CAUSE TITLE POCSO Case No. 50/16

Informant: The victim X.

Accused: Sri Raju Nayak,

S/o- Sri Arjun Nayak, R/o- Kharjan Tea Estate,

PS- Chabua, District- Dibrugarh.

ADVOCATES:-

For the State: Mrs. Runumi Devi, learned Public Prosecutor.

For the Defence: Mr. B Hussain, learned Advocate.

IN THE COURT OF THE SESSIONS JUDGE: DIBRUGARH

Present: Smti. SP Khaund, (MA Economics, LLB),

Sessions Judge, Dibrugarh.

> POCSO Case No. 50/16 G.R. Case No. 1694/16

> > State of Assam

-Vs-

Sri Raju Nayak

Charges: Unser Sections 4 of PCSO Act read with Section 376 IPC.

Date of evidence on : 23-09-16, 21-11-16, 15-02-17 & 14-03-17.

Date of argument : 30-06-17. Date of Judgment : 20-10-17.

JUDGMENT

- 1) The prosecution case in a nutshell is that Raju Nayak (hereinafter the accused) repeatedly called the victim X over phone and threatened her to come out of her house, lest her family members will face dire consequences. At about 9:30 p.m., victim was compelled to meet the accused who enticed her with proposal of marriage and committed rape on her. On 26-06-16, when the victim X went to the accused person's house, the accused denied the allegation of rape against him and fled. An ejahar regarding this incident was lodged by the victim X with the Chabua police. A Chabua PS Case No. 95/16 under section 376 of the Indian Penal Code (IPC in short) read with section 7 of the Protection of Children From Sexual Offences Act, 2012 (POCSO Act in short) was registered and SI Promod Phukan was endorsed with the investigation.
- 2) The investigating officer (IO in short) swung into action and embarked upon the investigation. He recorded the statement of the victim and forwarded her to the Magistrate for recording her statement under section 164 of the Code of Criminal Procedure (CrPC in short). He also forwarded the victim to the medical officer (MO in short) for examination. He went to the place of occurrence and prepared a sketch map and recorded the statements of the witnesses. On finding prima facie materials, he submitted Charge-Sheet

- against the accused person under section 376 IPC read with Section 4 of the POCSO Act.
- 3) On appearance of the accused, copies were furnished, and a formal charge under Section 4 of the POCSO Act and section 376 IPC was framed and read over and explained to the accused. The accused abjured his guilt and claimed innocence.
- 4) To substantiate the stance, the prosecution adduced and evidence of 7 witnesses including the MO and the IO. The defence cross examined all the witnesses in extenso to refute the charges. The victim's mother was not cross examined. The prosecution also exhibited several documents to buttress the evidence.

Submissions:

- 5) The learned Public Prosecutor emphasized through argument that this case has been proved beyond reasonable doubt and adequate punishment ought to be inflicted upon the accused. On the contrary, the learned counsel for the accused laid stress in his argument emphatically that a false case has been foisted against the accused. It is also contended that the evidence is replete with contradictions and the accused person ought to be acquitted from the charges leveled against him.
- 6) On the backdrop of the arrival proponents urged at the bar, the following points are apposite for the decision of this case:
 - 1. Whether the accused committed penetrative sexual assault on the victim X who was a minor at that time?
 - 2. Whether the accused committed rape on the victim X, forcefully, without her consent and against her will?

DECISION THEREON AND THE REASONS FOR THE DECISION:

- 7) To decide the case in its right perspective, it is necessary to delve into the evidence.
- 8) The victim X testified as PW-1 that on 26-06-16, at about 7 P.M, the accused called her over phone and after a while, at about 9:30 p.m., the accused called her over phone and asked her to go to the nearby tea garden. He also threatened her that if she refused to meet him, he shall kill her and lodge a false case against her family members. The accused again threatened her not to disclose about the matter to anybody and as the victim was terrified about the consequence, she went to the back side of her house to meet the

accused person. PW-1 further testified that the accused took her to the nearby tea garden and promised to marry her and thereafter committed sexual intercourse with her. After the ordeal, the accused asked the victim to wait there for a while and assuring her to take her on a motorbike, he left her waiting in the garden. She waited for half an hour as asked by the accused, but after a long wait, the accused failed to return. Then she frantically searched for the accused. She went to the accused person's house and to his shop and also called him over phone several times. When the accused did not respond to her calls, she went to her friend Kanchani Nag's house.

- 9) Kanchani Nag's house is near the accused person's house and they stayed there overnight. On the next morning, Kanchani called her mother to her house and she narrated about the incident to her mother. Then she along with her mother went to the accused person's house, but the accused denied about the incident that took place on the previous night. Then she showed the mobile to the accused person, but at that time the accused person fled. She also narrated about the incident to the accused person's family members. She also lodged an ejahar with the police. She narrated about the incident to a person who resides near the police station and the person wrote the ejahar for her and she affixed her signature after going through the contents of the ejahar. Ext. 1 is the ejahar and Ext. 1(1) is her signature. After 3 days of the incident, she was taken to the Assam Medical College and Hospital, Dibrugarh by the police personnel for medical examination and she also came to the Court for recording her statement Ext. 2, and Ext. 2(1) to Ext. 2(3) are her signatures.
- 10) She testified in her cross examination that she had a love relationship with the accused person for 3 years. She further testified that after the marriage of the accused person, she continued her friendship with him. She also testified in her cross examination that out of her love for the accused, she went to meet him on the day of the incident. At that time, her mother, her two maternal uncles and aunts were present in her house and all the family members were awake. She also admitted that she did not raise alarm at the time of the incident. She further admitted in her cross examination that the accused had used her as his wife and she was maintaining an illicit relationship with him.
- 11) Thus, the evidence of the victim clearly depicts that her testimony cannot be

relied to fasten the guild on the accused person. It is discernible from her evidence that the accused person is a married man and the victim continued with an extra marital affair with the accused person. Earlier she had extra marital relationship with the accused. After the date of the alleged incident, she was the one who went in pursuit of the accused person, searching for him frantically in his house and shop premises, etc. The accused tried to avoid her and fled. It is clear from her evidence that she tried to impose herself on the accused person. In such a case, the allegation of rape by such a victim cannot be relied upon. On the contrary, PW-1 is not a victim at all. She appears to be enamoured by the accused person. Her testimony that she was terrified by the accused person and so she went out and on being enticed with the promise of marriage, she offered herself to be sexually assaulted by the accused, cannot be relied upon by any prudent person.

12) The victim's mother Smti. Monika Tanti testified as PW-2 that the victim was 16 years of age at that time. The incident took place on 26-04-16. On that night, at about 9:30 pm, she retired to bed after dinner, but could not find her daughter 'X' in the house. Then she informed her younger brother that X was missing. After a frantic search in the locality, she could not trace out her daughter. On the next morning, she searched for her daughter in the line, but could not find her. Then Kanchani Nag's mother informed her that her daughter was in their house. Then she went to Kanchani Nag's house and met her daughter there. She asked her daughter about her disappearance and her daughter informed her that the accused person called her to the nearby garden and enticed her with a proposal of marriage and with such false promise and threats of dire consequences exercised on her daughter, her daughter went out from their house and met the accused person in the nearby garden. Smti. Monika Tanti further testified that the accused abandoned her daughter in the garden promising that he would bring a motorcycle and take her on the bike, but the accused person failed to return. When the accused person did not return for a long time, 'X' went to Kanchani Nag's house and stayed there. There after she along with her daughter went to the accused person's house and asked him about the incident which the accused person denied and he fled away. Then she accompanied her daughter to the Chabua Police Station and her daughter lodged an ejahar. The prosecution exhibited the Xerox copy of the birth

- certificate of the victim X produced by Smti. Monika Tanti.
- 13) It has also been held that the victim's testimony belies her evidence. In similar manner, her mother's testimony also belies the evidence. Smti. Monika Tanti failed to incriminate that the accused person committed rape on her daughter. The accused has been alleged with a serious offence and it has to be proved beyond a reasonable doubt that the accused is complicit. When the victim's mother failed to incriminate that the accused person committed rape on her daughter, the allegation of penetrative sexual assault falls through. The PW-2 testified that the accused exercised threats on her daughter and compelled her daughter to meet him in the nearby garden. Thereafter, the accused person abandoned her daughter. Thus, it can be deciphered that the victim X is the one who was in pursuit of the accused person. Her mother did not testify that the accused sexually assaulted her.
- 14) Sri Sankar Deep testified as PW-3 that the victim X is his niece. The incident took place on 26-06-16. On that day, at about 10 p.m, his elder sister Smti. Monika Tanti informed him that X was missing from her house. Then they all set out in search of X, but could not find X. On the following day also, they set out in search of X and at about 8 am, Kanchani Nag's mother informed his elder sister over phone that X was in their house. Immediately Monika went to Kanchani Nag's house and thereafter, she came to his house. PW-3 further testified that he learnt that X was taken by the accused and thereafter she went and stayed overnight in Kanchani's house. Then he along with his sister Monika and X went to the accused person's house. Monika charged the accused about the incident, but the accused denied about the incident. At that, his niece showed her mobile phone with the call logs of the previous night and then the accused fled. Then he informed the nearby people and Line Chowkider Sri Puran Nando about the incident. When the accused did not return till late in the evening, his sister lodged an ejahar with the police. When he asked X about the incident, X informed him that the accused called her towards the backyard of her house and promising to marry her, he committed sexual intercourse with her and abandoned her in the backyard promising that he would return with a motorcycle, but did not return.
- 15) Contrary to this, he admitted in his cross examination that he did not ask X about the incident. He admitted in his cross examination that prior to the incident, there was love relationship between the accused and 'X'.

- 16) The evidence of PW-3 also does not inspire confidence. When the victim herself did not state before her own mother that the accused sexually assaulted her, there appears to be no reason why she will go ahead and inform her uncle that the accused committed penetrative sexual assault on her or committed rape on her. PW-3 has also admitted that the victim had a love relationship with the accused before the incident.
- 17) Even if the accused had a love relationship with the victim, yet the accused cannot be charged with the offence of cheating the victim and inducing her to have sexual relationship with him with the promise of marriage. He was also married at the time and his promise to marry again depicts illicit relationship between the accused and victim.
- 18) The Other discrepancy in the evidence is that Kanchani Nag was not examined as a witness. According to the evidence, the victim took shelter in Kanchani's house on the fateful night, but the prosecution agency failed to examine Kanchani Nag as a witness. This casts a shadow of doubt over the veracity of the evidence of PW-1, 2 & 3.
- 19) Smti. Anita Nath testified as PW-4 that Kanchani Nag is her daughter and the victim X is Kanchani's friend. The incident took place about 3/4 months back. On the Night of the incident, while she was sleeping with her daughter, at about 1 a.m., the victim X called her daughter from outside the house. Then she awoke and opened the door and saw the victim standing in front of her house. She asked the victim what happened. The victim then went into her house and stated that she was with the accused person. She also informed her that the accused would come to her house after a while. Then she allowed the victim to stay in her house and she slept with her daughter Kanchani. On the next morning, she came to know from the victim's mother and the family members that they were searching for her. Then she sent back the victim to her house. Later on, the victim filed an ejahar against the accused.
- 20) In her cross examination, she testified that the victim was about 17 years as she was born on the same year when her daughter was born. She also denied any knowledge about the incident.
- 21) The evidence of PW-4 depicts that the victim stayed in her house on the night of the incident, but PW-4 did not incriminate the accused person. On the contrary, PW-4's evidence depicts that the accused was supposed to join

- the victim in her (PW-4) house. Her evidence depicts that she took the victim back to her house.
- 22) It is true that on the fateful night, the victim took shelter in her friend's house, but the reason why the victim had to take shelter in her friend's house, could not be properly elicited. It has also been held that the victim's evidence does not inspire confidence and her testimony was found unreliable.
- 23) Sri Puran Nanda testified as PW-5 that the incident took place about 3/4 months back. One morning, the victim's mother went to his house and informed him that her daughter X was taken by the accused person on the previous night and her daughter was found in Kanchani Nag's house. Smti. Monika Tanti, i.e., mother of X, took her daughter to the accused person's house and asked him to accept her daughter, but the accused person denied to accept X as his wife and fled away from his house. PW-5 further testified that as he is the Line Chawkider of the tea garden, Smti. Monika Tanti asked him to arrange for a meeting to discuss the matter, but the accused person was absent in the meeting. Later on, X lodged an ejahar with the police.
- 24) Thus, it is clear from the evidence that when the accused person failed to accept the victim as his wife, a case was slammed against him with allegation of rape.
- 25) The medical officer Dr. Ashrulina Deori testified as PW-6 that on 28-06-16, she examined X on police requisition in connection with this case and found the following:

On genital examination: Genital organs well developed. Vulva is healthy. Hymen: Old tear present 2, 6 & 9 O' clock position. Vagina healthy. Cervix: Os closed. Uterus: Normal size. Evidence of veneral disease not detected clinically. Evidence of injury on her body or private parts: No evidence of injury on her private part. Vaginal smears were taken from glass slide from posterior fornix in and around the cervix result of which does not show any spermatozoa.

X-ray requisition was given to WPC 691 Rima Das on 28-06-16, but till date (18-07-16), X-ray report was not found.

- 26) On the basis of Physical examination, dental examination and Laboratory Investigation done on the victim X, the doctor has opined that-
 - (1) Her approximate age is sixteen to seventeen years. However, to

know the exact age of the victim, X-ray report is necessary.

- (2) Evidence of recent sexual intercourse is not detected on her body.
- (3) No evidence of violence mark on her private part.
- Ext. 4 is the Medico-legal Report where Ext. 4(1) to Ext. (3) are her signatures.
- 27) In cross-examination, the doctor testified that the period of recent sexual intercourse has to be 24-40 hours.
- 28) The doctor did not detect any evidence of sexual assault on the victim's body. No incident of forceful sexual intercourse was also detected on the victim's body. The victim's evidence appears to be too farfetched and sketchy. Moreover, her evidence is not supported by the evidence of her medical examination. Her age is opined to be from 16 to 17 years. On the basis of criminal jurisprudence, the victim's age is considered to be 2 years on the higher side of 17 years. As the victim could not produce any school certificate or birth certificate, the victim is considered to be a major at the time of the alleged incident.
- 29) The IO is a formal witness. SI Promud Phukan testified as PW-7 that on 27-06-16, while working as SI of police at Chabua Police Station, the OC of Chabua Police Station endorsed him to investigate the case registered on the basis of ejahar received from the victim X. The ejahar was registered as Chabua PS Case No. 95/16 under section 376 IPC read with section 7 of the POCSO Act. He recorded the statement of the victim in police station and forwarded her to the Magistrate for recording her statement under section 164 CrPC and to the doctor for medical examination. He went to the place of occurrence and recorded the statements of the witnesses and prepared the sketch map Ext. 5 where Ext. 5(1) is his signature. He also recorded the statements of the witnesses at the place of occurrence. On finding prima facie materials, he submitted Charge-Sheet against accused. Ext. 6 is the Charge-Sheet and Ext. 6(1) is his signature.
- 30) It has already been held in my foregoing discussions that the victim's testimony does not inspire confidence. Her evidence is not supported by the evidence of her own mother who failed to implicate that the accused committed penetrative sexual assault on her daughter, i.e., on X. It is thereby held that the prosecution failed to prove beyond reasonable doubt that the accused committed penetrative sexual assault on the victim X. The

prosecution also failed to prove beyond reasonable doubt that the accused had sexual intercourse with the victim without her consent and against her will. Thereby the accused Sri Raju Nayak is acquitted from the charges under section 376 IPC read with Section 4 of the POCSO Act on benefit of doubt and is set at liberty forthwith.

Judgment is signed, sealed and delivered in the open Court on the 20th day of October, 2017.

Sessions Judge, Dibrugarh

Certified that the judgment is typed to my dictation and corrected by me and each page bears my signature.

> Sessions Judge, Dibrugarh

APPENDIX

List of witnesses:

- 1. PW-1 The victim X;
- 2. PW-2 Smti. Monika Tanti;
- 3. PW-3 Sri Sankar Deep;
- 4. PW-4 Smti. Anita Nath;
- 5. PW-5 Sri Puran Nanda;
- 6. PW-6 Dr. Ashrulina Deori;
- 7. PW-7 SI Promud Phukan.

List of Exhibits:

- 1. Ext. 1 Ejahar;
- 2. Ext. 2 Statement of the victim recorded under Section 164 CrPC;
- 3. Ext. 3 Photocopy of the Birth Certificate of the victim (proved in original);
- 4. Ext. 4 Medico-legal Report;
- 5. Ext. 5 Sketch-Map; and
- 6. Ext. 6 Charge-Sheet.

List of witnesses and Exhibits for defence- None

Sessions Judge, Dibrugarh

Transcribed and typed by:-Bhaskar Jyoti Bora, Steno.