IN THE COURT OF THE SPECIAL JUDGE, BARPETA

Special POCSO Case No. 15/2018
(Arising out of G.R. Case No. 1302/2018)
U/S 4 of POCSO Act

PRESENT: Sri Chatra Bhukhan Gogoi, AJS, Special Judge, Barpeta.

Charge framed on:- 05.05.2018

State of Assam

- Vs -

Ahed Ali.....Accused.

Date of Recording Evidence on - 07.06.2018, 02.08.2018,

24.01.2019, 28.02.2019 &

18.06.2019

Date of Hearing Argument on – 24.07.2019.

Date of Delivering the Judgment on – 01.08.2019.

Appearance:

Advocate for the State----- Mrs. P. Das, Learned Addl. P.P. Advocate for the Accused----- Abdul Mannan, Learned Advocate.

JUDGMENT

- 1. The prosecution case, in brief, is that, on 22.03.2018 one Ajufa Khatun lodged an FIR in Baghbor P.S. alleging inter alia that on 21.03.2018 at about 1 pm accused named in the FIR committed penetrative sexual assault on her minor daughter age about 13 years by putting her mouth shut with a gamosa. At that time, none were present in the house. On her return home when she found her daughter weeping she on being questioned narrated her ordeal. Hence the case.
- 2. Acting on the information police got a case registered being Baghbor P.S. case No. 62/18 dated 22.03.2018 u/s 376 IPC R/W section 4 of POCSO Act and investigated the case.
- 3. On completion of investigation, police finally laid the charge sheet against accused Ahed Ali u/s 4 of POCSO Act with a view to stand trial.

- 4. In due course, when accused entered his appearance in court vide order dated 05.05.2018 the than Hon'ble Special Judge framed charges against accused u/s 4 of POCSO Act. The substance of the offence on being read over and explained accused pleaded not guilty and claim trial.
- 5. During the course of trial, the prosecution examined 8 witnesses including the informant, the alleged victim and the investigating officer respectively.
- 6. Thereafter, hearing the learned Addl. P.P. further prosecution evidence stands closed.
- 7. Accused is examined u/s 313 Cr.P.C. in which he also denied the prosecution evidence as false and misleading. The plea of the accused is total denial of the prosecution case. As such, on being asked accused declined to adduce defence evidence.

8. Now point for determination ;-

.1. Whether on 21.03.2018 at about 1 pm accused committed penetrative sexual assault on the victim girl as alleged?

9. <u>Discussion, Decision and reasons for such decision</u> :-

I have heard the learned lawyers appearing for both sides and also carefully scanned the prosecution evidence available on record.

- 10. The learned counsel appearing for the State Smti. P. Das submitted that in the present case the prosecution examined 8 witnesses out of which the evidence of the victim girl found to be genuine and natural and her evidence inspires confidence about the incident which is duly supported by the evidence of PW-1 her mother in material particulars. Even though PW-7 China Khatun is the eye witness but she did not support the evidence of the victim girl because accused is her husband. Nevertheless, this does not weaken the prosecution case. Hence she submitted that this is a case where accused can be punish adequately in accordance with law.
- 11. On the other hand, the learned counsel Abdul Mannan appearing for the accused person vehemently contended that there is absolutely nothing in the evidence of the prosecution witnesses which constitute the ingredients of the offence u/s 4 of POCSO Act. According to the learned defence counsel, the prosecution has failed to bring home the guilt of accused for sustaining conviction u/s 4 of POCSO Act as the evidence of the victim girl does not inspire confidence because the so called eye witness

China Khatun (PW-7) denied having any such crime committed by accused. The learned counsel further contended that the prosecution filed this false case against the accused due to existing enmity between them regarding land. So in order to settle score, a false and concocted case has been filed against accused. According to learned counsel the evidence of PW-1 and PW-2 the mother and the alleged victim are exaggerated in nature. The evidence of other prosecution witnesses also does not support the version of the victim girl PW-3 in material particulars. The medical officer PW-1 on her examination on 23.03.2018 found no recent sign of sexual intercourse or find any injury on her body. She has not been suffering from any physical or mental illness or there were any foreign particles found on her body or clothes. According to learned counsels the opinion of doctor that the victim is accustom to sexual intercourse does not suggest that accused had committed any penetrating sexual assault on the victim. According to learned defence counsel, given the nature and quality of the evidence available on record it is unsafe to hold the accused guilty u/s 4 of POCSO Act as such, the learned counsel prays to acquit the accused person from the charge u/s 4 of POCSO Act.

- 12. In the context of the submission of the learned counsel appearing for both sides it would be in the fitness of things to refer to section 3 and 4 as defined in the POCSO Act 2012.
 - **"3.** <u>Penetrative sexual assault</u>. 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 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 or any other person.
 - "4. **Punishment for penetrative sexual assault**. Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less

then 7 years but which may extend to imprisonment for life, and shall also be liable to fine."

- 13. Now, on perusal of the offence u/s 3 of POCSO Act it appears that section 3 define the nature of the act/acts which constitutes penetrative sexual assault and section 4 of the POCSO Act provides punishment for any of the act/acts done by accused as defined in section 3 (a) to (d).
- Now, on careful perusal of the evidence available on record 14. particularly the evidence of the alleged victim girl PW-3 age about 12 years it transpires that she in her deposition clearly stated that she knows accused person very well. On the day of incident at about 1 pm when she was sleeping in the house alone accused came to her residence put her mouth shut and by removing her clothes did uncivilized acts (Asabhya Kam). She made attempt to cry but could not because accused put her mouth shut. But wife of accused China Khatun saw the incident from window and shouted. Then nearby people alerted and accused fled away. Then her grand mother Nurjahan and Amirjan along with Shantabhanu also came to her house. At about 4 pm when her mother returned home then she disclosed to her the entire incident. She also deposed that after one day of the incident case was filed. During investigation police took her for medical examination and forwarded her to court for recording her statement before Magistrate. Ext. 2 is the FIR and Ext. 2(1) and 2(2) are her signatures.
- 15. In her cross examination she also stated that her mother reached home at about 4 pm and brother of her mother filed the case on the same day. When the mother came home she was sitting in the house of her maternal aunt. Though she was in good health she did not disclose it to her mother out of shame. She did not show her clothes to her mother as well as to police. She denied that accused did not commit penetrative sexual assault on her by putting her mouth shut. There are so many suggestions but she denied all the defence suggestions as false.
- 16. In her statement before Magistrate u/s 164 Cr.P.C. (Ext.2) the victim girl very clearly stated that on 21.03.2018 at about 1 pm while she was sleeping in her home alone, accused taking advantage of her loneliness secretly entered into the room and put a gamocha on her mouth and then committed rape on her. At that time wife of Ahed Ali also reached her home searching Ahed Ali and saw Ahed Ali committing rape on her so she raised hue and cry. Then accused went out side from her house and ran away.
- 17. In her evidence PW-2 Ajufa Khatun, who is the informant deposed

that the incident occurred about three months back from the date of her evidence while her daughter was alone in the house. At about 1 pm while she was sleeping accused entered into her room and committed rape on her. The wife of accused Ahed Ali also saw the incident while she visited her house searching Ahed. Hearing hue and cry others also gathered. At about 4 pm the other family members also came to know about the incident. While she reached home her daughter was suffering from great fear. On being asked, she narrated to her ordeal and neighbor Santa and another woman also saw the incident. On the next day she filed the case. She being the illiterate woman. She put her thumb impression in her FIR. She also accompanied the victim while she was taken from medical examination.

- 18. In her cross examination she stated that on the next day of incident victim was examined by doctor and found no such disease. She also saw the bleeding on the cloth of the victim. Initially the matter was informed to her neighbor but the police enquired her about two months back.
- 19. PW-1 doctor Anima Boro, who examined the victim girl on 23.03.2018 in connection with Baghbor P.S. case No.62/18 u/s 376 IPC R/W Section 4 of POCSO Act deposed that on examination she found the following:-

There is no recent sign of sexual intercourse but victim is accustom with sexual intercourse. There is no sign detected, there is no injury on body, there is no foreign particles on body or clothes, there is no X-ray report. So her age could not be ascertained. Ext.1 is her medical report and Ext.1(1) and 1(2) are her signatures.

The evidence of PW-4 Santa Bhanu is inconsequential as she did not elaborate anything.

- 20. PW-5 is Nurjahan who is an independent witness deposed that the residence of accused is adjacent to her house. On the day of incident she heard that accused visited the home of informant Ajufa Khatun. The wife of accused told her that she do not want to continue her conjugal life with accused because he visited the house of informant and on further query she told her that accused tried to commit rape on the victim by pressing her mouth. She also stated that after the incident, police visited the house of victim and during that time police recorded her statement.
- 21. In her cross examination she stated that when she visited the house of victim she saw her in frightening condition but accused was not there then. However, she had not seen any strain on her clothes. She denied the

defence suggestion that she do not state before police that she did not hear that accused visited the house of informant around noon in the absence of her parents. She also deposed that accused purchased land adjacent to the land of informant having the common boundary. The mother of victim is a daily labour who returned home in the evening after the days work. She denied that she deposed false evidence and there was a land dispute between the parents of victim and accused.

- 22. PW-6 Amirjan Nessa deposed that the incident occurred about 11 to 12 noon about 8/9 months back, when she was in the residence she heard hue and cry of the wife of accused then she rushed to the house of accused and inquired what had happened. Then the wife of accused told her that her husband visited the house of informant. Then she went to the house of informant and on being asked the victim girl told her that accused visited her house. Since she has a baby on her lap she left for her house.
- 23. PW-7 Saina Khatun, who is the wife of accused Ahed Ali expressed her ignorance about any incident but said that a false case has been filed against her husband due to land dispute.
- 24. PW-8 Tarun Chandra Boro, the I/O deposed that on 22.03.2018 while he was working as O/C, Baghbor police station having got the information from one Ajufa Khatun a case being Baghbor P.S. case No.62/18 u/s 376 IPC R/W section 4 of POCSO Act was registered and investigated the case. During investigation he visited the place of occurrence, recorded the statement of the witnesses including the victim girl and forwarded her to court to record her statement before Magistrate u/s 164 Cr.P.C. The girl was also examined by doctor. He also arrested the accused person and having found prima facie case submitted the charge sheet against accused u/s 4 of POCSO Act. Ext.3 is the sketch map and Ext.3(1) is his signature. Ext.4 is the charge sheet and Ext.4(1) is his signature. Ext.5 is the seizure list of the birth certificate of the victim and Ext.5(1) is his signature.
- 25. In the cross examination the I/O stated that PW-2 Ajufa Khatun did not state before him that on her return home at 4 pm she was told by neighbors that accused forcefully committed "Beya kam" on the victim and having seen this the wife of accused made hue and cry.
- 26. On perusal of her statement before police u/s 161 Cr.P.C. it is seen that she stated before police that on 21.03.2018 at about 1 pm while her daughter was alone in the house, accused Ahed Ali came to her house and forcefully committed rape on her daughter and hearing hue and cry of her

daughter when neighbors came forward accused fled away.

- 27. Therefore, it appears that there is no such major contradiction or omission in the evidence of PW-2 in court with that of her previous statement before police. In court she stated that accused committed "Balatkar" i.e. rape and in her statement before police she stated that accused committed "Dharkhan" meaning thereby that accused committed sexual intercourse with her daughter. The I/O also stated in his cross examination that PW-3 the victim girl did not state before him that hearing hue and cry wife of accused, her grand mother and maternal aunt also rushed there and she told them that accused forcefully committed "Ashavya kam" i.e uncivilized act with her.
- 28. Now, on careful perusal of the evidence of the victim girl it appears that she clearly stated that on the day of incident at about 1 pm while she was alone in the house accused entered into the house and committed "Ashavya kam" by removing her clothes. In her statement before police u/s 161 Cr.P.C. also she stated that on 21.03.2018 at about 1 pm while she was alone in the house accused entered into the house secretly and by putting her mouth shut with a gamocha committed "Balatkar" i.e. rape on her. Therefore, it is seen that there is no such major omission or contradiction in the evidence of the victim girl as well as her mother as pointed out by the learned defence counsel during the course of arguments.
- 29. It is to be noted that the offence was committed on 21.03.2018 and the FIR was lodged on 22.03.2018. The statement of the victim girl was recorded before Magistrate u/s 164 Cr.P.C. on 23.03.2018 wherein victim girl clearly stated that the incident occurred on 21.03.2018. During the course of evidence, PW-1 doctor Anima Boro deposed that during the course of physical examination of the victim girl on 23.03.2018 she found no recent sign of sexual intercourse but the victim was found accustom to sexual intercourse. It is true that victim was examined by doctor after two days of the incident. Therefore, doctor having found no recent sign of sexual intercourse is not unusual because after the gape of two days it is difficult to get sign of recent sexual intercourse. Nevertheless, the doctor found the victim accustom to sexual intercourse which shows that there was sexual intercourse with the victim girl.
- 20. The facts that have emerged in the mouth of the prosecution witnesses particularly in the evidence of the victim girl and the medical officer there is no denying of the fact that there was sexual intercourse with

the victim girl. Now, it is to be seen who had the access with the victim girl. In the absence of any evidence to show that any person other than the accused had access with the girl the accusing finger is towards the accused as the victim girl clearly stated that it was accused who had committed sexual intercourse with her supported by medical evidence of doctor PW-1 who stated that victim was accustom to sexual intercourse. The evidence of the victim girl and medical officer shows that the sexual intercourse took place not in one occasion but on several occasions. Accused being a major person and the victim girl being minor. So, accused taking advantage of the weakness of the girl in committing sexual intercourse with her cannot be ruled out. It is to be noted that the society and the environment in which the victim lives, it is common practice thing that the parents leave their children alone in the house under compulsion of their survival, as they either work in the paddy field or went out side home in search of work. Therefore, absence of parents in the house leaving their children alone fear and attention is a common scene in the rustic, rural backdrop.

- 31. In such a situation, taking advantage of loneliness of the children by unscrupulous person to commit crime against the minor is the easiest thing as the minor victim was left unattended by parents. Therefore, the victim girl becoming the easy pray of the lust of accused is not uncommon which is the real fact in the instant case, as, at the time of incident victim was alone in the house. Therefore, her evidence cannot be discarded or thrown out as unworthy of credit in a pedantic manner without appreciating the ground realities under which the victim lives.
- 32. Though the learned defence counsel tried to project a picture to negate the prosecution case by bringing the point that false case has been filed against accused for existing land dispute appears to be not a strong proposition to negate/discard/disbelieve the evidence of the victim girl which is supported by the evidence of medical officer as well as her mother.
- 33. In view of the foregoing discussion and reason, this court is of the clear view that prosecution has been able to establish the case against accused for commission of offence u/s 4 of POCSO Act. Accordingly, accused is found guilty u/s 4 of POCSO Act.
- 34. I have considered the provision of section 360 Cr.P.C. but after due consideration of the attending facts and circumstances of the case and the age of the accused the nature of the offence committed, this court is not inclined to extend the benefit of Probation of Offenders Act in favour of

accused.

SENTENCE HEARING

- 35. I have heard the accused person on the point of sentence as provided u/s 235(2) Cr.P.C. It is submitted that accused person hails from very poor strata of society and survives by doing cultivator. He is a married person. He was having his wife and children to maintain. So, in the event he is put behind bar his innocent family members would suffer a lot. Hence, accused pleaded clemency.
- 36. Heaving considered the extenuating and mitigating circumstances of the case and the punishment prescribed in section 4 of POCSO Act, 2012 which shall be imprisonment of either description for a term which shall not be less then 7 (seven) years but which may extend to imprisonment for life, and shall also be liable to fine. Therefore, considering the nature and gravity of the offence proved and the punishment prescribed by law, accused is convicted and sentenced u/s 4 of POCSO Act to under go Rigorous imprisonment for a term of 10 years (ten years) and fine of Rs.2000/- I/d simple imprisonment for one year.
- 37. The period of detention, if any, undergone by accused during the course of investigation, enquiry or trial shall be set off against the term of imprisonment as provided u/s 428 Cr.P.C.
- 38. Let a copy of the judgment be furnished to accused person free of cost as provided in section 363 Cr.P.C.
- 39. Let copy of the judgment be forwarded to the learned District Magistrate, Barpeta as provided in section 365 Cr.P.C.
- 40. Let case record be consigned to record room after completing the formalities.
- 41. Given under my hand and seal of this Court on this 1st day of August, 2019 at Barpeta.

Dictated & Corrected my me

Sd/-

Sd/-

(Sri C.B. Gogoi)

(Sri C.B. Gogoi)

Special Judge, Barpeta

Special Judge, Barpeta

APPENDIX

1. The prosecution has examined the following 8 nos. of witnesses:-

PW-1 = Dr. Anima Boro.

PW-2 = Ajufa Khatun, the informant.

PW-3 = victim girl(X).

PW-4 = Santa Bhanu.

PW-5 = Nurjahan.

PW- 6 = Amirjan Nessa.

PW-7 = Saina Khatun.

PW-8 = TaRUN Chandra Boro, the I/O.

2. The prosecution has exhibited only one document :-

Ext. 1 =is the medical report.

Ext.1(1) = is the signatures of doctor Anima Boro.

Ext. 1(2) = is the signature of doctor Manoj Kr. Singha.

Ext. 2 = is the statement of victim u/s 164 Cr.P.C.

Ext.2(1) = is the signature of victim (X).

Ext. 3 = is the sketch map.

Ext. 3(1) = is the signature of I/O.sketch map.

Ext. 4 = is the charge sheet.

Ext.4(1) = is the signature of I/O.

Ext.5= is the seizure list.

Ext.5(1) = is the signature of I/O.

Sd/-

(Sri C.B. Gogoi) Special Judge, Barpeta.