## IN THE COURT OF THE SESSIONS JUDGE, KARIMGANJ AT KARIMGANJ

**Present: Utpal Prasad. AJS** 

**Sessions Judge** 

Karimganj at Karimganj.

# **SPECIAL SESSIONS CASE NO. 37 OF 2016**

u/ss. 448/376 of the Indian Penal Code, 1860 and under section 4 of the Protection of Children from Sexual Offences Act, 2012

State of Assam

-Vs-

Arup Ranjan Das @ Sanatan S/o late Anil Chandra Das R/o Village Purba Bazari P.S. Bazaricherra

Date of framing of charge : 18.07.2017

Dates of recording of

Prosecution's evidence : 06.11.2017, 08.11.2017, 09.11.2017,

08.02.2018.

Date of examination of the

accused u/s 313 of Cr. P. C. : 24.04.20187.

Dates of recording of

defence evidence : 26.07.2018.

Date of hearing of argument : 27.08.2018.

Date of judgement : 26.09.2018.

## **LEARNED ADVOCATES WHO APPEARED FOR THE PARTIES**

For the State : Mr. B. Deb, Public Prosecutor

For the accused : Mr. J. Das, Advocate.

# JUDGEMENT

- 1. Bazaricerra Police Station case number 119 of 2016 was registered under sections 376/511 of the Indian Penal Code and under section 8 of the Protection of Children from Sexual Offences Act, 2012 after the prosecution witness number 1, Haris Uddin had lodged a first information alleging that the aforesaid accused, namely, Arup Ranjan Das @ Sanatan, who was a private tutor and used to teach the informant's daughter, had come to his residence at 9 PM on the pretext of giving some lessons to his daughter and had tried to commit rape on the minor daughter, who was a student of class X, after closing the door of the room. The accused was arrested and forwarded to the judicial custody. After investigation, the investigating officer had submitted charge sheet alleging commission of offences under sections 376/511 of the Indian Penal Code and under section 8 of the Protection of Children from Sexual Offences Act, 2012 and eventually, based on the materials collected during evidence, charges under sections 448/376 of the Indian Penal Code and under section 4 of the Protection of Children from Sexual Offences Act, 2012 have been framed against the aforesaid accused. As the accused claimed to stand trial, he has been put to trial in course of which, the prosecution has examined 7 of the 8 listed witnesses in the charge sheet. After the accused was examined under section 313 of the Code of Criminal Procedure, 1973, he entered on his defence and 2 witnesses adduced evidence in support of his defence. Thereafter, arguments were heard in this case.
- 2. Learned that Public Prosecutor has argued that the evidence adduced on behalf of the prosecution amply proves the charges against the accused. He has submitted that the defence could not rebut the testimonies of the prosecution witnesses during cross-examination and that all the prosecution witnesses have corroborated one another. On the other hand, learned Counsel for the accused has submitted that admission by the first informant,

during his cross-examination, that the victim had appeared in HSLC examination for the first time in the year 2014 and as the incident took place on 07.10.2016, the victim was aged more than 18 years and therefore, the provisions of Protection of Children from Sexual Offences Act, 2012 do not apply. He has further argued that at some places the victim has stated that she was raped, at some places she has stated that attempted rape was committed on her which shows the falsity of the case of the prosecution. In a nutshell he has submitted that the accused is entitled to an acquittal in this case.

- 3. Based on the materials on record, the following points for determination arise for a decision by this court:
  - i. Was the victim a minor at the time of the alleged incident?
  - ii. Has the prosecution been able to prove beyond reasonable doubts that the accused entered into the house of the victim at night with of the intention of committing rape on her or remained there with the said intention after having entered lawfully and whether, the accused committed rape as defined in section 375 of the Indian Penal Code or penetrative sexual assault as defined in section 3 of the Protection of Children from Sexual Offences Act, 2012?
- 4. For the purpose of answering the first of the aforesaid questions, This court is first considering the medico legal injury report of the victim which also contains the opinion of the examining Doctor as to her age after radiological examination. The Doctor, who was examined as prosecution witness number 6, has given the opinion that at the time of her examination, the victim was aged between 16 and 18 years. During her cross-examination, the defence took the stand that the comprehensive examination for determination of the victim's age was not done and in response to the said stand, the said Doctor has admitted that height and weight of the victim was not taken during her examination. She has also admitted that she did not mention the

- classification of teeth in the medico legal injury report exhibited as Exhibit 4.
- 5. The victim has stated her age to be 18 years at the time of her examination in Court, that is, on 08.11.2017. This means that she claims to be aged 17 at the time of the alleged incident. She has stated that she was studying in class X when the alleged incident had taken place. The defence took the stand that she had also appeared in HSLC examination in the years 2014 and 2015 which she denied. The prosecution witness number 2 has corroborated her. However, the prosecution witness number 1, that is, the informant, who also happens to be the victim's father, has stated in his cross-examination that the victim had twice failed in HSLC examination between 2014, 2015 and 2016 and that she did not appear in HSLC examination the 3<sup>rd</sup> time. He has also admitted that the victim has the HSLC admin card. However, he expressed his inability to say the exact date of birth of the victim on the ground that he is an illiterate person. The investigating officer has admitted that he had not collected any school certificate or any other proof of date of birth of the victim. During his cross-examination, the defence took the stand that in order to cook up the case against the accused and to suppress the actual age of the victim, he did not seize the proof of date of birth of the victim.
- 6. The defence witness number 2 has stated in her evidence that the victim used to take tuition from the accused in the year 2014 and that at that time she was studying in class X and had failed in the examination. Though she has admitted in cross-examination that she is not a batch mate of the victim, her statement lends further credibility to the doubt created by the defence that the victim was not a minor. If the version of the father is taken to be correct, then in the year 2014, the victim would have been 16 years of age as on the first of March of the said year. This means that on the alleged date of the incident, she was more than 18 years of age. Learned that Public Prosecutor has argued that as no other proof of date of birth or age of the

victim was available, report of the radiological examination and opinion of the Doctor as to her age should be taken as correct. However, the same is in the teeth of the guidelines issued by the Honourable Supreme Court in the case of *State of Madhya Pradesh Versus Anoop Singh (Criminal Appeal number 442 of 2010)* in the judgement dated 03.07.2015 which states as follows:

- "12. This Court in the case of Mahadeo S/o Kerba Maske Vs. State of Maharashtra and Anr., (2013) 14 SCC 637, has held that Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007, is applicable in determining the age of the victim of rape. Rule 12(3) reads as under:
- "Rule 12(3): In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –
- (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
- (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
- (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;
- (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his

age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

13. This Court further held in paragraph 12 of Mahadeo S/o Kerba Maske (supra) as under:

"Under rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of the juvenile in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of the ascertaining the age of a victim as well." (Emphasis supplied) This Court therefore relied on the certificates issued by the school in determining the age of the prosecutrix."

7. Clearly, as per the own admission of the informant and the victim, the victim had proof of age as she was studying in class X. As she was to appear in the HSLC examination, and as a student is to register himself with the Secondary Education Board of Assam in the 9<sup>th</sup> standard itself, she must have had proof like registration certificate or admin card of the Board examination. If we consider the statement made by the victim's father during cross-examination that she had appeared in HSLC examination in 2014 and 2015 and that she was having the HSLC admit card, then also it becomes clear that the prosecution was having the first of the two options enunciated by the Honourable Supreme Court for proving the age of the victim. As has been laid down by the Honourable Supreme Court that only in absence of these proofs, recourse to ossification test should be taken, failure of the investigating agency to collect the school certificate or HSLC admin card of the victim, as the case may be, and also the failure of the prosecution to do the same, shows that there is something to suppress in respect of the age. In such a scenario, in view of this Court, the prosecution cannot be held to have

- proved that the victim was a minor at the time of the alleged incident. As such, the question under reference is answered in the negative.
- 8. In view of the aforesaid, it is held that the prosecution could not prove that the accused has committed penetrative sexual assault as defined in section 3 of the Protection of Children from Sexual Offences Act, 2012 inasmuch as the said definition applies when the victim is less than 18 years of age. Consequently, the accused is acquitted of the charge of having committed an offence under section 4 of the Protection of Children from Sexual Offences Act, 2012. The 2<sup>nd</sup> question is answered partly thus.
- 9. The accused has taken the stand that as the victim's father owed tuition fee to him, on the pretext of paying him the due fee, he had taken the accused to his house and then had falsely implicated in the case with false allegations. The case of the prosecution is that the accused had gone to the house of the victim stating that he was to give some lessons to the victim and as the ensuring exams had neared, and it was necessary for the victim to complete her course of studies, he wanted to teach her in the residence. It is nobody's case that entry of the accused into the house was in forced one. There is no material to show that the accused had, from the outset, the intention of committing rape on the victim and had, with the said purpose and design, gone to the house of the victim. The accused's intention to commit rape when he went to the house of the victim cannot be a matter of presumption and in absence of any positive material on record, the same cannot be readily presumed. The case would be otherwise if it is proved that he committed the offence of rape or attempted to commit rape on the victim in her house. Obviously, the same will unfold itself once we go through the relevant evidence recorded.
- 10. The first information, exhibited as Exhibit 1, alleges that the accused had started to commit rape on the victim when the victim had raised hue and cry leading to gathering of others and thereafter, the accused tried to escape,

and the persons gathered there had apprehended him and later, had handed him over to the police. The prosecution witness number 1 has stated in his examination in chief that after the police had taken the accused away, he had asked the victim and the victim had told him that the accused had attempted to commit rape on her. The victim has stated that on the pretext that if the room remained open there would be disturbances, the accused had bolted the door from inside and after sometime, had started molesting her. She has also stated that she had objected but the accused had gone on and had started biting her with his teeth on her face and other parts of the body and had also started scratching her. She has stated that the accused had torn her clothes and had also committed rape on her. The testimony of the Doctor who had done medicolegal examination of the victim shows that she had not found any injury mark on the person or in the private parts of the victim. It is to be noted that the incident is alleged to have taken place at 9 PM on 06.10.2016 and the victim was medically examined on 07.10.2016 at around 3:30 PM and therefore, there was a gap of less than 19 hours between the alleged incident and medico-legal examination. The Doctor also gave the opinion that there was no sign of recent sexual intercourse found on examination of the victim. The investigating officer has confirmed the stand of the accused that during investigation, the victim had not alleged, before him, that the accused had committed rape on her. However, in the statement under section 164 of the Code of Criminal Procedure, 1973, she has alleged that the accused had committed rape on her. While both the parents and the victim have stated that he immediately after the incident, the victim had become unconscious, the investigating officer has confirmed the stand of the defence that the victim had not stated to the police that she had fainted after the incident. While the victim has stated that the accused had bolted the door of the room from inside, as confirmed by the investigating officer and as seen from the case diary, she had stated to the investigating officer that her mother and her father's elder brother's wife had opened the door by

pushing it (Due to typographical error, the said sentence has been written in the negative but a perusal of the statement of the victim in the case diary shows that the same is a typographical error.). This means that the doors of the room were not bolted from inside. While the victim, and her 2 parents have stated that the investigating officer had seized the apparels the victim was wearing at the time of the incident, the investigating officer has stated that he had not seized any such clothes and the materials on record also support the stand of the investigating officer. The prosecution witness number 5 has stated that at the relevant time he had heard the scream of the mother and aunt of the victim and had gone to their house and that they had told him that the accused had committed rape on the victim and that he had seen that both the 2 ladies were having a scuffle with the accused and that even though, till his arrival at the place of occurrence, others had not arrived, during the course of the said conversation around 20-25 persons including females and children had gathered at that place. At the instance of the defence, the investigating officer has confirmed that this witness had stated to him (the investigating officer) that when he was returning from the Bazaricherra market to his home, he had heard hue and cry and had seen that the accused was running away from the place of occurrence and that he, along with others, had detained him and had taken him to the house of the victim. While the informant has stated that the victim had told him that the accused had attempted to commit rape on her, the informant's wife has stated that in her presence and in presence of the informant, the victim had narrated the incident alleging that the accused had committed rape on her. The victim's mother has also stated that after the incident and after the accused was detained, she had asked the victim about the incident and that the victim had come out of her room and that at that time, her husband was not in the residence. The prosecution witness number 4 has stated that the investigating officer had not recorded her statement. In such a scenario, her evidence cannot be given any evidential weight. Moreover, she has stated in her examination in chief that the victim's mother had told her that the accused had misbehaved with the victim and therefore, she had detained the accused and that later, when the victim had regained her consciousness, the victim had stated that the accused had committed rape on her. This runs counter to the statement of the victim's mother that after the room was opened, the victim had come out of her room and had narrated the incident to her.

11. The aforesaid shows that the allegation of rape could not be substantiated. Because of vacillating stand of the victim at different stages before different persons, it is difficult to hold and to form a definite view that the accused committed rape on the victim or molested her. While the allegation of molestation, as it is covered by the definition of rape, has been made by the victim and her parents, in view of the fact that there are so many major and material contradictions, it is not safe to rely on the said part of the testimony. As has been observed above, the victim and her parents have suppressed the proof of actual age of the victim even though the same is very much available and within the power. This shows that they have extras zeal in seeing that the accused is put behind the bar at any cost. While suppression of evidence as to date of birth or actual age may not by itself proves that other allegations levelled by the victim and her family members are lies, given the fact that their versions as to the age of the victim are not correct and are concealing and deceptive, the same creates an overall doubt on their creditworthiness. This lends a reasonable probability to the case of the defence that the accused has been falsely implicated in the case and that he was called by the victim's father to his house and then was implicated in the case. The testimony of the defence witness number 1 strengthens the said doubt. It has already been observed that even though the medico-legal examination of the victim was conducted within 19 hours of the alleged incident, no mark of injury was found on the person or on the private parts of the victim which further strengthens the suspicion that the accused has been

falsely implicated in the case. The medical evidence shows that the hymen of the victim was absent which means that either she herself had or she was subjected to sexual intercourse. While it is true that rupture of hymen may be caused by a reason other than sexual intercourse, complete absence of hymen points to the fact that the victim either had sexual intercourse on her or was subjected to the same. In the latter case, there would be some sign of forced sexual intercourse which were absent in the case in hand. In her testimony she has stated that she had resisted the attempt made by the accused which means that forced sexual intercourse would have left some sign to be discovered by the Doctor. Further, even though the medical examination was done within 19 hours of the alleged incident, vagina swab did not show any spermatozoa on microscopic examination.

- 12. The aforesaid makes it clear that the prosecution has not been able to prove that the accused committed rape on the victim. As is clear from the testimonies of the victim and her family members and from the contradictions in their testimonies, there allegation as to molestation committed by the accused can also not be believed. When the prosecution has not been able to prove that any offence was committed in the house of the victim, and as it is the case of the prosecution itself that the accused had not made any forced entry into the house of the victim, it cannot be said that after entering into the house lawfully, he remained there for the purpose of committing an offence and therefore, it is held that the prosecution has failed to prove that the accused committed an office under section 448 of the Indian Penal Code.
- 13. In view of the above, the accused is also acquitted of the charges under sections 448 and section 376 of the Indian Penal Code. He, having been acquitted of all the charges framed against him, is set at liberty forthwith. However, his bail bond(s) and surety/sureties shall stand extended till the next 6 months.
- 14. As the prosecution could not show that any offence has been committed in

the case, no one falls under the definition of the term 'victim' as given in section 2(wa) of the Code of Criminal Procedure, 1973 and therefore, no occasion for awarding any compensation under section 357 of the Code of Criminal Procedure, 1973 or under the Victims Compensation Scheme of the State of Assam arises.

- 15. With the above, the instant case stands dismissed on contest.
- 16. Send a copy of this judgment to the learned District Magistrate, Karimgani District. Also send a copy of this judgement to the Superintendent of Police, Karimganj District.

Given under my hand and seal of this Court in presence of the learned that Public Prosecutor, the accused and his learned counsel on this the 26th day of September 2018.

> Sessions Judge Karimganj at Karimganj.

## **APPENDIX**

#### **Prosecution Witnesses: --**

P. W. 1 : Shri Haris Uddin P. W. 2 : Shrimati Lutfa Begum P. W. 3 : Victim (name withheld) P. W. 4 P. W. 5 P. W. 6 P. W. 7 : Shrimati Khoirun Nesa : Shri Khoir Uddin : Dr. Suparna Paul

: Shri Shankar Chakraborty

## **Prosecution Exhibits: -**

Exhibit 1 : First Information.

Exhibit 2 : Printed form of the first information report.

Exhibit 3 : Statement of the victim under section 164 of the Code of

Criminal Procedure, 1973.

Exhibit 4 : Medical Report of the victim.

Exhibit 5 : Vaginal swab report. Exhibit 6 : Sketch map of the place of occurrence.

Procedure, 1973.

: Charge-sheet. Exhibit 7

**Material Exhibits: -** NIL

**Defence Witness: -**

D. W. 1 : Shri Rekman Ali D W. 2 : Shrimati Fatima

D W. 2 : Shrimati Fatima Begum

**Defence Exhibit:-** NIL.

NIL. **Court Witness: -**

> Sessions Judge Karimganj at Karimganj.