### :: IN THE COURT OF THE SESSIONS JUDGE ::::: NALBARI ::

<u>Present</u>: Mrs. S. Begum.

Sessions Judge,

Nalbari.

# SESSIONS SPL (P)CASE NO: 14/2016 u/s- Sec. 4 of the POCSO Act.

State of Assam ......Complainant

-Vs-

Md. Azad Ali.....Accused person.

Appearance:-

For the prosecution : Mr. D. Barman, Public Prosecutor

For the defence : Mr. ....., Advocate.

Date of argument : 18/12/2018.

Date of Judgment : 18/12/2018.

#### J U D G M E N T

The prosecution case which is reflected in the ejahar lodged by one Md. Rakmat Ali, is that on 04/09/16 at about 6 pm his minor daughter, Ruksana Ahmed, aged 5 years (hereinafter referred as Miss 'X') was raped in his house by the accused Azad Ali. On the strength of the ejahar Mukalmua PS Case No.307/16 u/s-4 of the POCSO Act has been registered.

- 2. Police force set into motion on receipt of the ejahar and police on completion of the investigation submitted charge-sheet against accused u/s- 4 of the POCSO Act.
- 3. While the accused entered into his appearance before this court getting prima facie material against the accused u/s-4 of the POCSO Act charge was framed accordingly and read over to the accused to which he pleaded not guilty and claimed to be tried.

4. The prosecution to bring home charge against the accused examined as many as eight witnesses including I/O and M/O. The case of the accused is of denial but accused did not adduce any evidence in support of his plea of denial.

5.

#### POINT FOR DETERMINATION.

(i) Whether the accused on 04/09/2016 at village Bonpura under Mukalmua P.S committed penetrative sexual assault upon Miss 'X', aged about 5 years and thereby committed an offence punishable u/s-4 of the POCSO Act ?

#### **DECISION AND REASONS THEREOF**

- 6. The evidence on record have been carefully scrutinized by me and the argument put forwarded by the learned counsel for both the sides also considered. The learned defence counsel submitted that none of the witnesses including the victim disclosed anything against the accused. It is submitted that there is not a single iota of evidence against the accused. It is submitted that prosecution has miserably failed to establish the case u/s-4 of the POCSO Act against the accused beyond reasonable doubt and hence accused deserves to be acquitted.
- 7. On the back drop of the above argument now let me discuss the testimony of the witnesses. First of all let me come to the evidence of PW-2 Asma Begum. She during her evidence disclosed that about 5/6 months ago the incident happened. At that particular time the victim was aged 5 years. On the date of occurrence the victim was suffering from fever and she providing biscuit and water to the victim went to the tube-well for washing vegetable. At that time it was 5-30 pm. While she returned back from tube-well she noticed that victim was crying at the veranda of the house. While she took the victim in her lap then she found the clothes of the victim in wet condition. Entering the room she found that bed was also in wet condition. She also found her panty in wet condition. She disclosed that while she was washing vegetable at the tube-well she noticed accused Azad sitting at the veranda of the house. She on suspicion informed the

matter to her husband and as her husband suspected that something might have been done by the accused upon his daughter he on suspicion lodged the ejahar. It is disclosed that police seized the wearing panty of the victim and the bed-sheet vide Ext-2. She identified material Ext-1 & 2 as the bed cover and the panty which was seized by police. She during cross-examination admitted that while she went to the tube-well at that time neighbouring children were playing with the victim and that the victim did not complain anything to her.

- 8. Now let me come to the evidence of the victim who is examined as PW-3. The victim is a minor girl aged 5 years. So to ascertain whether she has proper understanding to depose few questions were asked and after recording the answers to the question put to her while this court came to the opinion that she has proper understanding and maturity to depose then her evidence was recorded accordingly. The victim during her evidence disclosed that one day the accused who is her brother made her panty dirty inside their room. As the panty was made dirty so she cried and her mother came and noticed her panty.
- 9. PW-4 Renuka begum who is the neighbour of the informant testified that on the date of occurrence hearing hue and cry at the house of the victim she came to the house of the victim and noticed that Rakmat's wife was crying . On inquiry she informed her that accused did bad work with the victim at her bed. She also entered into the room and noticed that the bed-sheet was in wet condition. She also noticed a bottle over the said bed. The panty and bed cover was seized by police vide Ext-2.
- 10. PW-5 Sufia Khatoon who is the aunt of the victim stated during her evidence that on the date of occurrence at about 5-30 pm she and the accused were sitting at the veranda of the informant. The victim and her sister Nargish were playing at the veranda eating biscuit. She thereafter went to her own house and after a few moment hearing cry of victim she ran to the house of the victim and the victim showed her bed. She noticed dirty articles in the bed. Police seized the bed cover vide Ext-2.

11. PW-1, Dr. Urmi devi Choudhury is the Medical Officer of this case. On 07/12/17 while she was working as M & H.O-1 at SMK Civil Hospital, Nalbari on that day she examined Miss 'X', aged 5 years, D/O-Rakmat Ali of village Banpura, PS-Mukalmua who was brought by WHG- Rameya Begum in connection with Mukalmua PS Case No.307/16. Medical examination of the victim was done in presence of sister TH-Narmada Devi and Rameya Begum. On examination of the patient she found the following:-

Her external genitalia was found healthy. Hymen-intact. Scratch mark with reddish colour. (5 x 5) cm is seen in the right lateral part of the hymen. Vaginal swab was taken by the soft stitch where no sperm was found. X-Ray was advised for age determination but report not submitted till the time of reporting. There is attempt of vaginal penetration. Ext-1 is the injury report and Ext-1(1) & 1(2) are her signature. During cross-examination she disclosed that scratch mark is caused due to use of nail.

- 12. PW-6, Rakmat Ali who is the informant cum father of the victim testified that on the date of occurrence in the evening while he came back from tuition to his house his wife informed him that some dirty articles were in the bed and that he noticed the victim in crying condition in the courtyard. He noticed the clothe of the victim in wet condition. Suspecting that something untoward had happened to the victim he lodged ejahar Ext-3. He also noticed Azad at the courtyard of their house. He exhibited Ext-3 as the ejahar lodged by him. During cross-examination he revealed that the ejahar was not read over to him. It is disclosed that his wife did not inform him that Azad was sitting inside the house. It is admitted by him that his daughter was playing with many children. It is submitted that there was boundary dispute between him and the accused.
- 13. PW-8, Manalisha M. Bhakta is the I/O of this case. On 04/09/16 while she was working as S/I at Nalbari PS on that day the O/C Mukalmua PS received an ejahar lodged by Rakmat Ali and registered Mukalmua PS Case No.307/16 u/s-4 of the POCSO Act. The SP, Nalbari entrusted her with the charge of investigation of the said case. Taking the charge of investigation she immediately visited the place of occurrence which is the house of the informant Rakmat Ali. She seized one panty of the victim and one bed-sheet from the place of occurrence vide Ext-

2 in presence of the witnesses. Ext-2(3) is her signature. She prepared the sketch map of the place of occurrence. Thereafter she recorded the statement of witnesses including victim and informant. The medical examination of the victim was done locally at Mukalmua PHC. Thereafter she searched for the accused but could not find him. On the next day the victim was again medically examined at SMK Civil Hospital, Nalbari and thereafter victim's statement was recorded by the Magistrate u/s-164 CrPC. On that very day she arrested the accused with the assistance of police of Mukalmua PS and after interrogating the accused, she produced him before the CJM, Nalbari. She collected the medical report. After completion of the investigation she submitted charge-sheet against the accused u/s-4 of the POCSO Act. Ext-5 is the charge-sheet and Ext-5(1) is her signature. Mat Ext-1 is the bed sheet, Mat. Ext-2 is the wearing panty of the victim which was seized by her from the place of occurrence. During cross-examination she disclosed that she did not send the seized articles i.e bed-sheet, panty for forensic examination to FSL Kahilipara. She also disclosed that she did not take any step for medical examination of the accused for ascertaining his potentiality. She also disclosed that statement of the victim was recorded by her in questionanswer pattern.

14. PW-7, Jubi Chaliha is the JMFC, Nalbari. On 5/9/16 as per prayer of the I/O, she recorded the 164 CrPC statement of the victim Miss 'X' in connection with Mukalmua PS Case No.307/16 u/s-4 of the POCSO Act,2012. The victim was aged 4 years 5 months. Prior to recording her 164 CrPC statement, she put some preliminary question to the victim to ascertain her mental maturity level. While the victim gave rational answer to the preliminary questions, then she recorded her statement u/s-164 CrPC. After recording 164 CrPC of the victim, the statement was read over to the victim and thereafter her Bench Assistant obtained thumb impression of the victim. Ext-4 is the statement of the victim and Ext-4(1) is her signature and Ext-4(2) & Ext-4(4) are the signature of her Bench Assistant Anuradha Barman who endorsed the thumb impression of the victim. After recording the 164 CrPC statement of the victim she passed an order in the record. Ext-5 is the order passed by her and Ext-5(1) is her signature.

15. In the instant case the victim in her evidence disclosed that the accused made her panty dirty inside her room. In the statement u/s-164 CrPC she disclosed the same thing except stating that the accused made her panty dirty she did not disclose anything that the accused touched her vagina or her private part by his land or by his private part. Nothing is also stated that her panty was removed from her body. The victim nowhere disclosed that the accused touched any part of her body. Though this court tried to bring out by interrogating her how the accused made her panty dirty but she did not reveal how the accused made her panty dirty. The mother of the accused PW-1 Asma stated that seeing her daughter crying in the evening she noticed that the clothes of her daughter was wet and the bed cover was also wet. She also noticed that in the wearing party of the victim also there is some water like substance. However in the crossexamination she admitted that the water like substance in the panty is actually water and not other thing. According to PW-4 Renuka that while she noticed the bed of the informant as shown to him by the mother of the victim it is found by her that the bed was wet with water and that a bottle was also lying there. The PW-5 SafiK disclosed that dirty article was noticed by her in the bed. Father of the victim stated that he noticed water like substance in the cloth of the victim. He also disclosed that the panty was also dirty. However, the evidence of this witness did not reveal what was the dirty article in the panty of the victim. His wife i.e the mother of the victim during cross admitted that it is water which she noticed in the panty of the victim. So it is clear that the panty was wet with water. Her evidence also showed that all the wearing clothes of the victim were wet. She and PW-4 Renuka also disclosed that the bed cover is also wet with water. A bottle was also over the bed. So it is clear from their evidence that the panty, other wearing cloths of the victim and the bed sheet was wet with water. Though the victim disclosed that the accused made her panty dirty but could not say what is the dirty article and how he caused it dirty. Though PW-5 stated that dirty article was seen over the bed of the informant yet she cannot specify what was the dirty article. The mother of the victim on the other hand in her crossexamination made it clear that it is water in both the bed-sheet as well as in the bed cover.

- 16. It transpires from the evidence that though the bed-sheet, panty were seized by the I/O but the same were not sent for forensic examination for the reason best know to the I/O.
- 17. The M.O only found during examination of the victim scratch mark reddish in colour in the lateral side of the hymen. On the basis of the said scratch mark she opined that there is attempt of penetration. She did not find any injury except scratch mark and she opined that the scratch was caused due to use of nail. The mother of the victim stated that the victim suffered from itching on the date of occurrence. So she might have caused the scratching by nail. Only for having scratch mark it cannot be presumed that there was attempt of penetration. Victim nowhere disclosed that her vagina was touched by the accused or that the accused touched his private part in her vagina or touched her vagina with his hand or by any other article. It is found that prosecution has miserably failed to establish that there was any penetrative sexual assault or any sexual assault has been caused upon the victim by the accused.
- 17. Prosecution has miserably failed to prove the case against the

accused under section 4 of the POCSO Act. Accordingly, accused Md. Azad Ali is acquitted from the above mentioned section.

- 18. The accused Md. Azad Ali will go on a fresh bail of Rs.10,000/- with one surety of like amount u/s-437-A IPC assuring that he will appear before the higher court as and when such court issue notice in respect of any appeal or petition filed against the judgment and order of this court.
- 19. Judgment is pronounced at the open court in presence of the accused.
- 20. Judgment written in separated sheet be kept with record.

Given under my hand and the seal of this court on this the 18<sup>th</sup> day of December/2018.

Send a copy of judgment to District Magistrate, Nalbari.

Dictated and corrected by me

Session Judge, Nalbari.

Sessions Judge, Nalbari.

D. Roy (steno)

Contd.

## **APPENDIX**

## A. <u>Prosecution witness</u>.

PW-1 Dr. Urmi Devi Choudhury (M.O).

PW-2 Asma Begum.

PW-3 Ruksana Ahmed.

PW-4 Renuka Begum.

PW-5 Safia Khatun.

PW-6 Rakmat Ali.

PW-7 Jubi Chaliha (Magistrate).

PW-8 Manalisha M. Bhakta (I.O)

# B. <u>Defence witness.</u>

Nil.

# C. <u>Prosecution Exhibit.</u>

Ext-1 Injury report.

Ext-2 Seized article.

Ext-3 Ejahar.

Ext-4 Statement.

Ext-5 Charge-sheet.

# D. <u>Defence Exhibit.</u>

Nil.

Sessions Judge, Nalbari.