s 8 of POCSO Act against the accused beyond all reasonable doubt.

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ORDER:

23. In the result, I find accused Kandowa Mali guilty u/s 8 of POCSO Act. Accordingly he is convicted thereunder.
24. Heard the accused on the point of sentence.
25. It is submitted that accused is aged about 60 years and lenient view may be taken while awarding punishment.
26. Considering all aspect accused is sentenced R.I. for 3 years and to pay a fine of Rs.1,000/- (one thousand) i/d R.I. for another one month.
27. Set off the period of detention.
28. Furnish copy of judgment to the accused free of cost.
29. Judgment is pronounced in open Court.
30. Given under my hand and seal of this Court on this the **18th** day of August/2018.

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(S. Das)
Special Judge,
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Dharmaji.

APPENDIX :

Prosecution Witnesses

PW1 : Tulan Saikia,
 PW2 : Smt. Pratibha Saikia,
 PW3 : Miss 'X', (Victim)
 PW4 : Smti Dipsikha Dutta,
 PW5 : Smti Sabita Saikia,
 PW6 : Pradip Senapati,
 PW7 : Babul Saikia,
 PW8 : Dr. Khanikar Gogoi,
 PW9 : Sumnath Bhuyan,
 PW10 : Lalit Saikia, (I/O).

Prosecution Exhibits :

Exhibit-1 : Ejahar,
 Exhibit-1(1) : Signature of Tulan Saikia (complainant),
 Exhibit-2 : Statement of Victim 'X' u/s 164 Cr.PC,
 Exhibit-2(1-2): Signatures of the victim 'X'.
 Exhibit-3 : Medical Report,
 Exhibit-3(1) : Signature of Dr. Khanikar Gogoi,
 Exhibit-4 : X-Ray report,
 Exhibit-4(1) : Signature of Dr. B Kuli,
 Exhibit-5 : Sketch Map.
 Exhibit-5(1) : Signature of Lalit Saikia, (I/O).
 Exhibit-6 : Charge Sheet,
 Exhibit-6(1) : Signature of Lalit Saikaia, I/O.



(S.Das)
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 Special Judge,
 Dhemaji,
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