IN THE COURT OF ADDL SPECIAL JUDGE ::KOKRAJHAR

Present :- Sri C. Chaturvedy, Addl. Special Judge (FTC), Kokrajhar.

> SPECIAL CASE NO.43/2018 U/S.4 of POCSO Act

> > STATE OF ASSAM

Vs

Sri Biswajit Mandal S/O Sri Labkishor Mandal Vill:- Jaypur P.S. Gossaigaon District Kokrajhar

...... Accused person.

Appearance: -

Learned Counsel for the State Mr. Monjit Kr. Ghose

Learned Counsel for the defence Mr. Kalyan Ray

Charge framed on 27.11.2018

Evidence recorded on 21.12.2018; 24.01.2019;

11.02.2019

Argument heard on 06.03.2019

Judgment pronounced on 12.03.2019

JUDGMENT

1. The case of the prosecution is that on 28.7.2018 one xxx, grandfather of the victim, lodged a written FIR with in-charge of Tulsibil Police Out-post alleging that on 22.7.2018, at about 11 PM, his grand-daughter, the victim, aged about 15 years, had gone to attend her nature's call. At that time, accused Biswajit Mandal grabbed her from behind, gagged her mouth and thereafter, committed rape on her. The

informant also alleged that on 23.7.2018, at about 4 PM, accused again entered into the residence and attempted to commit rape on the victim but as the victim raised hue and cry, the neighbouring people gathered and prevented the commission of rape.

- 2. On receipt of the FIR, it was forwarded to Gossaigaon Police Station. A case under Section 447/506 IPC R/W Section 4 of Protection of Children from Sexual Offences Act, 2012, was registered and investigated. Upon completion of investigation a charge- sheet was laid against the accused for the offences under Section 447/506 IPC R/W Section 4 of POCSO Act.
- 3. The case was transferred to this Court for disposal. Copies of the relevant documents were furnished to the accused and upon hearing both sides charge U/S 4 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 six witnesses. The accused was examined U/S 313 of CrPC. He denied the allegation appearing against him and declined to adduce evidence.

POINTS FOR DETERMINATION:-

(i) Whether the accused committed penetrative sexual assault on the victim ?

Decision With Reasons:

5. Pw 1 is the victim and she deposes as hereinafter;

The incident occurred about 3 months back at 8 P.M. She was in her house. Her mother and elder brother work in Gujrat. She had come to Jaipur, Gossaingaon in connection with NRC matter. She was staying in the house of her grandfather. She had gone to her own house situated near the house of her grandfather. At that time accused Biswajit was also going by the road and she was talking with Biswajit. Suddenly, some boys came and started beating Biswajit. Those boys also beat up the victim. Her grandfather then lodged an FIR with the police.

- 6. As the evidence of pw 1 was in deviation of the statement under Section 164 CrPC, the learned Special P.P sought the leave of the Cout to declare the witness as hostile and the leave was granted.
- 7. In her cross-examination by the learned Special P.P, pw 1 stated that she had stated in her statement under Section 164 CrPC that at about 11 p.m when she had come out of her residence for relieving, the accused came and grabbed her from behind and thereafter committed sexual intercourse with her after felling her on the ground.
- 8. In her cross-examination by the defence, pw 1 deposed that she calls the accused as *dada* (elder brother). She also deposed that she was threatened by the local boys to make a statement before the Magistrate.

9. Pw 2, xxx, is the informant and the grandfather of the victim. His deposition goes as follows;

The incident occurred about 5 months back. He heard from local villagers that accused Biswajit had committed sexual intercourse with his grand-daughter. He lodged an FIR with the police. He inquired with her grand-daughter and she told him that accused committed sexual intercourse with her.

- 10. In cross-examination by the defence, pw 2 deposed that he is an illiterate and that he had put his thumb impression on a blank paper. On the date of occurrence he was working in a brick kiln at a different place. When he returned to his house, at evening hours, he saw that several village people have assembled near his house. He was told by the villagers to lodge a case else there might be problems.
- 11. Pw 3, Pradip Barman, deposed that the occurence took place about 5 months back. After he returned from his work he heard about some village disputes. He did not go to the place of dispute. Later, he learnt that Biswajit was apprehended by local villager while talking to the victim.
- 12. This witness has also been declared hostile by the prosecution and has been cross-examined with reference to his statement under Section 161 CrPC.
- 13. PW4 Sri Bisadu Barman deposed that the occurrence took place about 4 months back in the evening hours. He had gone for fishing and heard hue and cry near the residence of victim. He went to the

residence of victim and heard that there was a dispute between Biswajit and vicitm regarding love affairs.

- 14. PW5 Sri Rabinson Barman also deposed in the lines of pw 4 that he had only heard about a dispute between accused and the victim.
- 15. It would be seen that none of the prosecution witnesses have implicated the accused for commission of offence of penetrative sexual assault. The only element in prosecution evidence which has been emphasised by the learned Special P.P is that victim had made a statement under Section 164 CrPC and also made incriminating statement under Section 161 CrPC.
- 16. It goes without saying that evidence of hostile witnesses can be used by the prosecution if any part of the evidence corroborates the prosecution case. In the present case, the principal prosecution witness, the victim, has not supported the prosecution case.
- 17. In the case of V.K. Mishra v. State of Uttarakhand, (2015) 9 SCC 588, the Hon'ble Supreme Court held that Section 161 CrPC provides for oral examination of a person by any Investigating Officer when such person is supposed to be acquainted with the facts and circumstances of the case. The purpose for and the manner in which the statement recorded by police under Section 161 CrPC can be used at any trial are indicated in Section 162 CrPC. It was further observed in the case of V.K. Mishra (supra), that Section 162 CrPC bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated there. The statement

made by a witness before the police under Section 161(1) CrPC can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 162(1) CrPC. The statements under Section 161 CrPC, recorded during the investigation, are not substantive pieces of evidence but can be used primarily for the limited purpose:

- (i) of contradicting such witness by an accused under Section 145 of the Evidence Act;
- (ii) the contradiction of such witness also by the prosecution but with the leave of the Court; and
- (iii) the re-examination of the witness, if necessary.
- 18. Hence, if the prosecution, by cross-examining the witnesses is able to bring on record the statements made by them in Section 161 CrPC or in Section 164 CrPC it only proves that such statements were made in Section 161 CrPC or in Section 164 CrPC and since both these statements are not to be treated as substantive evidence, the proof of statements under Section 161 CrPC or under Section 164 CrPC will not assist the prosecution in bringing home the charge against the accused. The cross-examination by the prosecution must bring forth substantive evidence on record and not just previous statements.
- 19. Now, on the basis of evidence on record what is proved that the victim was only talking to the accused and entire episode leading to the present trial is a mistake of fact. Even though the victim admitted, in her cross-examination by the prosecution, that she had made a

statement U/S 164 of CrPC wherein she stated that accused grabbed

her and thereafter committed sexual intercourse, the probative value

of statement U/S 164 of CrPC has been negated in the course of

examination by the defence, wherein the victim stated that she was

threatened by local boys to make a statement before the Magistrate.

Hence, even the statement under Section 164 CrPC was not voluntarily

made.

20. In view of this evidence on record there appears no reason for

holding the accused guilty for the offences charged. In the result the

point for determination is answered negative.

ORDER

Accused Biswajit Mandal is acquitted of the charge

under Section 4 of the POCSO Act and set at liberty

forthwith.

Bail bonds shall remain valid for six months.

Given under the hand and seal of this Court on this

12th day of March, 2019.

Dictated by

Addl. Special Judge Kokrajhar Addl Special Judge Kokrajhar

<u>Appendix</u>

1. Prosecution Exhibits :-

Exhibit-1 Statement of victim

Exhibit-2 Medical report

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

3. <u>Prosecution Witness</u>

P.W.1 xxx Victim

P.W.2 xxx Grandather of victim

P.W.3 Sri Pradip Barman
P.W.4 Sri BisaduBarman

P.W.5 Sri Robinson Barman

P.W.6 Dr. Manisha Boro Phukan

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

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

Addl. Special Judge, Kokrajhar