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

# Special Case No.23/2016

State of Assam

Versus

Sri Sameswar @ Khumbra Basumatary .... Accused

Present: Smt.Mitali Thakuria, Special Judge, Kokrajhar

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

Ld. advocate for the accused: Mr S. Basumatary

Evidence recorded on : 17.02.17, 17.02.17, 10.3.17, 16.5.17,

06.02.18, 10.8.18, 07.9.18, 04.12.18

Argument heard on : 14.03.2019

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Judgment delivered on: 29.03.2019

# J U D G E M E N T

1. The prosecution story in brief is that on 04.02.2016 the informant Sri Sarat Singh Basumatary lodged the first information report stating that to the effect that on 03.02.2016 at about 4 P.M. the accused took his minor daughter from his house for fishing in Laopani river where he committed rape on his daughter for which she sustained injury and had to be hospitalized. It is also mentioned that the accused was staying in their house since one week prior from the date of the incident. Hence, the first information report.

- 2. On receipt of the first information report in Kokrajhar P.S., a case has been registered as Kokrajhar P.S. case No.72/16 under section 376 of IPC, R.W. section 4 of the Protection of Children from Sexual Offices Act and case was endorsed to SI Ritujyoti Nath 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 4 of POCSO Act against the accused Sri Sameswar @ Khumbra Basumatary. 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 Sri Sarat Singh Basumatary (Informant),

PW 2 Sri Nabin Mushahary,

PW 3 Sri Jagen Narzary,

PW4 Dr Manisha Boro Phukan,

PW5 Sri Badi Boro,

PW6 Sri Bimal Basumatary,

PW 7 Smti Gebril Basumatary,

PW8 Sri Jibi Basumatary @ Narzary

PW9 Smti Renu Borah Handique,

PW10 SI Ritujyoti Nath and

CW1 Miss Binita Basumatary (Victim).

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:-
- 7. As stated above the first information report of this case is lodged by one Sri Sarat Singh Basumatary with the allegation that the accused on 03.02.2016 took his minor daughter for fishing in Laopani river where he committed rape on his daughter for which she sustained injury and had to be hospitalized. It is also mentioned that the accused was staying in their house since one week prior from the date of the incident. While deposing before the court also the informant as PW1 narrated the same story and deposed that at about 11/12 P.M. accused brought back his daughter to his house and they found their daughter sleeping on her bed and entire bed cover was wet by watery substance and his daughter also sustained injury on her private part and there was continuous bleeding from her private part. He brought his daughter to the hospital for treatment at Bishmuri and Kokrajhar and thereafter she had to admitted his daughter in GMCH, Guwahati where stitches were given on her private part. She was admitted in the hospital for about one week for the injury sustained by her. It also reveals from his evidence that the family members were searching for their daughter as she did not return for several hours and then they came to know that the accused brought back his daughter to his house.

- 8. PW2 is the nieghbour of the informant and during the period of incident he was discharging his duty as Goanbura of Laopani village. He also rushed to the house of the informant getting the information of commission of rape on the minor daughter of the informant and on enquiry he also found profuse bleeding from her private part. Her condition was very serious and accused was found sleeping in the house of the informant at the state of intoxication. He further deposed that on enquiry the accused confessed his guilt and thereafter they handed over the accused to Bishmuri Police Out Post.
- 9. PW3 another neighbour also came to the house of the informant in the morning coming to know about the incident and he also saw serious condition of the minor victim. As per this witness also the accused confessed that he committed rape on the minor victim and he also informed that he is feeling guilty after committing the offence.
- 10. PW5 also came to know about the incident from the mother of the victim and she also saw injury and bleeding from the private part of the minor victim.
- 11. PW6 nephew of the informant also came to their house as called by the informant and he also saw the injury and bleeding of the minor victim.
- 12. As per PW7 the accused confessed before the villagers about the commission of rape on the minor daughter of the informant. They accordingly informed the police and handed over the accused to the police.
- 13. PW8 is the mother of the minor victim and she deposed that the accused came to their residence and stayed in their house and on the day of the incident he took their daughter for fishing in Laopani river, where the accused committed rape on her daughter taking her in lonely place in the evening time. Later on, her daughter informed about the incident and then they found profuse bleeding on her private part. Accused also confessed his guilt before

her and later on before the villagers. They informed the villagers on the night of the occurrence where the accused confessed his guilt. Her daughter was taken to the hospital for treatment for bleeding from her private part and injury sustained by her due to commission of rape by the accused.

- 14. So from the testimonies of PWs1, 2, 3, 5, 7 and 8 it is seen that all the witnesses corroborating each other have deposed that the accused committed rape on the minor daughter of the informant by taking her for fishing in lonely place. From their evidence it also reveals that the victim sustained severe injury on her vagina (private part) and all of them have seen profuse bleeding from her private part and they also found the victim in serious condition. More so, all the witnesses have stated that the accused also confessed his guilt before the villagers and on the next day he was handed over to the police. At the same time all the witnesses have stated that the victim had to be hospitalized and she was initially took to Bishmuri and Kokrajhar and thereafter she took her treatment at GMCH. PWs5 and 6 also accompanied PWs1 and 8 to the doctor. Another witness PW6 who is the nephew of the informant also came to the house of the informant and thereafter he also accompanied the informant to the doctor for treatment of the minor victim. So as per these witnesses the accused not only committed rape on the minor victim and he also confessed his guilt before the villagers and they also stressed on the point that victim sustained severe injury on her private part.
- 15. From the cross evidences of all the witnesses, it is seen that the accused confessed before the villagers about the commission of offence and these witnesses denied when suggested that the accused confessed before the villagers only out of fear and compulsion.
- 16. As per medical evidence (PW4) she found multiple vaginal mucus bleeding on examination of vulva and vagina. The report also speak

that there was grievous mark of violence on her private part and hymen was also torned. Doctor also opined that child has subjected to sexual/physical abuse. On cross-examination also she stated that bleeding came out due to sexual penetration. She further stated that it may be by penetration by hands and/or by sexual organ. So the medical evidence also corroborates the ocular evidence of all the witnesses discussed above and as per medical report also there was sexual assault and penetration into the vagina of the minor victim for which hymen was raptured and at the time of examination also there found multiple mucus bleeding on the private part of the minor victim.

- 17. The victim was examined as court witness as her name was not listed in the list of witnesses. After putting some preliminary questions her capacity of understanding was judged and thereafter the statement of the minor was recorded. The minor victim very specifically stated in her statement that the accused took her near the bank of river and has done misdeed with her. She clearly stated that he asked her to open her panty and after opening his Gamosa he thrown her on the ground and forcibly penetrated his penis into her vagina. She cried as it was paining and blood was coming out. Thereafter the accused himself brought her to her own house and kept her in her bed and stayed in the night in their house. On the next day she was brought before the doctor for treatment. In her cross evidence she stated that the accused had consumed alcohol at the time of incident and he also asked her not to disclose anything about the incident to others.
- 18. PW10, I.O. of this case and from his evidence it is evident that he rushed to the place of occurrence getting telephonic message but, in the mean time the victim was admitted in RNB Civil Hospital, Kokrajhar in a critical condition and the villagers confined the accused. He made GDE as soon as he got the information and immediately rushed to place of occurrence

occurrence where the accused was tying on a tree and the villagers gharoed him and hence, he rescued the accused and took him in his custody. Thereafter he made a requisition to know medical status of the victim and also to ascertain sign of rape. Thereafter the father of the victim lodged the first information report which was accordingly a case is registered in Kokrajhar P.S. and the case was endorsed with him. As per the I.O. also the accused confessed his guilt while recording his statement. He also seized undergarment of both the accused and victim and sent the same for examination to FSL. The victim was referred to GMCH for further treatment after which the statement of the minor victim was recorded. Her statement was recorded on 20.5.2016 after her discharge from GMCH. On completion of investigation, collecting FSL report, medical report etc. he filed the charge sheet against the accused. So it is seen that the I.O. not only examined the victim but, he also collected undergarment of both the accused and victim. PW2 put his signature as seizure witness when the I.O. seized undergarment of both the victim and accused.

19. Coming to the evidence of Scientific Officer (PW9) who examined undergarment of both the accused and victim it is seen that half pant of the accused gave positive test for human spermatozoa and pant of the victim gave positive test of human blood and negative test for spermatozoa. Thus, it is seen that blood stain which was found in the pant of the victim gave for positive test and at the same time the half pant of the accused also gave positive test of human spermatozoa which otherwise corroborates the medical evidence as well as ocular evidence of prosecution witnesses. It is not possible for scientific officer to know the accused or to say as to whether human spermatozoa which was found at the time of examination belonged to accused or not and at the same time it is also not possible for the scientific officer to say as to whether positive test of human blood is blood stain or blood came out from the vagina of the minor victim.

- 20. During the course of argument the learned advocate appeared for the accused person raised the following points:-
  - (i) There is no eye witness of the incident;
  - (ii) The accused confessed his guilt out of fear and compulsion;
- (iii) The accused brought the victim girl to her own house which otherwise establishes that he has not committed any offence with the minor girl;
- (iv) The Scientific Officer (PW9) do not know any whether spermatozoa found on the pant and human blood found in any long pant belong to the accused and victim respectively;
- 21. It is an admitted position that there was no eye witnesses and all the witnesses have heard about the incident from the minor victim. The circumstance of the case is that the accused took the minor victim in the evening time in the bank of river Laopani which was lonely place and hence presence of other people at the time of incident cannot be expected. So mainly because of non availability of any eye witnesses, testimonies of all the witnesses cannot be disbelieved. All the witnesses have heard about the incident from the victim and also saw her in serious injured condition. At the same time the minor victim who is examined as court witness has specifically stated that the accused forcibly penetrated his penis into her vagina by throwing her on the ground and opening her cloth etc. She also stated that she felt pain on her vagina and blood came out when the accused forcibly entered his penis into her vagina. Not only all the witnesses supported the prosecution version but, medical evidence also supported the ocular evidence and it is very clear that doctor found grievous mark of violence on her private part and also found profuse bleeding from her vagina. Hymen of the minor victim is also ruptured as per medical opinion.

22. 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 n 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."

- 23. In the instant case also the statement of the victim about the commission of rape by the accused found trustworthy, reliable and medical evidence showing torn hymen with injury on her private part showing grievous mark of violence also fully supported the prosecution version. More so, the evidence of PW9, the Scientific Officer and his report also speak that the garment of the accused and victim gave positive test for human spermatozoa and human blood respectively.
- 24. Coming to the confession by the accused it is seen that all the prosecution witnesses corroborating to each other have stated that when they enquired about the matter the accused confessed his guilt before the villagers. The learned advocate submitted in this regard that he confessed before the villagers only out of fear and compulsion and hence such extra-judicial confession cannot be taken into consideration or cannot be used against the accused. But, from the evidence of all the witnesses it is seen that they denied to the suggestion put by the defence that the accused confessed out of fear and compulsion. All the prosecution witnesses corroborating to each other have deposed that on enquiry the accused confessed his guilt before the villagers. There is no whisper in the testimonies of the prosecution witnesses that he made the extra-judicial confession only out of fear and compulsion. The circumstance of the case is that when the prosecution witnesses and other villagers came to the house of the informant getting the information about the commission of rape on their minor daughter. They enquired the matter with the accused when he confessed that he committed rape on the minor victim. Thus, the evidence of prosecution witnesses cannot be disbelieved in regard to

the extra-judicial confession made by the accused unless there is some rebuttal evidence from the defence side. It reveals from the cross evidence of prosecution witnesses that the defence could not rebut their evidence in respect of confession made by the accused before them. More so, there is no any evidence that these witnesses had any enmity to bring such a grave allegation against the accused. Accused is also not resident of that village to have any previous grudge or enmity with the parents of the minor victim or with other villagers.

25. "It is true that the court requires the witness to give the actual words used by the accused as nearly as possible but it is not an invariable rule that court should not accept the evidence, if not the actual words by the substances were given. It is for the court having regard to the credibility of the witness before whom the confession is made and it is satisfied that confession was voluntarily, conviction can be founded on such evidence".

This has been held by the Hon'ble Apex Court in a decision reported in **AIR 1991 SC 37 Baldev Raj V State of Haryana**.

- 26. In various decisions also the Hon'ble Supreme Court has held that the conviction can be passed fully on extra-judicial confession without corroboration if it inspires confidence (AIR 1975SC 1320).
- From the discussion made above, it is seen that the prosecution witnesses before whom the accused is alleged to have been confessed is found trustworthy and the entire circumstances also supported version of the prosecution witnesses. Our Hon'ble High Court in a case reported in **2001 (3) GLR 533 Baharul Bibi Vs State of Assam** has held that- "Circumstances can be acted upon if the evidence of the person before whom the confession was made inspires confidence".

28. So from the detail discussion made above it is seen that the prosecution could establish that the accused took the minor victim to the bank of river Laopani in the forest area where he penetrated his penis into her vagina to that extend that her hymen was ruptured and there was profuse bleeding from her vagina. Thus, the medical evidence also fully supports that there was penetration in the private part of the minor victim.

Section 3 of the POCSO 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 of 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 body 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 of any other person.

As per the provision of this Act even manipulation of any part of the body of a child so as to cause penetration would amount to penetrative sexual assault which is available under section 4 of POCSO Act [2017 SCC Gau 576 - Sri Kamakhya Roy Vs State of Assam].

29. Accordingly, it is held that the prosecution is able to establish the case against the accused Sameswar @ Kumbra Basumatary under section 4 of POCSO Act and accordingly the accused is convicted under the said section of law.

- 30. I have considered section 360 Cr.P.C. to release the accused on probation. But, the heinous crime of committing rape on a minor girl of 6/7 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.
- 31. 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 very poor person and accordingly he prays for his release without any sort of punishment.
- 32. 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).
- 33. 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".

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35. 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 Rigorous Imprisonment for ten years with fine will meet ends of justice.

## ORDER

- 36. In the result, the accused Sri Sameswar @ Khumbra Basumatary is hereby convicted under section 4 of the Protection of Child from Sexual Offences Act and hereby sentence with Rigorous Imprisonment for 10 (ten) years along with a fine of Rs.2,000/-. In default of payment of fine will undergo Rigorous Imprisonment for two months. The period of custody of the accused shall be set off from the period of sentence if any.
- 37. Free copy of the judgment be furnished to the convicted Sameswar @ Khumbra Basumatary 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.
- 38. The judgment is delivered in the open court and given under my hand and seal of the Court on this 29th March/2019 at Kokrajhar Court.

Dictated & corrected by me

Special Judge,

Special Judge, Kokrajhar

Kokrajhar

# **Appendix**

## The prosecution witnesses are:

- 1) PW 1 Sri Sarat Singh Basumatary (Informant),
- 2) PW 2 Sri Nabin Mushahary,
- 3) PW 3 Sri Jagen Narzary,
- 4) PW4 Dr Manisha Boro Phukan,
- 5) PW5 Sri Badi Boro,
- 6) PW6 Sri Bimal Basumatary,
- 7) PW 7 Smti Gebril Basumatary,
- 8) PW8 Sri Jibi Basumatary @ Narzary
- 9) PW9 Smti Renu Borah Handique and
- 10) PW10 SI Ritujyoti Nath.

# The Court Witness is:

CW1 Miss Binita Basumatary (Victim)

The Defence witness is: Nil.

#### The exhibited documents are:

- 1. Ext-1 ... Seizure list,
- 2. Ext.2 ... Medical report of victim,
- 3. Ext.3 ... Report of Scientific Officer,
- 4. Ext.4 ... Extract copy of GDE,
- 5. Ext.5 ... Charge sheet,
- 6. Ext.6 .... Seizure list,
- 7. Ext.7 .... Sketch map,
- 8. Material Ext.1.. Black colour half pant of accused and
- 9. Material Ext.2 .. Grey colour of long pant of victim with blood stain.

The Defence witness and exhibit: Nil

Special Judge, Kokrajhar