# IN THE COURT OF ADDL SPECIAL JUDGE (FTC)::KOKRAJHAR

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

SPECIAL CASE No.03/2019
U/S. 8 of the Protection of Children from Sexual Offences Act, 2012

STATE OF ASSAM

Vs

1.Opiul Sk S/O. Lt. Jasumuddin Sk Village- No.1 Guwabari

2. Kartik Barman S/O. Sri Deben Barman Village- Guwabari Both are P.S. Gossaigaon District- Kokrajhar

...... Accused persons

#### Appearance: -

Learned Counsel for the State Mr. Manjit Ghosh, Special P.P Learned Counsel for the Mr. Iqbal Hussain, Advocate defence

Charge framed on 15.02.2019

Evidence recorded on 08.03.2019; 29.03.2019;

12.04.2019; 03.05.2019;

07.06.2019

Argument heard on 30.07.2019 Judgment pronounced 09.08.2019

on

#### **JUDGMENT**

1. The case of the prosecution is that on 7.11.2018, the victim, lodged an FIR at Grahampur Police Out Post alleging that on 06.11.2018, at about 4-30 PM, she was alone in her house. At that time, accused Opiul Sk came to her house and asked for oil. The victim gave oil to the accused and went inside her house.

Later, the accused entered into her residence and attempted to commit rape on her. The victim screamed, as a result of which the nearby people gathered and the accused was apprehended.

- 2. The FIR was sent to Gossaigaon Police Station. On receipt of the FIR, a case U/S 120(B)/448/376/511/506/34 IPC read with Section 8 of the POCSO Act was registered and investigated. After completion of the investigation, a charge sheet was laid against the accused Opiul Sk and Kartick Barman for offences U/S 120(B)/448/506/34 IPC R/W Section 8 of POCSO Act.
- 3. The case was transferred to this Court for disposal. The accused persons were summoned and after furnishing copies to them, charge U/S 8 of the POCSO Act was framed against them to which they pleaded not guilty and claimed trial.
- 4. In the course of trial prosecution examined 7 witnesses. At the closure of prosecution evidence, the accused persons were examined U/S 313 of the Cr.P.C. The defence plea is of total denial and they adduced the evidence of accused Kartick Barman.

#### **POINTS FOR DETERMINATION:**

(i) Whether the accused persons in furtherance of their common intention attempted to commit penetrative sexual assault on the victim?

#### **DECISION AND REASONS:**

5. PW 1 is the victim of this case. She deposed that in the month of November, 2018, accused persons were working in her house as mason. In the evening hours, she was alone in her

house and was preparing food. At that time, accused Opiul Sheikh asked her for some mustard oil to rub in his hand which she gave. Thereafter, she went back to cooking. Suddenly, accused Opiul Sheikh came inside her kitchen and grabbed her from behind touching her breasts. She screamed and tried to come out of the grab of the accused Opiul Sheikh. Hearing her scream, her neighbour Subhalini Tudu, came to her house. Thereafter, some other villagers came and apprehended accused Opiul Sheikh.

- 6. In her cross-examination, she deposed that she does not know the name of the scribe of the FIR. Pw 1 denied the defence suggestions with reference to omissions appearing in her statements, made under Section 161 CrPC. Pw 1 also denied the suggestion that she misunderstood accused Opiul Sheikh when he asked for mustard oil. It was also suggested to pw 1 that it was she who had slapped the accused Opiul though the slap did not fall in his body. There were some other suggestions to pw 1 but she denied each of those suggestions.
- 7. Pw 2 xxx, is the mother of the victim. She deposed that at the time of occurrence she was away from home. When she returned home, she saw a crowd of people. She then asked her daughter as to what had happened. Her daughter informed that accused Opiul had asked her for some mustard oil which she gave but a little while later the said accused came and grabbed her from behind. Pw 2 also deposed that accused was handed over to Dingdinga O.P and on the following day my daughter lodged the FIR.

- 8. In cross-examination, pw 2 deposed that when she returned home, she saw a huge crowd consisting of more than 30 people. She deposed that she did not ask Subhalini Tudu anything about the incident. She also deposed that she also did not ask anything from the neighbouring people and also the persons present at that time. She admitted that Opiul and Kartick had come to our residence for the first time on that day for mason works. She denied the defence suggestions made to her.
- 9. PW3 Sri Solomon Soren deposed that he knows the informant. He deposed that on the date of occurrence, at about 4 PM, while he was going for grazing his cows, he heard noise of people near the residence of the informant. When he went there, he saw accused Opiul Sheikh has been apprehended by the victim and others. On inquiry with the victim she told that accused Opiul had grabbed her hands. pw 3 also deposed that he then asked the accused Opiul about the incident to which he replied that he had grabbed the hands of victim.
- 10. In cross examination, PW3 deposed that he was alone when he had gone to bring his cows from the grazing field. He deposed that when he reached the place of occurrence, he had seen Sivlal and Subhasini apart from the victim. Pw 3 also deposed that the house of Nikudin Tudu is situated at a distance of 45 ft near the residence of victim but had not seen Nikudin Tudu and his wife in the place of occurrence. He denied the defence suggestion that he had not stated before police that on inquiry from the accused Opiul Sheikh about the incident he

replied that he had grabbed the hands of victim. The accused Opiul was not tied up in tree but his hands were tied up with a rope.

- 11. PW4 Sri Shiblal Hasda deposed that in the month of November, during Kalipuja, in the evening hours, he was returning from paddy field. When he reached the residence of victim, she called me and informed me that accused Opiul Sheikh had grabbed her hands. At that time, Subhasini was also present. Pw 4 deposed that he then inquired with the accused regarding the incident and he admitted that he had grabbed the victim. After a while, Solomon also came to the place of occurrence and later many villagers also assembled.
- 12. In cross examination PW4 deposed that at the time when he reached the place of occurrence he had seen only the victim, Subhasini and accused Opiul Sheikh. Soloman came after him. Pw 4 denied the defence suggestion that he did not state in his police statement that he had held the accused.
- 13. PW5 Sri Luk Hasda deposed that on 6.11.2018, he heard noise from the residence of xxx, father of victim, during evening hours. He went to the residence of xxx, father of victim. He saw the victim at the outside of her home. On inquiry she told that accused Opiul Sheikh attempted to rape her. Accused Opiul was sitting on the bench and there were some other people around him. Later, police came and took away the accused Opiul.
- 14. In cross examination, pw 5 denied the suggestion that he did not state before police that victim informed him that accused attempted to commit rape on her.

- 15. Pw 6 Subhalini Tudu deposed that the occurrence took place on 6.11.2019, at about 4 p.m. She deposed that heard loud scream coming from the residence of victim, her neighbour. She rushed to the residence of victim and saw accused Opiul. On inquiry, she came to know from victim that initially accused Opiul asked her mustard oil for cleaning his hand which she gave. Thereafter, the victim went into the kitchen but accused Opiul followed her and grabbed her with intent to commit rape on her.
- 16. In cross examination she deposed that Elenmary Soren's father and my mother are own brother and sister. She denied the suggestion that she is deposing falsely. She also denied the suggestion that accused had asked for mustard oil for use but the communication was misunderstood by victim indicating sexual overtones and that is why the victim had beaten the accused Opiul though the strike did not touch the body of Opiul.
- 17. PW7 Sri Mojen Barman is the Investigating Officer. He deposed about the sual aspects of investigation conducted by him in this case.
- 18. In cross examination PW7 deposed that at the time when he visited the place of occurrence lots of people were already there. He had not recorded the statement of Hopna, Einstain Hembrom, Sonaton. He had found Opiul Sheikh in injured condition. He deposed that he had not recorded the statement of the brother and sister of PW1. He deposed that he knows that victim is the Secretary of Santhal Student Union. Pw 7 confirmed the contradiction that PW1 did not state in the statement of U/S

- 161 Cr.PC that Subhasini Tudu came to her house when she shouted. Pw 7 also deposed that PW1 did not specifically state in the statement U/S 161 of Cr.PC that accused touched her breast.
- 19. DW1 Sri Kartik Barman, one of the accused in this case, deposed that he has filed a petition in this case to depose as defence witness. He deposed that about 7 months back, he had gone to a village alongwith Opiul Sheikh for constructing an RCC tank. After finishing the work they were cleaning themselves. At that time, at about 4 PM, accused Opiul Sheikh asked for some mustard oil from the girl in that house. The girl, who is the informant of this case, became furious and chased both of us with a lathi. The girl had also slapped Opiul Sheikh before chasing them. Dw 1 deposed that he got scared and ran away from that place and informed the family members of accused Opiul Sheikh. Later, he along with some villagers went to Gossaigaon Police Station and informed them about the matter. A police team from Gossaigaon Police Station had gone to the residence of the girl, but by then accused Opiul Sheikh was taken to Dingdinga Police out post. Dw 1 deposed that accused Opiul Sheikh had not entered into the residence of the informant and that he had not attempted to commit rape or touch the body of the informant.
- 20. Learned Addl. P.P gave certain suggestions to dw 1 but he denied those suggestions.
- 21. The evidence, as reproduced above, would establish that there is absolutely no material against accused Kartick Barman in the commission of offence as alleged. The evidence points

towards the involvement of accused Opiul Sheikh only. The plea taken by the accused Opiul Sheikh, both in the cross-examination of prosecution witnesses and the evidence adduced by dw 1 is that he had only asked for mustard oil to rub his hands and this expression was misunderstood by the victim as having sexual overtones and the entire episode thereafter was a result of mistake of fact. Now, if the accused succeeds in probabilising his plea he can be said to have discharged his onus and in such circumstances he would be entitled to an acquittal on benefit of doubt.

- 22. Now, so far as prosecution evidence is concerned, pw 1 is the only witness for herself so far as the allegation of accused grabbing her is concerned. a contradiction appearing in the evidence of pw 1 was emphasised by the learned defence Counsel and he argued that pw 1 cannot be believed to sustain a conviction. Pw 1 deposed in her evidence that accused grabbed her from behind touching her breasts. However, what is missing in the statement under Section 161 CrPC is touching of breasts. There remains no disparity or omission regarding the statement that accused grabbed the victim with intent to commit penetrative sexual assault. These omissions therefore cannot be termed as material and hence cannot amount to contradictions.
- 23. Pw 1 admits the defence suggestion that accused asked for mustard oil and this incident took place outside the residence of victim. However, the subsequent at of accused following the victim and grabbing her, took place inside the home of victim. The victim has deposed that she was alone in her house. The

mother of the victim confirms the fact that victim was alone. Thus, according to the evidence of pw 1, accused entered into the home of pw 1 while she was alone, an allegation disputed by the accused. In this regard, pw 6 Subhalini Tudu, deposed that she heard a loud scream coming from the residence of victim, her neighbour. She rushed to the residence of victim and saw accused Opiul. The cross-examination of these two prosecution evidence has not been able to impeach their credibility on this particular fact that accused Opiul Sheikh entered inside the residence of victim. Now, once the prosecution evidence establishes that accused Opiul Sheikh was found inside the residence of victim, a culpable intention can be attributed to the accused for he had no reasons to enter into the residence knowing that the victim is alone in her house. Section 29 of the POCSO Act provides that the evidence of pw 1, that accused grabbed her and touched her breasts, raises a legal presumption regarding the veracity of such statement and convincing evidence to the contrary would be required from the accused to rebut such presumption. A reading of the defence suggestion coupled with the defence evidence does not probabilise the plea that entire episode, leading to the present prosecution, was a result of misunderstanding.

24. In the result, I find that the prosecution has been able to establish the charge against the accused Opiul Sheikh that by his act he committed sexual assault on the victim, a minor girl, made punishable under Section 8 of the POCSO Act.

25. I have heard the accused on the point of sentence. The accused submitted that he is married and has children to look after. The accused also submits that he comes from a poor background and hence he pleaded mercy.

26. Considering the nature of offence committed by the accused I believe a sentence of 3 years of rigorous imprisonment would meet the ends of justice.

### **ORDER**

Accused Kartick Barman is acquitted of the charge under Section 8 of the POCSO Act and set at liberty forthwith.

Accused Opiul Sheikh is convicted for the offence under Section 8 of the POCSO Act and sentenced to rigorous imprisonment for 3 years with payment of fine of Rs 5,000 in default of payment of fine, to undergo imprisonment for 3 months.

A free copy of the judgment be furnished to the convict Opiul Sheikh.

A recommendation is made to the District Legal Services

Authority, Kokrajhar for payment of adequate

compensation to the victim.

A copy of this judgment be sent to District Magistrate, Kokrajhar.

Given under the hand and seal of this Court

Dictated and corrected by me:

Addl. Special Judge (FTC) Kokrajhar Addl. Special Judge (FTC) Kokrajhar

### **APPENDIX**

# **Prosecution Exhibits:-**

Exhibit-1 FIR

Exhibit-2 Statement

Exhibit-3 Seizure list

Exhibit-4 Charge sheet

### **Prosecution witnesses: -**

1. Pw 1 - Victim

2. Pw 2- Mother of victim

3. Pw 3- Sri Solomon Soren

4. Pw 4- Sri Shiblal Hasda

5. Pw 5- Sri Luk Hasda

6. Pw 6- Ms. Subhalini Tudu

7. Pw 7- Sri Mojen Barman

### **Defence Evidence-**

1. DW1 Kartick Barman

# **Court evidence**

1. Nil

Addl. Special Judge (FTC), Kokrajhar