# IN THE COURT OF THE SPECIAL JUDGE, MORIGAON

### Special Case No. 01/2015

(U/s 376/34 IPC r/w Section 6 of the POCSO Act, 2012)

Present: Mr. P Das,

Special Judge (POCSO),

Morigaon, Assam

State of Assam

-Vs-

1. Md. Rafikul Islam

S/O Mohammad Ali

2. Md. Asanullah

S/O Lt. Abdul Kuddus

Both are from Village- Moirabari

District- Morigaon

..... Accused Persons

Date of Argument : 24.09.2018.

Date of Judgment : 11.10.2018.

#### **Appearance for the Parties**

Advocate for the State : Mr. A. Kalam, Ld. P.P.

Advocate for the accused : Mr. P.R. Borah, Ld. Advocate.

: Mr. U.C. Roy, Ld. Advocate.

### **JUDGMENT**

1. The prosecution case in brief is that on 11/09/2013, an ejahar was lodged by the prosecutrix at the Moirabari police station stating inter-alia that the accused persons named in the ejahar took the victim inside a vehicle by

gagging her mouth and thereafter committed sexual torture upon her. On the basis of the said ejahar, Moirabari PS case number 134/2013 was registered under section 376/34 IPC read with section 4 of the POCSO act, 2012. Investigation started into the case and after completion of investigation charge sheet was submitted against the present two accused persons under section 376/34 IPC read with section 6 of the POCSO act, 2012. Subsequently, vide order dated 29/09/2015 passed by my learned predecessor; charges were framed against both the accused persons under section 376/34 IPC read with section 6 of the POCSO act, 2012. The charges were read over and explained to the accused persons, to which they denied and claim to be tried, whereupon the trial started.

2. At the trial, the prosecution side examined as many as 13 witnesses. After the closure of prosecution evidence, the accused persons were duly examined under section 313 of the Cr.P.C. the defence did not adduce any evidence.

#### **Point for determination:**

3. Whether the accused persons are guilty of committing offences against the prosecutrix under section 376/34 IPC and/or section 6 of the POCSO Act, 2012.

#### **DISCUSSION, DECISION AND REASONS THEREOF**

- 4. I have heard the learned public prosecutor appearing for the state and the learned defence counsel appearing for the accused persons. I have perused the evidence on record carefully and other relevant materials on record.
- 5. The learned public prosecutor appearing for the state has argued that the prosecution has been able to prove the case against the accused persons and prays that they may be convicted under the relevant provisions of the POCSO Act, 2012. On the other hand, Sri U C Roy and Sri P R Borah, the learned

defence counsels appearing for the accused persons submit that the prosecution has failed to prove its case.

- 6. The prosecutrix/alleged victim adduced evidence as PW-5. In her evidence, the prosecutrix has stated that on the day of the incident while proceeding towards Solmari, she was grabbed by the hand by accused Rafikul Islam and thereafter made her to board the vehicle brought by the other accused Asanullah and that she was kept inside the car till mid night. The prosecutrix further stated in her deposition that the accused had forcible sex with her on the back side of the car and that subsequently she was dropped at the place called Doloigaon and the car went away. She further stated that thereafter she went to the house of one rickshaw puller. In cross-examination, she stated that she had lodged the ejahar after about 10 days of the incident. There, she had stayed in the house of the rickshaw puller for about 4/5 days. The testimony of the prosecutrix regarding commission of forcible sex upon her by the accused Rafikul Islam after taking her in the car, has remain unshaken in cross examination. Further, it may be mentioned herein that the victim in her statement recorded U/s 164 Cr.PC. stated her age to be 15 years.
- 7. It is well-settled that in a trial for sexual offences, a conviction can be based upon the sole testimony of the prosecutrix, if the same is found to be inspiring, reliable and trustworthy. It has been laid down by the Hon'ble Supreme Court in numerous cases that the position of the prosecutrix in a case of sexual offence is similar to that of an injured victim, rather than that of an accomplice. Of course, corroboration is always a role of prudence and it fortifies the prosecution case and strengthens the conscience of the court in coming to a conclusion of guilt of the accused.
- 8. In a case of sexual offence, it is not common to find an eye witness to the occurrence. However, interestingly, in this instant case, Kasem Ali, who adduced evidence as PW-1, claims to be an eye witness to the occurrence. He stated in his deposition that he knew the accused persons and that on the day

of the incident accused Asanullah brought one vehicle from Roumari village and accompanied him to test the vehicle and then the said accused took the custody of the vehicle and they went to Nagaon from there and thereafter repairing the vehicle at Nagaon, they came back to Moirabari. Subsequently, accused Rafikul boarded the vehicle along with the victim girl and the girl was in the vehicle was driven around. He further stated in his deposition that the accused Rafikul rape the prosecutrix in his presence and that at that time the other accused Asanullah was sitting on the front seat of the car. The said witness also stated that the accused persons threatened him to silence. In cross-examination on behalf of the accused Asanullah he stated that the accused Asanullah did not rape the girl/prosecutrix. In cross-examination on behalf of the accused Rafikul Islam, PW-1 stood his ground that the said accused had raped the prosecutrix forcibly.

- 9. In her evidence, the prosecutrix has stated that after the accused Rafikul Islam dragged her by the hand and he stopped at a pan shop, where the pan shop owner questioned him about her and that he introduced her as his sister-in-law. This fact has been corroborated by witness Rafikul Islam PW-2, who deposed that on the day of the incident accused Rafikul Islam along with the girl came to his pan shop, took a pan and thereafter left the shop. However this witness was not cross-examined on behalf of the defence.
- 10. Nurul Islam, adduced evidence as PW-7 and he stated in his deposition that after going to sleep in the night of the incident, one unknown girl came to his house and upon asking her, she stated that two boys had brought her in a vehicle and left her near Dolaigaon School. Thereafter, he brought VDP Secretary Fajlul Hoque and that the said VDP secretary questioned the girl in his presence. He further stated that subsequently they took the girl to the police station. This witness was not cross-examined on behalf of the defence. The said VDP secretary has also adduced evidence as PW-6 and he has corroborated the evidence of PW-7 about an unknown girl coming to the house of PW-7 in the night. This witness further stated in his deposition that when he questioned that

girl, she told that two persons in a red Indica vehicle had left her there. This witness was also not cross-examined on behalf of the defence.

- 11. Dr Ruby Bhuyan, the medical officer, has adduced evidence as PW-13. She has stated in her evidence that on 13/09/2013, while serving as Senior Medical and Health Officer at B.P.Civil Hospital at Nagaon, she examined the prosecutrix in connection with this case. She has further stated in her evidence that upon examination she did not find any recent signs of rape nor any violence marks on the private parts of the prosecutrix. She further stated in her deposition that she found the age of the victim girl to be 16/17 years. The Medical Officer was not cross-examined on behalf of the defence.
- 12. With regard to the evidence of the Medical Officer and her findings thereon, I take note of the fact that the alleged incident is stated to have taken place on 22/08/2013 and the medical examination of the prosecutrix was conducted on 13/09/2013. Therefore, I am of the considered view that the findings of the medical examination regarding non-existence of recent signs of rape would not be fatal to the prosecution case, if there are other areas of the prosecution case supporting the commission of offence.
- 13. The learned defence counsels in their arguments have assailed the prosecution case on the point of delay of the prosecutrix in lodging the ejahar. I have given my anxious consideration to the said submissions. It is true that there has been some delay in lodging of the ejahar by the prosecutrix. However, I am of the considered view that such delay has to be seen in the context of the nature of the offence in the instant case. In this context, I refer to the principles laid down by the Hon'ble Supreme Court in the case of *State of Uttar Pradesh v. Manoj Kumar Pandey, reported in (2009) 1 SCC 72.* It has been held by the Hon'ble Supreme Court in paragraph three of this judgment that the *normal rule regarding the duty of the prosecution to explain the delay in lodging FIR and the lack of prejudice and/or prejudice caused because of such delayed lodging of*

FIR does not per se apply to cases of rape. In view of the aforesaid principle laid down by the Hon'ble Apex Court and the circumstances of this case, I am of the considered view that the delay in lodging of the ejahar by the prosecutrix in the instant case, is not fatal to the prosecution case and accordingly, the submissions of the learned defence counsels on this point stands negative.

- 14. The learned defence counsels have also submitted that there are discrepancies in the testimony of the prosecutrix in her statement before the learned Magistrate recorded U/s 164 of the Cr.PC. and her testimony before this court. To ascertain the said issue, I have perused the statement of the prosecutrix recorded during investigation by the learned Magistrate under section 164 Cr.PC. With regard to the commission of forcible sex upon her, I do not find any fundamental divergence between the two pieces of evidence and accordingly, I am of the considered view that there is no material discrepancy and therefore, there is no force in the submission of the learned defence counsel and the same is accordingly, negative.
- 15. On the basis of the aforesaid evidence on record and in view of the above discussion, I am of the considered finding that the prosecution has been able to prove beyond reasonable doubt that on the day of the incident, the accused Rafikul Islam, committed penetrative sexual assault upon the prosecutrix, thereby making him guilty for committing an offence punishable under section 4 of the POCSO Act, 2012. On the basis of the said evidence, the accused Rafikul Islam, is also guilty of commission of offence punishable under section 376 IPC.
- 16. With regard to the accused Asanullah, I am inclined to give him benefit of doubt for commission of offence of penetrative sexual assault because PW-1 Kasem Ali who claims to be eye witness of the incident of sexual assault had categorically stated in his cross-examination that this accused Asanullah did not rape the prosecutrix.

- 17. However, from the evidence of Kasem Ali eye witness as PW-1, it is clear that the accused Asanullah came with the vehicle to the place where the prosecutrix was made to board the vehicle by the other accused. It has also come in the evidence of the said witness that the accused Asanullah was present in the car when the other accused committed penetrative sexual assault upon the prosecutrix in the vehicle. The evidence of the VDP secretary PW-6 and the other villager Nurul Islam as PW-7 has also supported the case of the prosecutrix that she was dropped by two boys by an Indica vehicle.
- 18. Thus, on the basis of the evidence of prosecutrix as PW-5, Kasem Ali eye witness as PW-1 and the evidence of Pan shop owner Rafikul Islam as PW-2, the evidence of VDP secretary as PW-6 and the evidence of Nurul Islam as PW-7, I come to the considered finding that the prosecution has been able to prove in this case that the accused Asanullah had abetted the commission of penetrative sexual assault upon the prosecutrix by the accused Rafikul Islam.
- 19. Under the provision of the POCSO Act, 2012, the abetment of offence is defined U/s 16 and made punishable U/s 17 with the same punishment as that of provided for the offence to which the accused abetted, if the offence abetted gets committed.
- 20. On the basis of the entire evidence on record, I am of the considered finding that the accused Rafikul Islam @ Robikul is guilty of committing penetrative sexual assault upon the prosecutrix punishable U/s 4 of the POCSO Act, 2012 and also under section 376 IPC. Further, the accused Asan Ullah is found to be guilty of committing abetment of penetrative sexual assault punishable U/s 17 of the POCSO Act, 2012.
- 21. Accordingly, the prosecution succeeds and accused Rafikul Islam @ Robikul is convicted U/s 4 of the POCSO Act, 2012, read with section 376 IPC and the accused Asanullah is convicted U/s 17 of the POCSO Act, 2012.

#### Order on sentence

- 22. Heard the convicts and the learned defence counsels on the point of sentence. Under the facts and circumstances considering the gravity of the crime and the interests of society, accused Rafikul Islam @ Robikul is sentenced to undergo rigorous imprisonment (R.I.) for 7 (seven) years and to pay a fine of Rs.10,000/- (Rupees ten thousand), in default, R.I. for 6 (six) months, for his conviction U/s 4 of the POCSO Act. In view of section 42 of the POCSO Act, 2012, separate punishment for the conviction under section 376 IPC, is not necessary. The convict Asanullah is sentenced to undergo rigorous imprisonment (R.I.) for 7 (seven) years and to pay a fine of Rs.10,000/- (Rupees ten thousand), in default, R.I. for 6 (six) months for his conviction U/s 17 of the POCSO Act. The fine amount, upon being realized, shall be paid as compensation to the victim.
- 23. Further, the victim shall also be paid a suitable compensation under the Assam Victim Compensation Scheme, in exercise of powers under Section 357-A Cr.P.C. The DLSA, Morigaon shall quantify the suitable and applicable compensation amount.
- 24. The compensation awarded to the victim, shall be preferably utilized, at least in part, for her rehabilitation, especially her psychological rehabilitation.
- 25. Any period of detention undergone by the convicts during investigation and trial shall be set off as against the substantive sentence.
- 26. A copy of the Judgment and order shall be sent to the learned District Magistrate, Morigaon for information and to the Secretary, DLSA, Morigaon for the needful.

27. Let a copy of the Judgment and order be given to each of the convicts, free of cost, immediately.

Judgment is delivered in the open court on this  $11^{\text{th}}$  day of October, 2018 under my hand and seal.

(P Das)

Special Judge, Morigaon

Dictated and corrected by me

(P Das)

Special Judge

### **APPENDIX**

# A. Prosecution witness

1. PW-1 : Md. Kasem Ali.

2. PW-2 : Md. Rafikul Islam.

3. PW-3 : Md. Ruhul Amin.

4. PW-4 : Md. Abul Kashem.

5. PW-5 : Prosecutrix

6. PW-6 : Md. Fazlul Hoque Khan.

7. PW-7 : Md. Nurul Islam.

8. PW-8 : Md. Harun Al Rashid.

9. PW-9 : Sri Bittu Marme.

10. PW-10 : Musstt. Bulbul Akhtara.

11. PW-11 : Md. Fakaruddin Ali Ahmed.

12. PW-12 : Sri Subhash Ch. Doley.

13. PW-13 : Dr. Ruby Bhuyan.

# B. <u>Defence witness:</u>

Nil.

2. Ext. 2

# **C. Prosecution Exhibits:**

1. Ext. 1 : The Seizure list

: Charge-sheet

3. Ext. 3 : Medical Report

# D. Defence exhibits:

Nil.

(P Das)

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Both the accused persons namely, Rafikul Islam and Asanullah are present along with the learned defense counsel.

Judgment is ready in separate sheet and pronounced in the open court.

In the result, the accused Rafikul Islam @ Robikul is sentenced to undergo rigorous imprisonment (R.I.) for 7 (seven) years and to pay a fine of Rs.10,000/- (Rupees ten thousand), in default, R.I. for 6 (six) months, for his conviction U/s 4 of the POCSO Act. In view of section 42 of the POCSO Act, 2012, separate punishment for the conviction under section 376 IPC, is not necessary. The convict Asanullah is sentenced to undergo rigorous imprisonment (R.I.) for 7 (seven) years and to pay a fine of Rs.10,000/- (Rupees ten thousand), in default, R.I. for 6 (six) months for his conviction U/s 17 of the POCSO Act. The fine amount, upon being realized, shall be paid as compensation to the victim.

Further, the victim shall also be paid a suitable compensation under the Assam Victim Compensation Scheme, in exercise of powers under Section 357-A Cr.P.C. The DLSA, Morigaon shall quantify the suitable and applicable compensation amount.

The compensation awarded to the victim, shall be preferably utilized, at least in part, for her rehabilitation, especially her psychological rehabilitation.

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A copy of the Judgment and order shall be sent to the learned District Magistrate, Morigaon for information and to the Secretary, DLSA, Morigaon for the needful.

Let a copy of the Judgment and order be given to each of the convicts, free of cost, immediately.

(P Das)

Special Judge, Morigaon