### **IN THE COURT OF THE SPECIAL JUDGE AT JORHAT**

Present : Sri Madhurjya Narayan, AJS

**Special Judge, Jorhat** 

SPECIAL CASE NO. 14 OF 2018 (G.R. Case No. 589 of 2018) Bhogamukh P.S. Case No. 13 of 2018

#### **State of Assam**

-Versus-

Sri Padmadhar Pegu, Son of Late Gulapchand Pegu, Resident of Bormathuri, P.S. Bhogamukh, District-Jorhat.

.... Accused

#### **APPEARANCES:**

For the State : Sri Muhidhar Dutta, Learned Special P.P., Jorhat For the Accused: Sri Bhumidhar Hazarika, Learned Counsel, Jorhat

# CHARGE FRAMED UNDER SECTION 448 OF INDIAN PENAL CODE READ WITH SECTIONS 8/12 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

**Date of Charge** : 18-04-2018

Date of prosecution evidence: 15-05-2018; 02-06-2018; 29-06-2018;

26-09-2018; 13-12-2018 & 03-01-2019

**Statement of Accused** 

 Recorded on
 : 11-02-2019

 Date of Argument
 : 20-04-2019

 Date of Judgment
 : 29-04-2019

#### JUDGMENT

- 1). The prosecution case, in a nutshell, as narrated in the F.I.R. dated 06/03/2018 lodged by Sri Biren Doley, uncle of the victim girl [hereinafter referred as (X) in order to screen her identity], is that on the previous night around 10.00 P.M., while all the family members of the informant were sleeping, taking advantage of the same, accused Sri Padmadhar Pegu entered into the room of 'X'. Thereafter, he made attempt to commit rape on her. In order to save herself, when the victim raised hue and cry, hearing the same, accused was caught, who was at that time wearing only his undergarments. The matter was reported to the members of the 'Yuva Sangha' of the village and as per their advice, accused person was handed over to the police of Bhogamukh P.S. on the same night.
- 1 [i] On receipt of the aforementioned F.I.R., S.I. Sri Atul Sarmah, the then Officer-in-charge, Bhogamukh P.S., registered a case being Bhogamukh P.S. Case No. 13/2018 under Section 448 of IPC read with Sections 8/12 of The Protection of Children From Sexual Offences Act, 2012 [in short, POCSO Act], and he himself took up the investigation of the case. On completion of the investigation, the investigating officer laid charge-sheet against the accused person under Section 448 of IPC read with Sections 8/12 of POCSO Act vide Charge-sheet No. 09/2018 dated 31-03-2018 [Exhibit-6].
- 2). On appearance of the accused person, copies of all relevant documents were furnished as required under the statutory provisions. After hearing the submissions of the learned Special P.P. as well as learned defence counsel on the point of charge and going through the relevant documents as furnished by the investigating officer under Section 173 of Cr.P.C., my learned predecessor-inchair having found a prima-facie case against the accused person under Section 448 of IPC read with Sections 8/12 of POCSO Act, 2012, framed formal charges there-under and the accusations of the said charges were read over and explained to the accused, to which, the accused person pleaded not guilty and claimed to be tried.

- **3).** To bring home the charges against the accused person, the prosecution side examined as many as **11** [eleven] numbers of witnesses including the I.O. as PW/11 and exhibited **05** [five] numbers of documents.
- **4).** On closure of the evidence of the prosecution side, statements of the accused person were recorded u/S. 313 of Cr.P.C. with respect to the incriminating circumstances which surfaced against him in the evidence on record. His pleas were of total denial. Defence declined to adduce evidence on its behalf.
- 5). I have heard arguments advanced by Sri Muhidhar Dutta, the learned Special Public Prosecutor as well as Sri Bhumidhar Hazarika, learned Defence Counsel. I have also scrutinized the entire evidence of the witnesses and the relevant materials on records including the exhibits.
- **6).** During arguments, learned Special P.P. submitted that prosecution could fairly able to bring home the guilt of the accused person beyond reasonable doubt for the offences punishable under Section 448 of IPC read with Sections 8/12 of The POCSO Act, 2012 and as such he be convicted thereof.

On the other hand, learned defence counsel argued that the prosecution case is not true rather it is concocted. It is also been argued that evidence on record is bereft of consistency and as such, accused person deserves acquittal of the charges so levelled against him.

#### 7). POINT FOR DETERMINATION:-

Whether on or about 05/03/2018 around 10.00 P.M., at Bormathuri Gaon under Bhogamukh P.S., the accused named-above,

- Criminally trespassed inside the house of the informant Sri Biren
   Doley with intent to commit an offence;
- ii. Inside the house of the informant, committed sexual assault on the niece of the informant, i.e., victim [X] who was a minor at that time;

iii. Committed sexual harassment to the victim [X] inside the house of the informant by using obscene words/languages.

#### **DISCUSSION, DECISIONS AND REASONS THEREOF:**

- 8). In the instant case, prosecution examined the informant namely Sri Biren Doley as PW-1 and the alleged victim [X] as PW-3 and her father Sri Kadam Doley as PW-2. There is no dispute at the bar with respect to the fact that at the time of the incident, [X] was a minor, i.e., below 18 [eighteen] years of age.
- **PW-1/Sri Biren Doley** testified that on the day of the occurrence, when he was sleeping at his house, hearing shout of the victim [X], he went to her room, switched on the lights and on search, found the accused person inside her bed. According to him, when the accused caught the victim by her hand, she shouted. On the other hand, Sri Kadam Doley [PW-2] deposed that he caught the accused at night from under the bed of the victim, when the latter shouted. He also deposed that the accused had caught the victim by her legs. Both PW-1 & PW-2 deposed that accused person was directly taken to the police station.
- **9). PW-3**, i.e., the **victim** [X], testified that at the time of the incident, when she was sleeping at her room with her sister, someone touched her legs and then her hands. Out of fear, she cried for help. Then her father [PW-2] and uncle [PW-1] caught the accused person and dragged him out.
- **10). PW-4/Smt. Nijora Doley** is the wife of PW-1 and aunt of PW-3/victim [X]. She testified that at the time of the incident, she was sleeping in her room just in front of the kitchen, whereas victim was sleeping in the last room of the house. That they went to sleep at about 10.00 P.M. and hearing hue and cry of PW-3, PW-4 rushed to the room of the former and found the accused person inside the room. She also deposed that when the victim shouted, the accused person concealed himself under the bed and from the victim, she learnt that the

accused person had touched her legs and hands. PW-4 further deposed that villagers had assembled and the accused person was handed over to the police.

- **11).** Thus, from the discussion of evidence so far made, it is seen that as per the evidence of PW-3, hearing her hue and cry, PW-1 & PW-2 caught the accused person and dragged him out of her room. However, she is silent as to from which part of the room, the accused person was caught.
- 11 [i]. On the other hand, according to PW-1, accused person was found inside the bed of the victim, but PW-2 and PW-4 found the accused person under the bed of the victim. It transpires from the evidence that only on hearing the hue and cry of the victim [X], i.e., PW-3, other family members, i.e., PW-1, PW-2 & PW-4 went to her room. This being so, these witnesses did not see the alleged commission of offence. Moreover, PW-3 did not testify that she had told PW-1, PW-2 & PW-4 that accused person had caught the victim [X] by her legs or hands. So, evidence of PW-1, PW-2 & PW-4 that accused had caught the victim by her hands or legs found to be hearsay and hence, inadmissible.
- **12). PW-5/Sri Rupak Pegu** deposed that being the President of the 'Yuva Sangha', one Sri Baba Tanti over telephone called him to the house of the former and accordingly he went there, found that the villagers were assaulting the accused person after gherowing him. From the villagers, PW-5 learnt that the accused person entered into the house of PW-3 wearing only banyan and underwear and touched her legs. But PW-5 did not state specifically the names of the villagers from whom he learnt about the incident. As such, his evidence as to the accused person entering into the house of the victim [X], wearing only banyan and underwear, and touched her legs is hearsay and hence, inadmissible.
- 12 [i] Though PW-5 claimed that he informed the police about the matter and handed over the accused person to the police, but the evidence of PW-1 & PW-2 did not reveal such fact. Even the investigating officer as PW-11, did not state that PW-5 had informed the police about the incident.

- around 10.00 P.M., hearing hue and cry at the house of the victim [X], he went there and found the accused person at the outside room of the house. Likewise, PW-7/Sri Niren Medok testified before the court, but he found the accused person at the courtyard of the house of PW-3, with his undergarments only. From the villagers, PW-6 came to know that the accused person had entered into the bedroom of the victim to rape her and according to PW-7, to do bad work with the victim [X] and touched her hands. But as PW-6 & PW-7 failed to state the names of the villagers from whom they came to know about the incident, hence, on these aspects, their evidence found to be hearsay and as such, inadmissible.
- 14). Prosecution examined **Sri Biren Pegu** as **PW-8**, who testified that on the date of the incident, while he was sleeping, hearing hue and cry of the victim [PW-3], he went there and found the accused person under the 'Chang-Ghar' of the informant/PW-1. Though PW-5, PW-6, PW-7 & PW-8 claimed that hearing hue and cry of the victim, when they rushed to her house, found villagers had gathered there, but PW-1 & PW-2 and even PW-3, however did not state anything about gathering of villagers at their house. In view of the above, the evidence of PW-5, PW-6, PW-7 & PW-8 that on hearing hue and cry, they went to the house of the victim [PW-3] on the night of the incident, creates a doubt.
- **15).** PW-3, i.e., the victim [X], deposed that at the relevant time, she was sleeping in her room alongwith her sister. However, other family members, i.e., PW-1, PW-2 & PW-4 did not state any such fact. Even the ejahar [Exhibit-1] is silent on this aspect.
- **16).** Be that as it may, prosecution, examined **Smt. Jimi Modok** as **PW-9**, with whom PW-3/victim claimed to have been sleeping at the time of the incident. According to her, she was sleeping with the victim/PW-3 in the same bed. Then about 10.00 P.M., she found the accused person sitting in between her and the victim/PW-3. Initially she thought that cat had entered into their

room, and as such, she shouted and then the accused person concealed himself under the bed. But, the evidence of PW-3/victim reveals that it was she who had raised hue and cry and not her sister [PW-9]. Further, PW-9 did not testify anything about the accused person holding the victim/PW-3 either by her hands or legs. Thus, PW-3 & PW-9 being the most material witnesses, contradicted on vital aspects.

- **PW-10/Sri Shankar Doley** deposed that on the date of incident, both victim/PW-3 and Smt. Jimi Modok/PW-9 shouted 'Chur, Chur' [Thief, thief] and father of PW-3, caught the accused person from under the bed of the victim. PW-10 also went there, found gathering of villagers and accused person was handed over to the police. From cross-examination of PW-10, it is seen that he was sleeping in the same room, where the victim was also sleeping. However, in the later part of his cross-examination, PW-10 stated that he arrived at the spot after the accused person was caught by PW-2. This contradiction in the evidence of PW-10 coupled with the contradictions in the evidence of other witnesses, including PW-3 & PW-9, as discussed above, creates a doubt on the entire incident.
- Further, evidence of PW-1, PW-3 & PW-4 reveal that their family consisted of about 13 members and reside in the same house, which is a 'Chang Ghar'. PW-10, who is according to PW-2, is brother of the latter, during cross-examination stated that the house of the victim is a 'Chang Ghar' with three bedrooms and he alongwith his two brothers, resided in the same house. According to PW-10, in order to reach the room where he and the victim were sleeping, one has to pass through the other two rooms. Evidence of PW-3/victim shows that the front side of the room is closed at the time of sleeping. The investigating officer as PW-11 supported the fact that the site of the occurrence is after two rooms of the house of the informant/PW-1. In the backdrop of the aforesaid discussion, it is seen that the incident had taken place in the last room of the house of PW-1, which is a 'Chang Ghar', and in order to reach the same room, two bedrooms had to be passed through. It is very unlikely that the other family members consisting of thirteen members, would be completely unaware of

the accused person passing through their rooms to the room of the victim/PW-3. Taking all these facts in its entirety, prosecution case appears to be doubtful. This is, more-so, PW-1 during cross-examination admitted that they have boundary dispute with the accused person and according to PW-2, they had altercation with the accused person over land dispute.

- 19). Though PW-10 during cross-examination denied the suggestion that on the date of the incident, he consumed liquor with the accused person, but PW-1 stated during cross-examination that he cannot say if PW-10 had consumed liquor with the accused person on the night of the incident. Thus, PW-1 did not deny outright that PW-10 consumed liquor with the accused person at the relevant time, which raises a reasonable probability that the defence, set up by the accused person that he consumed liquor with PW-10 on the date of the incident, is true. Further, PW-1 & PW-2, during cross-examination denied the suggestion that they had caught the accused person while he was going out from their house after consuming liquor. On the other hand, PW-10 denied the suggestion that accused person had entered into the room of the victim/PW-3 by mistake. So, what could be inferred from these suggestions that the accused person went to the house of the informant/PW-1 on the date of the incident and went inside the room of the victim/PW-3 by mistake. In the instant case, defence did not adduce any evidence nor did accused person in his examination under Section 313 of Cr.P.C. stated anything about the defence set up that PW-1 & PW-2 had caught him and that he entered into the room of the victim by mistake. The point that falls for consideration is whether failure on the part of the accused person in proving his defence will lead to the establishment of the prosecution case.
- 20). Section 30 [1] of the POCSO Act, 2012 lays down that "in any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution".

- 21). Now, the basis of our criminal justice system is that a person although charged with an offence, is considered innocent until proved guilty of the offence. However, presumptions laid down in certain Special Acts, including the POCSO Act, 2012, places a reverse burden on the accused. In case law of *Noor Aga-versus-State of Punjab*, reported in 2008 [16] SCC 417, the Hon'ble Supreme Court, dealt with the constitutionality of the reverse onus clauses present in the Narcotic Drugs & Psychotropic Substances Act, 1985. The Hon'ble court held that "requiring proof of foundational facts before invoking the presumption, would dilute the intrusion". Dealing with the foundational facts, the Hon'ble court opined that "provisions imposing reverse burden, however, must not only be required to be strictly complied with but also may be subject to proof of some basic facts as envisaged under the statute in question".
- 22). In the backdrop of the discussion so made on the law of presumption as it stands, the burden of proving the commission of offence rests upon the prosecution. Although, prosecution may not require to prove its case beyond reasonable doubt in cases under the POCSO Act, 2012, but the commission of offence has to be proved by the prosecution in such a way as a reasonable person would believe it to happen, before shifting the burden to the accused person.
- **23).** As already discussed, the evidence on record failed to prove the case of the prosecution so as to shift the burden on the accused person. Although the accused person went to the house of PW-1 at the relevant time, but the evidence on record falls short off proving that the accused person entered into the house of PW-1 with intent to commit the alleged offences.
- **24).** Taking all the evidence in its entirety, this court is constrained to extend benefit of doubt to the accused person as prosecution side failed to prove its case beyond reasonable doubt. Hence, accused Sri Padmadhar Pegu is entitled to acquittal.

- **25).** In the result, accused **Sri Padmadhar Pegu** is <u>acquitted</u> of the charges under Section 448 of IPC read with Sections 8/12 of The Protection of Children From Sexual Offences Act, 2012, levelled against him on benefit of doubt and he is set at liberty forthwith.
- **26).** Accused is on bail. The bail bond of accused is extended for another **06 [six]** months from today as per provision of Section 437-A Cr.P.C.
- 27). Given under my hand and seal of this Court on this 29th day of April,2019.

**Special Judge, Jorhat** 

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## **ANNEXURES:-**

## **PROSECUTION WITNESSES:-**

PW-1	Sri Biren Doley, informant-cum-uncle of the victim
	girl [X].
PW-2	Sri Kadam Doley, cultivator.
PW-3	Victim girl.
PW-4	Smt. Nijora Doley, Student of Class-IX.
PW-5	Sri Rupak Pegu, cultivator.
PW-6	Sri Amio Doley, another cultivator.
PW-7	Sri Niren Medok, cultivator.
PW-8	Sri Biren Pegu, another cultivator.
PW-9	Miss Jimi Medok, Student of Class-IX.
PW-10	Sri Sankar Doley, cultivator.
PW-11	Sri Atul Sarmah, I.O. of the case.

# **COURT WITNESS:- NIL**

## **EXHIBITS FOR THE PROSECUTION:-**

Exhibit-1	Ejahar
Exhibit-2	Seizure-list
Exhibit-3	Statement of the victim/PW-3 recorded by the
	learned Magistrate under Section 164 of Cr.P.C.
Exhibit-4	Sketch Map of the place of occurrence with index.
Exhibit-5	Charge-sheet.

# **MATERIAL EXHIBIT:-**

<b>Material Exhibit-1</b>	School certificate of the victim.
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## **DEFENCE WITNESSES:-** NONE

Special Judge, Jorhat.

# **Typed & transcribed by:**

Sri Mrinal Jyoti Bora, (Stenographer Grade-I)