IN THE COURT OF THE SPECIAL JUDGE :::::: KOKRAJHAR

Special Case No.26/2017

State of Assam

Versus

Sri Samesh Hazwary Accused

Present: Smti Mitali Thakuria,M.Sc,LLB, Special Judge, Kokrajhar

Ld. advocate for the State : Mr M.K.Ghose, Special P.P.

Ld. advocate for the accused: Mr A.K. Brahma

Evidence recorded on : 09.01.18, 22.6.18, 16.11.18,

13.12.18, 20.5.19

Argument heard on : 05.7.2019 and 19.7.2019

Judgment delivered on: 25.7.2019

JUDGMENT

1. The prosecution initiated the case on receipt of the first information report lodged by Smti Poula Tudu with the allegation that on 25.9.2017 at about 7 P.M. accused Sri Samesh Hazwary committed rape on the minor girl Miss Sonamoni Hembram by gagging her mouth when she came to the pharmacy of the accused to purchase medicine and hence, the first information report.

- 2. On receipt of the first information report in Gerufela Out Post the same has been sent to Kochugaon P.S. for registration of the case making Gurufela O.P. GDE No.441 dated 26.9.17. Accordingly the case has been registered as Kochugaon P.S. case No.53/17 under section 376 of IPC, R.W. section 4 of the Protection of Children from Sexual Offences Act and case was endorsed to ASI Kamaruddin Ahmed for investigation. During investigation the I.O. visited to the place of occurrence and recorded the statement of the witnesses, arrested the accused, medically examined her and after ascertaining the minor age of the victim, the charge sheet has been filed by the I.O. under section 376 of IPC read with section 4 of POCSO Act against the accused Sri Samesh Hazwary. Relevant copies also furnished to the accused and my learned Predecessor framed the charge under section 4 of POCSO Act against the accused finding a prima-facie case. The charge was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 3. The prosecution side examined as many as 10 (ten) number of witnesses including the informant, victim, M.O. and I.O. as follows:-

PW 1 Miss Sonamoni Hembram (victim),

PW 2 Smti Poula Tudu (informant),

PW 3 Sri Amindra Narzary,

PW4 Smti Sonashri Hazowari,

PW5 Sri Seven Basumatary,

PW6 Sri Probinson Kisku,

PW7 Sri Imanul Murmu.

PW8 Sri Suniram Soren.

PW9 Dr Sushma Brahma and

PW10 ASI Kamaruddin Ahmed

4. The accused person took the plea of total denial while recording his statement under section 313 of Cr.P.C. and declined to adduce any evidence.

5. **Point for determination:**

Whether the accused committed the offence of penetrative sexual assault to the minor victim?

Discussion, Decision and Reasons thereof:

- 6. I have thoroughly perused the evidences on record and also heard argument put forwarded by both the parties to arrive at a just decision and assessing the evidence on record I have decided the case as follows with my reason thereof:-
- As stated above the first information report of this case was lodged by PW2 Smti Poula Tudu with the allegation of rape against her minor daughter by the accused. From her testimony it reveals that she was not present at the time of incident. But, hearing the incident from her daughter and the persons present in the Police Station she lodged the first information report. So, PW2 has no personal knowledge about the incident and she lodged the first information report after hearing the same from her daughter as well as from the persons who were present in the police station at the time of lodging the first information report.
- 8. PW1 is the minor victim of this case and she deposed that on the day of the incident she visited to the pharmacy of the accused to purchase some medicines. At that time the accused was alone and he asked her to come inside the pharmacy to get medicine. Accordingly the victim entered into the pharmacy when accused immediately closed the door and gagged her mouth with the cloth and committed rape on her. She tried to prevent him and requested him but, he then thrown her on the ground and forcibly opened her

Churidar, he also opened his own cloth and committed rape on her. Thereafter he gave her medicine and asked her to get outside. When she came out she saw a lot of gathered people and gathered people handed over her along with the accused to the police station. The witness identified the accused in the court. She deposed further that she did not sustain injury on her private part but, after 2/3 days she felt pain.

- 9. PW3 and PW4 heard about the incident on the next day that the accused committed rape on a minor girl. PW3 heard about the incident on the next day when he was going to bazar and PW4 also heard about the same when on the next day he came to open his tea stall which is located near to the pharmacy of the accused.
- 10. PW5 deposed that on the day of the incident at about 5.30 P.M. he closed his tea stall and at that time the accused was closing his pharmacy. But, on the next day morning he came to know that the accused committed rape on Adivasi minor girl.
- 11. PW6 and PW7 claimed their presence at the time of incident near to the pharmacy of the accused and at about 7/7.30 P.M. they heard hulla inside the pharmacy and when she came out they enquired the matter and then came to know that the accused committed rape on her.
- 12. PW8 also narrated the same story and claiming his presence at the time of incident. He deposed that when they enquired the minor girl she told that the accused gagged her mouth and committed rape on her for which she could not raise alarm.
- 13. PW9 is doctor who examined the victim and she opined that the girl is below 16 years of age but, she was habituated to sexual intercourse. During her examination no such mark of physical assault was seen.

- 14. PW10 is I.O. who investigated the case and accordingly finding a prima-facie case he filed the charge sheet against the accused under section 376 of IPC, read with section 4 of POCSO Act.
- 15. So from the testimonies of the prosecution witnesses discussed above, it is seen that there is no eye witness of the occurrence but, PWs6, 7 and 8 claimed their presence at the time of incident near to the pharmacy when they heard hulla inside the pharmacy and on enquiry it has come to their knowledge that the accused committed rape on minor girl gagging her mouth. The other two witnesses i.e. PWs3 and 4 only heard about the incident on the next day morning when they came to bazar. Further PW2 informant of this case has also no personal knowledge about the incident nor she was present when people handed over her daughter and the accused to the police. But, she lodged the first information report after hearing about the incident from gathered people in the police station.
- The defence's plea is that he is innocent. A false and concocted case is lodged against him on the instigation of Sri Probinson Kisku (PW6) as he tried to restrain him from cutting sal tree illegally. It is also pleaded that the said Probinson Kisku called him over phone saying that one patient is waiting in the pharmacy when he was sitting with his family after closing his pharmacy. When he came there a lot of people gharoed him and started assaulting him. Thereafter police arrived and took him to the police station.
- 17. During the course of argument the learned advocate for the accused took the following pleas:-
- (i) PW3 and PW4 supported defence's plea that the accused went to his house after closing his pharmacy and when he was called by someone over phone to come and give medicine to someone.

- (ii) PW7 contradicts the statement of the victim and deposed that at the time of incident the victim was wearing skirt and shirt and they came to know about the incident as the victim made hue and cry.
- (iii) On the other hand, as per the victim she was wearing Churidar at the time of incident and also could not make any hue and cry as the accused gagged her mouth and committed rape on her. During argument the defence counsel also raised a point that how it can be possible to give medicine to the girl after committing rape on her?
- 18. So, as per the defence plea a false and concocted case is lodged against the accused with the instigation as he had previous enmity with the PW6. Accused was trapped and handed over to the police otherwise why people will gather in the pharmacy.
- 19. After hearing argument from the learned defence counsel, I have thoroughly perused the cross evidence of the witnesses to arrive at a just decision.
- 20. From the cross evidence of PW3 it is seen that on the next day morning only he came to know about the incident as on the previous night he went to his own house which is about 2 K.M. far from his own pan shop. From his evidence it also reveals that the accused used to go to the pharmacy and open the pharmacy for the people if he is called over phone for an emergency or at any time. From the evidence of PW4 it is also seen that he has tea stall in the same locality and on the next day of the incident he heard about the same when he was going to open his own tea stall. It also reveals from his cross evidence that he was sitting in the house of the accused after closing his pharmacy when someone came and informed over mobile phone to the accused to come to the pharmacy for medicine. So it is admitted position that

the accused came back to his own pharmacy as he was called by someone and asked to open pharmacy for medicine which otherwise supported the defence version that on the day of the incident also the accused closed his pharmacy and came to his own house and on the same day he again returned back to his own pharmacy to open the same. Thus, the defence admitted the fact that at the time of incident the accused was in the pharmacy. So the question arises as to whether the presence of the accused in the pharmacy on call will hamper the entire prosecution case. The possibility of presence of the accused in the pharmacy alone after providing medicine cannot be disbelieved as the victim found the accused alone in the pharmacy at the time of incident. So in one hand it is admitted that the accused again went to open his pharmacy after closing his pharmacy which is also seen by PW4 and PW5. But, at the same time it is also evident that the accused again returned back to his pharmacy when someone made contact with him to come to pharmacy and open the same for medicine. So merely because the accused returned back to pharmacy on call by someone cannot be the ground to disbelieve the entire prosecution case.

21. Coming to the another plea of gathering people outside the pharmacy also cannot be sole ground for disbelief the prosecution story. From the testimonies of PWs6, 7 and 8, it reveals that they were present in the bazar area in the evening time when they heard hulla inside the pharmacy they gathered there and soon after girl came out from the pharmacy they enquired the matter and came to know about the incident that the accused committed rape on minor victim. From the testimonies of PWs6, 7 and 8 they all are of contemporary age and they used to remain bazar area before the tea stall till 8/9 P.M. and on the day of the incident also they were 10/12 persons near the tea stall which is in front of the pharmacy of the accused. When they heard

noise inside the pharmacy they came and gathered and saw the accused and the victim inside the pharmacy and accordingly enquired about the matter. So the presence of about 10/12 persons of young age at the evening time in the bazar or near to the tea stall is not an unbelievable story. It is very common for the young age people spending time in the evening specially in the bazar area or near to the tea stall etc.

- 22. Coming to the evidence of medical officer, it is seen that during examination she did not find any mark of injury on her body and private part. It is also opined that she was habituated to sexual intercourse. Further she also did not find any sign of physical assault or sexual assault of the victim. Hymen of victim was found rupture but, no spermatozoa seen in her vagina canal.
- 23. So from the above discussion of the prosecution witnesses, it is seen that though there was no eye witness to the occurrence but, a lot of people gathered near the pharmacy and soon after the occurrence and when the victim came out from the pharmacy she was enquired the matter and then she disclosed that the accused committed rape on her. This part of evidence cannot be rebutted by the prosecution neither cross-examining the PWs nor producing any rebuttal evidence. The presence of 10/12 persons near the tea stall or in front of the pharmacy along with PWs6, 7 and 8 is also well explained by the prosecution. The defence did not produce any evidence in support of his plea that false and concocted case is lodged only on the instigation of PW6 who was prevented by the accused from cutting sal tree illegally. Rather, the presence of the accused in the pharmacy at the time of incident is well established.

- 24. Coming to the evidence of the victim, it is seen that she found the accused alone in the pharmacy when he asked her to come inside the pharmacy to have medicine and closing the door of the pharmacy he committed rape on her by gagging her mouth with the cloth. She could not identify any of the gathered person as she is not resident of that locality and also not frequent visitor to the pharmacy. She further deposed in her evidence in chief that she did not sustain any injury on her body or private part nor her cloth had any stain. However, she felt pain after 2/3 days of the incident. And the defence could not rebut the evidence of the victim that she was subjected to sexual assault by the accused. More so from the evidence of I.O. it is seen that she also stated before him that while committing rape the accused gagged her mouth with the cloth and she was rescued by other persons and she saw a lot of people near to the pharmacy. It is also admitted position that her mother/informant was not present among the gathering people and as per PW1 she only met her daughter in the police station who was brought by the people and then she came to know about the incident. Thus, the evidence of I.O. also supported the evidence of victim and the informant that when she was rescued by the gathered people in the pharmacy and she met her mother only in the police station.
- 25. The plea of the defence is that the accused was trapped by the people gathered only on the grudge as he prevented PW6 from doing any illegal act or cutting the sale etc. But, the defence failed to bring any link with the victim as to how and what manner she is also linked with the PWs6, 7 and 8 to involve the accused in the case that too in absence of her mother. More so there found nothing to disbelievable the testimonies of the prosecutrix who alleged that the accused committed rape on her inside the pharmacy by gagging her mouth.

26. In this context the judgment of the <u>Hon'ble High Court</u> reported in 2017 (4) GLT 395 Shiv Charan Talukdar Vs State of Assam can be cited where in para 23 of the said judgment the Hon'ble High Court has referred the judgment of the <u>Hon'ble Supreme Court reported in 2017 (2)</u> SCC 51 and paragraph 31 reads as follows:-

"31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondents, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons, which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated the material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles

fitted with lenses tinged with doubt, disbelief of suspicion? The plea about lack of corroboration has no substance (See <u>Bhupinder Sharma V State of H.P.</u>). Notwithstanding this legal position, in the instances case, we even find enough corroborative material as well, which is discussed herein above."

- 27. In the instant case also it is seen that the evidence of the victim or prosecutrix is found believable and trustworthy. The circumstances of the prosecution is also not unbelievable as commission of such a crime finding the girl lonely is also acceptable. The other circumstances of the case i.e. gathering about 10/12 number of young people in front of the pharmacy after hearing the sound inside the pharmacy is also quite normal as presence of some young people in the evening time near tea stall or in the bazar area is also quite normal and hence the entire circumstances of the prosecution is found to be believable and trustworthy.
- 28. As stated above the defence took plea that the accused was trapped creating the scene on the instigation of PW6 with whom the accused had enmity as the accused restrained him from illegal cutting of sal tree. But, as stated above, the defence could not substantiate their plea neither by adducing any rebuttal evidence or by cross-examining the prosecution witnesses. More so, the defence did not bring any link of the victim with PW6 or others to entangle her in the alleged crime. There is no evidence that the victim adduced false evidence against the accused having conspiracy with PW6 or others only on the grudge against the accused. The victim and the informant are not resident of that locality and hence it cannot be held that the victim and the informant had any previous enmity with the accused to bring a false allegation of rape against him. More so it is evident that the informant

got the information only in the police station when her daughter was brought to the police station with the accused by the villagers. So she has no link with the accused nor defence could prove any link with PW6 and others to compel the informant to lodge a false case against the accused where she entangled her own daughter with a grave allegation of rape against her.

- 29. Section 29 of POCSO Act provided for presumption that the accused had committed or abetted to commit the offence of penetrative sexual assault unless contrary is proved.
- 30. Here in the instant case also it is seen that the defence has failed to rebut presumption in any manner neither cross-examining the PWs specially the victim nor by producing rebuttal evidence.
- 31. In the case of <u>Nivrutti Pandurang Kokate Vs State of Maharashtra (2008) 12 SCC 565</u> which was relied on the case of <u>Hemmat Sukhadeo Wahurwagh Vs State of Maharashtra (2009) 6 SCC 712 (FB),</u> the Hon'ble Supreme Court of India has held that-

"...... Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and molded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

As per section 118 of the Evidence Act, 1872, all persons shall be competent persons to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions.

32. Coming to the medical evidence it is seen that doctor found no mark of violence or injury on the private part of the victim while examining her. No spermatozoa seen on her vagina smear. Hymen of the girl was found ruptured and accordingly doctor opined that the girl may be habituated to sexual intercourse. It is admitted that the victim did not sustain any blood injury on her private part nor there was any blood stain on her cloth. However, the victim complained pain on her private part after 2/3 days of the occurrence. The victim is a minor girl of 14/15 years of age and the circumstances of the case is that the accused by gagging her mouth committed rape on her and from her evidence it also reveals that the entire incident took place only in two minutes as there was hulla outside the pharmacy and a lot of people gathered hearing noise inside the pharmacy. So in such situation the degree of penetration may not be ascertained and it is also not clear as to whether the accused released any semen inside vagina of the victim. So in such situation blood stain on her cloth or injury on her private part and presence of spermatozoa on her vaginal smear may not be possible. Doctor opined that the victim may be habituated to sexual intercourse only on the basis of rupture of hymen of the victim. There may be various causes of rupture of hymen and the girl may also be habituated to sexual intercourse. But, only because of there was no injury on her private part no blood stain on her cloth or absence of spermatozoa in her vaginal smear cannot be the sole ground to disbelieve the entire prosecution case where the evidence of the victim cannot be rebutted by the defence. So far as the definition of rape even slightest penetration amounts to offence of rape.

Section 3 of the Protection of Children From Sexual Offences Act read as follows:-

- "A person is said to commit "penetrative sexual assault" if-
- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person."
- 33. As per the provision of the Act even the manipulation of any part of the body of a child so as to cause penetration would amount to penetrative sexual assault which is punishable under section 4 of the Act. [2017 SCC Gau 576 Sri Kamakhya Roy Vs State of Assam].
- 34. The Hon'ble Supreme Court in a case reported in (1983) 3 SCC 217 Bharwada Bhoginbhi Hirjubhai V. State of Gujrat has held that"testimony of victim of sexual assault is vital and unless there are compelling reasons which necessitates looking for corroboration of her statement, the Court should not find difficulty in acting on the testimony of the victim of sexual assault alone to convict an accused when her testimony inspires confidence and found to be reliable. Seeking corroboration of her statement before relying upon the same as rule in such cases amounts to adding insult to the injury".

- 35. "Child rape cases are cases of perverse lust for sex where even innocent child are not spared in pursuit of sexual pleasure. There cannot be any obscene than this. It is a crime against humanity. Many such cases are not even brought into light because of social stigma attached thereto." [(2002) 5 SCC State of Rajasthan V. Om Prakash].
- 36. Another point raised by the learned defence counsel is that as per PWs6 and 7 the victim was wearing skirt and shirt at the time of incident. But, contradicting their statements the victim has stated that she was wearing Churidar at the time of incident and the accused committed rape on her by opening her Churidar. The circumstances of the case brought by the prosecution is that when gathered people heard noise inside the pharmacy and when they saw the girl coming out from the pharmacy they enquired about the matter and came to know about the commission of rape by the accused. They informed the police and the police was taken initially to Gurufela O.P. and then Kochugaon P.S. So in such circumstances there may be some discrepancies about description of wearing apparel of the victim as every person gathered at the time of incident were mainly focused in the incident of commission of rape by the accused and hence, it is quite possible that the version of the prosecution witnesses may be vary one to another. But, it is seen that inspite of such discrepancies the defence could not shake basic version of the prosecution. There may be some discrepancies in the evidence of the prosecution witnesses but, that can be ignored if it does not amount to major contradiction shaking the root of the prosecution case.
- 37. The Hon'ble Gauhati High Court in a case reported in 2001(1) GLR 557 has held that- "over importance should not be attached to omission and contradiction and minor discrepancy who do not go to the root of the matter and shake basic version of the prosecution."

- 38. In a criminal case the court should not be looked for mathematical accuracy and exactitude, be weighed by reference to normal hymen contact [(2001) 2 GLR 631].
- 39. So considering the detail discussion made above, it is held that the prosecution is able to establish the case against the accused Sri Samesh Hazwary under section 4 of POCSO Act and accordingly the accused is convicted under the said section of law.
- 40. I have considered section 360 Cr.P.C. to release the accused on probation. But, the heinous crime of committing penetrative sexual assault on a minor girl of 14/15 years old shakes our judicial conscience. The offence was inhuman. Sexual violence apart from being dehumanizing act is an unlawful intrusion of right of privacy and sanctity of a female and as such the accused does not deserve such leniency. "Till rape cases are cases of rarest".
- 41. Heard the accused on the point of sentence under section 235 (2) Cr.P.C. which is written in separate sheet and tagged the same with case record. He submitted that he is an old and poor person and there is none to look after his wife and she solely depend on him and accordingly, he prays for his release without any sort of punishment.
- 42. The object of the sentence should be to protect the society and deter the criminal. Gravity of the offence, mitigating factors, manner in which the offence was planned and committed, prescribed punishment and the social abhorrence of the offences etc. are indicators for sentencing. Reference in this regard made to the Judgment of the Hon'ble Supreme Court reported in **2016** (16) SCC 441 (Jasbir Singh Vs Tara Singh).
- 43. One of the prime objective of criminal law is imposition of adequate, just and proper punishment which commensurates with the gravity, nature of crime and manner in which the offence is committed. One should

keep in mind social interest and consideration of the society while considering the determinative factors of sentence with the gravity of the crime.

- In **Rajendra Prasad Vs State of Uttar Pradesh [(1979)3 SCC 646]** it is held that- "Judges are entitled to hold their own views, but it is the bounden duty of the Court to impose proper punishment, depending upon the degree of criminality and the desirability to impose such punishment as a measure of social necessity, as a means of deterring other potential offenders".
- 45. So considering all aspects of the case, circumstances and submission of the convicted accused, I find that it is not a fit case for sentencing the accused with the maximum punishment of imprisonment for life and hence **Imprisonment for seven years** with fine will meet ends of justice.

ORDER

- In the result, the accused Sri Samesh Hazwary is hereby convicted under section 4 of the Protection of Child from Sexual Offences Act and hereby sentence with **Imprisonment for 07 (seven) years along with a fine of Rs.2,000**/-. In default of payment of fine will undergo **Imprisonment for two months.** The period of custody of the accused shall be set off from the period of sentence if any.
- Free copy of the judgment be furnished to the convicted Sri Samesh Hazwary under section 363 of Cr.P.C. and also a copy of the Judgment be furnished to the learned District Magistrate, Kokrajhar complying the provision of under section 365 of Cr.P.C.
- 48. The judgment is delivered in the open court and given under my hand and seal of the Court on this 25th July/2019 at Kokrajhar Court.

 Dictated & corrected by me

Special Judge,

Special Judge,

Kokrajhar

Kokrajhar

Appendix

The prosecution witnesses are:

PW 1 Miss Sonamoni Hembram (victim),

PW 2 Smti Poula Tudu (informant),

PW 3 Sri Amindra Narzary,

PW4 Smti Sonashri Hazowari,

PW5 Sri Seven Basumatary,

PW6 Sri Probinson Kisku,

PW7 Sri Imanul Murmu,

PW8 Sri Suniram Soren,

PW9 Dr Sushma Brahma and

PW10 ASI Kamaruddin Ahmed

<u>The Court Witness is</u>: Nil <u>The Defence witness is</u>: Nil.

The exhibited documents are:

1. Ext-1 ... Medical report of victim,

2. Ext.2 ... Charge sheet

3. Ext.3 ... FIR,

The Defence witness and exhibit: Nil

Special Judge, Kokrajhar