IN THE COURT OF SPECIAL JUDGE :: KAMRUP :: AMINGAON

Kamrup, Amingaon

District:

Present:	Smti. B. Kshetry
	Special Judge,
	Kamrup, Amingaon
	Special Sessions (POCSO) case No.01/2017
2012	U/S- 376 (2) (g)/34 of IPC R/W Section 4 of the POCSO Act,
	State of Assam
	-Versus-
	1. Niranjan Roy,
	s/o-Ram Charan Roy
	2. Naresh Sainal,
	s/o-Lt. Khusi Mohan Sainal
	3. Mahendra Roy
	s/o-Lt. Radha Charan Roy
	4. Shyamlal Mandal
	s/o-Sri Budheswar Mandal
	All are resident of vill -No. 2, Jogipara
	P.SBoko
	DistKamrup
	Accused
persons	Appearance:
	Mr. A.K. Baruah. Ld. Addl. Public Prosecutor
	for the State

Mr. A.H. Mullah, Ld. Advocates -----for the accused

Date of evidence: 19.09.2017, 07.12.2017, 07.12.2017, 21.02.2018, 25.04.2018, 22.06.2018, 27.11.2018, 07.06.2019 and 30.04.2019,

Date of Argument: 06.07.2019, 05.09.2019

Date of Judgment: 16.09.2019

JUDGMENT

- 1. The Prosecution case in brief is that—complainant—Smti Sangita Mandal lodged an ejahar on 08.11.2016 alleging that on 20.10.2016 at 1.30 am, accused —Niranjan Roy, Naresh Sanyal, Mahendra Roy and Shyamlal Mondal entered into her house by opening the door and committed sexual intercourse with her forcibly in the presence of her father. The accused persons threatened to kill her if she disclosed the incident to anybody. It is stated that the complainant's father expired after 3 days of the incident, Hence, the case.
- 2. On the basis of the said ejahar, Boko P.S Case No. 573/2016 U/S-376 of IPC R/W Section 4 of the POCSO Act, 2012 was registered. Investigation was conducted into the case and after completion of investigation, charge-sheet was submitted against the present accused person U/S- 4 of the POCSO Act, 2012.
- 3. The case was duly committed and the Court after hearing both the parties, framed charges U/S- 376 (2) (g)/34 of IPC r/w Section 4 of the POCSO Act, 2012 against accused— Niranjan Roy, Naresh Sainal, Mahendra Roy and Shyamlal Mandal. The aforesaid charges were read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried. At the time of preparing Judgment and on perusal of the evidences on record and the relevant documents, it is found that charge is required to be altered as per section 216 Cr. P.C. Hence, charge is altered from section 4 of the POCSO Act to Section 6 of POCSO Act. Accordingly, charge is reframed against the accused persons—Niranjan Roy, Naresh Sainal,

Mahendra Roy and Shymlal Mandal U/S- 376 (2) (g) of IPC R/W Section 6 of the POCSO Act, 2012. The charges are read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried. Both sides declined to re-call, examine and cross-examine the witnesses.

4. During the trial, the Prosecution side examined as many as seven (8) numbers of witnesses including the informant, the victim girl, I/O and M.O. Statement of the accused persons U/S-313 Cr. P.C have been recorded. They have denied committing the offence and declined to adduce evidence.

5. POINT FOR DETERMINATION:

- (I) Whether all the accused persons on 20.10.2016, at about 1.30 a.m at night at village no.2 Jogipara under Boko P.S in furtherance of your common intention committed gang rape upon the prosecutrix and thereby committed an offence punishable U/S 376 (2) (g)/34 of IPC?
- (II) Whether on the same date, time and place all the accused persons committed gang penetrative sexual assault on the victim U/S-5 (g) of the POCSO Act, 2012 and thereby committed an offence punishable U/S 6 of the POCSO Act ?

DISCUSSION, DECISION AND REASONS THEREOF

- 6. Perused the record. Heard Ld. Counsels for both the sides. Prosecution examined as many as 8 (eight) numbers of witnesses.
- 7. Pw-1 is the victim girl . She stated that the incident took place in the night of 20.10.2016 in her house . She was at home with her father. Then, the accused persons Niranjan, Naresh and Mohendra entered inside the house by pushing the door . The lamp was burning inside the house at that time , so pw-1 could identify the accused persons. Pw-1 saw accused Shyamlal standing near the door. Accused-Niranjan came near her and

accused- Naresh and Mohendra threatened them by showing the dagger on their neck. Pw-1 stated that accused- Niranjan tore off her frock and trouser and put off the lamp, which were lit in the room. He ,then, committed rape upon her. Pw-1 further alleged that after him, accused –Naresh and Mohendra also committed rape upon her one by one. After the incident, all the accused persons left their house . Then, after 3 days of the incident, pw-1's father died. PW-1 disclosed that there was delay in lodging the ejahar against the accused persons because of the death of her father. The ejahar was written by one-Tiken Kalita. Ext-1 is the ejahar and ext-1 (1) is her signature, Ext-2 is the printed form of FIR and Ext-2 (1) is her signature. Police recorded her statement and took her to the doctor for medical examination. Police produced her before the Magistrate. Ext-3 is the statement and Exts-3 (1 &2) are her signatures.

In her cross-examination, pw-1 stated that on the day of occurrence, her sister-in-law was present and she was staying in the house situated at the Southern side of their campus. And P.W.1 was staying at the Northern side of the house and the Southern part of the house is situated at a distance of more than 20 ft. The accused entered their room by breaking the door. She disclosed that she has not mentioned in the FIR that accused—Mohendra and Naresh showed dragger by putting it on the neck of her father and that three persons entered their house and they committed rape upon her one after another. But she mentioned in the FIR that the accused persons tore her wearing garments. She disclosed that she does not know the date of death of her father. She stated before the Magistrate that initially accused—Niranjan committed rape upon her and thereafter other two accused persons committed rape on her. She showed the broken door to police but the door was not seized by the police.

Pw-1 was re-examined by the prosecution side and she stated that at the time of occurrence, her age was 14 years and she was reading in class –IX at Jogipara SNMV High School. But after the incident, she discontinued her studies

8. Pw-2 Sri Gunodhar Mandal deposed that the victim is his sister . He stated that the incident took place on 20.10.2016 at night. At that time , victim was studying in class IX at Lal Bahadur Sastri High School and she was around 14 ½ years old. Pw-2 stated that at the time of occurrence, he was in a different house situated at a distance of about 30 feet away from the house of P.W.1. In the morning at around 4.30 am , when he woke up , his sister (pw-1) told him about the incident. She told him that accused- Niranjan Roy, Naresh Sanyal, Shyamlal Mandal and Mahendra Roy committed rape on her. Then, pw-2 went to the house of his cousin and informed him about the incident. Thereafter, his father expired. Pw-1 (victim) told the incident to the villagers who came to their house on the death of their father. The Mahila Samity also came to their house and took pw-1 to the police –station.

In his cross-examination, pw-2 disclosed that in their house campus, there are four houses. Out of which two houses are used for residential purpose. One is on the northern side and another on the southern side of their house campus. He stated that he is a married man living with his wife and children. His sister and father were residing in the house in the Northern side while he is residing in the Southern side. The distance between both the houses is approximately 30 feet. P.W.2 disclosed that the door of the house where his sister resides is bamboo door and the door was broken by the accused persons P.W.2 showed the door to the police. P.W.2 admitted that after being informed about the incident, he did not lodge he ejahar. He admitted that he stated before the I/O that he was not aware of any person coming to their house on the night of occurrence. P.W.2 could not state the exact date of death of his father.

9. Pw-3 Sri Ganesh Mandal deposed that he heard about the incident after one week . On the death of the father of the victim(pw-1) , he alongwith other villagers went to her house and then pw-1 told them that her father died due to the accused persons. She also told them that all the accused persons came to their house during the night time about nine days prior to the death of her father and committed rape upon her . Pw-3 disclosed that at the time of incident , pw-1 was studying in Jogipara High School .

In his cross-examination, P.W.3 stated that he has good terms with the informants family. This witness disclosed that the case was filed after the death of the father of the victim i.e after 9/10 days of the occurrence.

- 10. Pw-4 Sri Krishna Kanta Mandal deposed that he heard from the villagers that the accused persons committed rape upon the victim (pw-1). He also heard about the death of the father of the victim. And after one day of the death of the father of the victim, there was a womens' rally in the village where it was alleged that the accused persons raped the victim.
- 11. Pw-5 Smti Archana Mondal deposed that the victim is her sisterin-law . At around 1.30 a. m on the night of occurrence , she came to know that the victim(pw-1) was crying in her house for an incident which took place some ½ an hour before. Pw-5 went to the house of the victim and asked her what had happened. Then, pw-1 told her that accused- Niranjan, Mohendra, Shyamlal and another (known as 'BOROBURA' in village) had done bad act by touching her body. After hearing the incident , pw-5 returned back home. She stated that victim was studying in school and her age is 16 years.

In her cross-examination, P.W.5 stated that she did not see as to who entered into the house of the victim. She revealed that her husband (P.W.2) was present in the house on the day of incident. This witness stated that the door of the house of the victim is a bamboo door and was broken by the accused persons. Police saw the broken door.

- 12. Pw-6 Sri Upen Biswas deposed that on hearing about the death of the father of the victim, he came to their house. When people gathered on hearing the news of the death of victim's father, then she told pw-6 that about 10/12 days ago , all the accused persons came to their house and gave a proposal for marrying her but she refused. Then, the accused persons threatened her father by showing a dao on his neck and committed some bad acts upon her. And a case was given.
- 13. P.W.7, Sri Harendra Nath Kalita, Retd. S/I is the Investigating Officer of this case. He deposed that on 08.11.2016, he was serving as I/C at

Mandira O.P under Boko P.S. On that day after receiving an ejahar lodged by one Smti. Sangita Mandal, he made a G.D. Entry No.105/16 and forwarded the ejahar to O/C, Boko P.S—Sri Jogen Barman, who registered a case bearing Boko P.S Case No. 573/2016 U/S-376 of IPC R/W section 4 of POCSO Act, 2012 and directed him to investigate the case. Accordingly, P.W.7 took up the investigation. He visited the place of occurrence along with other staffs and recorded the statement of the witnesses including the victim girl. He also prepared the sketch map. Ext.4 is the sketch-map and Ext. 4(1) is his signature. P.W.7 sent the victim for her medical examination and also brought the victim to the Court for getting her statement recorded U/S-164 Cr. P.C before the Magistrate. The accused persons were arrested after three days of the occurrence and produced them before the Court. P.W.7 collected the medical report of the victim. Thereafter, he completed the investigation and on finding sufficient materials against the accused, submitted charge sheet against the accused persons— Niranjan Roy, Naresh Sainal, Mohendra Roy and Shymal Mandal U/S-376 of IPC R/W section 4 of POCSO Act along with the medical report of the victim. Ext.5 is the charge-sheet and Ext. 5 (1) is his signature.

In his cross-examination, P.W.7 deposed that the incident took place on 20.10.2016 and the ejahar was lodged on 08.11.2016. The door of the house of the victim was wooden and it was not broken. P.W.7 did not seize the wearing apparels of the victim. On investigation, P.W.7 found that the victim and her father were present in the house at the time of occurrence. In the same courtyard there was a separate house of victim's brother— Gunadhar Mandal and sister-in-law—Archana Mandal and they were present in P.W.7 did not examine the neighbouring people namely, their house. Budheswar Mandal, Harichandra Mandal and Mitta Mandal. P.W.7 stated that P.W.1 did not show him the broken door of their house and also did not give him her birth certificate. P.W.2 also did not show him the broken door. P.W.2 stated before him that P.W.1 did not state him anything about the incident on the next day of occurrence. P.W.4 did not state before P.W.7 that there a Rally was carried out by the villagers for the involvement of the accused persons in the offence. P.W.5 stated before P.W.7 that she does not know about the incident. P.W.5 did not tell P.W.7 that the accused persons touched the breast and body of the P.W.1 and that she went to the house of the P.W.1 where she was informed about the incident by P.W.1 herself. P.W.5 stated before him that P.W.1 told her about the incident after death of her father-in-law. She also did not tell P.W.7 that the incident was reported to her after two days of the occurrence. P.W.7 did not do any investigation regarding the school where victim (P.W.1) studied and which standard where she studied. The father of the victim lodged an ejahar against his son—Gunadhar Mandal.

14. P.W.8, is the M/O, Dr. Pooja Gajmir. She has deposed in her evidence that on 10.11.2016 she was working as PG on duty, Department of Forensic Medicine at GMCH. On that day at about 12.30p.m, she examined one Sangita Mandal, female, 14 years of age brought in reference Boko P.S case No. 573/16 U/S-376 of IPC R/W section 4 of the POCSO Act, 2012. She was accompanied and identified by WHG, Munu Sarma, female attendant—Aparajita Baruah. The victim stated before me that on 20.10.2016 all the four accused persons came to her house at about 1.30 a.m. and they threatened her father with a knife and tried to modest her and touched her breasts.

On the General examination of the victim it is found---

Her height—145 cm, weight—31 kg, chest girth—72 cm, abdominal girth—59 cm, total 28 teeth were present and all were permanent. She had adequate space for teeth. Scalp hair- black in colour. Axillary hair- black in colour, scanty, 1— 2c.m in length. Pubic hair--black in colour, 1-2 cm in length. Her breast were well developed, nipples and areola dark brown in colour. No discharge on gentle squeezing of breasts. Menarche—12 years, duration—3-4/28 days. Last menstrual period—5 days back. Upon genital examination, it is found that Genital organs—Developed, healthy, vulva—labia majora well opposed, labia minora partially visible on abducting the thighs, Hymen — old tears at 3, 5, 6, and 7 o'clock position, vagina—healthy, Cervix—healthy, Uterus—per abdomen not palpable, evidence of venereal disease —not detected clinically, vaginal swabs collected from —posterior fornix and around cervix, injury on the body—Not detected at the time of examination, her

mental condition at the time of examination—No abnormality detected, cooperation and behavior—Co-operative and good.

<u>Laboratory Investigation:-</u> Microscopic examination of vaginal smears is negative for spermatozoa or gonococcus.

<u>Opinion:-</u> P.W.3 has further deposed that on the basis of physical examination, radiological and laboratory investigation, she opined that-

- 1. There is no evidence of recent sexual intercourse detected on her person at the time of examination.
- 2. No injury marks were detected on her person at the time of examination.
- 3. Her age is above 14 (fourteen) years and below 16 (sixteen) years

Ext.6 is the medical report and Ext. 6 (1), 3 (2), 3 (3) and 3 (4) are her signatures thereon.

- I have heard the arguments of the Learned Counsels for both the sides. Defence side submitted written argument also and have relied upon Crl Appeal No. 27 of 2005, 2013 (4) GLT 682, Crl Appeal No. 192 of 2007. Learned Defence Counsel further submitted there has been considerable delay in lodging the ejahar. He also argued that the age of victim (pw-1) was not confirmed by cogent evidence like Birth Certificate or School Certificate even though victim claimed to be a student of Class IX in a nearby school. He further submitted that the accused persons are falsely implicated in the case out of grudge.
- 16. In this instant case, it is alleged by the victim (pw-1) that the accused persons entered inside her house by pushing the door and they raped her by threatening her and her father by showing a dagger. So, it has to be seen as if the prosecution side has succeeded to prove the case against the accused persons u/s 376 (2) (g) IPC r/w Section 6 of POCSO Act.

- 17. Now, it is clear from the evidence on record that there are no eye-witnesses to the occurrence except the victim (P.W.1). So, the evidence of pw-1, the alleged victim, is of crucial importance. Her evidence needs to be scrutinized very carefully. Coming to the evidence of victim (pw-1), it is found that in the FIR, she stated that on the night of incident while she was sleeping with her father, the accused persons entered into her house by pushing the door and committed forcefully rape upon her by threatening her and her father with the dagger. While in her cross-examination, pw-1 gave a contradictory version. She stated that the accused entered into the house by breaking the door. And she also admitted that she has mistakenly narrated in the FIR that the accused persons entered her house by opening the door. Pw-1 alleged that her wearing apparels were torn by the accused but I.O (PW-7) confirmed that he did not seize any wearing apparels of the victim. P.W.2 stated that the door of the house where P.W.1 resides is bamboo door and it was broken by the accused persons. P.W.1 and P.W.2 claimed that they showed the broken door to the police. Again, it comes out from the crossexamination of I.O (pw-7) that the door of the house where the incident was alleged to have been taken place was not bamboo made but was wooden door. Pw-7 confirmed that the door was not broken and so he did not seize the same.
- 18. Furthermore, victim (pw-1) stated that her brother (pw-2) was not present in the house on the day of occurrence, but it in the evidence of pw-2 and Pw-7 (I/O) that pw-2 was present in the house on the day of alleged incident and he had not seen or heard the incident on that night. According to pw-1, the incident was reported to pw-2 but I.O (Pw-7) confirmed that pw-2 told him that pw-1 did not inform him about the incident on the next day. Pw-2 very much claimed that he was present in the house on the day of alleged incident. In his statement U/S-161 Cr. P.C, P.W.2 stated that P.W.1 told him about the incident on the day in the morning hours when their father expired. So, the evidence of pw-1 is very much contradictory to the evidence of pw-2. Again Pw-5, wife of pw-2 stated that she found pw-1 crying after half an hour of the alleged incident and on asking, pw-1 narrated her the entire incident. It has come out from the cross-examination of pw-5 that pw-1 told her that the accused persons had done bad act by touching her body. But, pw-5 is silent

regarding reporting of the incident to pw-2. The other witnesses Pw-3, pw-4 and pw-6 are hearsay witnesses.

- 19. It is in the evidences of pw-3 , pw-4 and pw-6 that the incident was disclosed to them only after the death of the father of the victim. It is in the evidence of pw-3 that pw-1 (victim) told him and other villagers that all the accused persons came to their house during the night time about 9 days prior to the death of her father and they committed rape upon her. But, pw-1 stated that her father expired after 3 days of the incident. So, there is major contradiction regarding the date of occurrence.
- 20. Learned Counsel for the accused argued that in the Medical Report, Pw-1 stated before the doctor that the accused tried to molest her and touch her breast. When she struggled, the accused ran away. But, Pw-1 never whispered the incident of rape before the doctor. Perused the medical report (Ext-6) where the victim never uttered before the doctor that the accused persons raped her. He also argued that nowhere in the FIR, it has been alleged that accused-Naresh and Mahendra put dagger on the neck of the prosecutrix and her father.
- 21. Learned Counsel for the accused submitted that it has been confirmed by the I.O (pw-7) that earlier to this incident, the father of the prosecutrix lodged an FIR against Pw-2 as defence took the plea that for the quarrel between the father and son (pw-2) in respect of proposal of marriage of prosecutrix, an FIR was lodged and for that reason, there was enmity between father and son (pw-2) and that the present case is the culmination of their personal grudge and the accused persons have been falsely implicated.
- 22. P.W.7 (I/O) disclosed in his cross-examination that the victim's father lodged an ejahar against his own son—Gunadhar Mandal (P.W.2) The wearing apparels were alleged to be torn. But, no such apparels were seized by the I.O (PW-7).
- 23. Regarding the delay in lodging the ejahar, it is in the evidence of the victim (pw-1), that her father died after 3 days of the occurrence, so there

is delay in lodging the ejahar. But, pw-3 made it clear in his cross-examination that the victim's father died after 9/10 days of the alleged incident. So, there is contradiction regarding the fact as to when the father of P.W.1 expired.

- 24. The alleged incident took place on 20.10.2016, FIR was lodged on 08.11.2011 and the victim girl was examined on 10.11.16. There is delay of about 15 days in filing the FIR from the date of alleged occurrence. The said delay in filing the FIR has not been explained properly and satisfactorily. The evidences of the witnesses does not inspire confidence. There are inconsistencies and improvements in the deposition of the prosecution witnesses which creates a doubt regarding the prosecution story.
- 25. It is the cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubt. The burden of proving its case beyond all reasonable doubt lies on the prosecution and it never shifts. Here, the entire prosecution story is found to be false and concocted one.
- 26. In the midst of such major contradictions and embellishments, the accused is entitled to get the benefit of doubt.
- 27. In the result, the prosecution has miserably failed to prove the case beyond all reasonable doubt against the accused person. Accordingly, the accused persons—Niranjan Roy, Naresh Sainal, Mahendra Roy and Shymlal Mandal are held not guilty and they are acquitted of the offence U/S-376 (2) (g) of IPC R/W Section 6 of the POCSO Act, 2012 and set at liberty forthwith.
- 28. Their bail bond shall remain in force for next 6 (six) months U/S-437 (A) Cr. P.C.
- 29. The case is disposed of.
- 30. The Judgment is pronounced in open Court and written on separate sheets.

Given under my hand and seal of this Court on this 16^{th} day of September, 2019.

Special Judge,

Kamrup, Amingaon

Dictated and Corrected by me

Special Judge, Kamrup, Amingaon

APPENDIX

Prosecution Witness:

Pw-1 is the victim girl

Pw-2 Sri Gunodhar Mandal

Pw-3 Sri Ganesh Mandal

Pw-4 Sri Krishna Kanta Mandal

Pw-5 Smti Archana Mondal

Pw-6 Sri Upen Biswas

P.W.7, Sri Harendra Nath Kalita

P.W.8, is the M/O, Dr. Pooja Gajmir

Prosecution Exhibit

Ext-1 is the ejahar

Ext-2 is the printed form of FIR

Ext-3 is the statement

Ext.4 is the sketch-map

Ext.5 is the charge-sheet

Ext.6 is the medical report

Special Judge, Kamrup, Amingaon