IN THE COURT OF THE SPECIAL JUDGE :::::: KOKRAJHAR

Special Case No.29/2017

State of Assam
Versus
Md Janab Ali Mandal Accused

Present: Smti M. Thakuria, M.Sc, LLB, Special Judge, Kokrajhar

Ld. advocate for the State : Mr M.K.Ghose, Special P.P.

Ld. advocates for the accused: Mr M.A.Pradhani

Evidence recorded on : 19.4.18, 02.8.18, 27.8.18, 27.11.18

and 14.6.2019

Argument heard on : 14.8.2019 and 29.8.2019

Judgment delivered on: 13.9.2019

JUDGMENT

1. The prosecution initiated the case on receipt of the first information report lodged by the informant Sri Pradip Kumar Debnath, father of the victim alleging that his daughter went to the school at about 9 A.M. and thereafter the accused called her in the office room and taking advantage of absence of other students or teachers he sexually assaulted her and embraced her with bad intention. It is stated that she reported the matter to the teachers and they have come to know about the incident and hence, the first information report.

- 2. On receipt of the first information report in Chithila P.P. the same has been sent to the Officer-in-charge of Fakiragram P.S. for registration of the case making Chithila P.P. GDE No.217 dated 14.9.2017. Accordingly the case has been registered as Fakiragram P.S. case No.72/2017 under section 376/511 of IPC, R.W section 8/10 of the Protection of Children from Sexual Offences Act and case was endorsed to S.I. Sri Pankaj Kumar Roy for investigation. During investigation the I.O. visited to the place of occurrence and recorded the statement of the witnesses, arrested the accused, her statement recorded under section 164 Cr.P.C. and ascertaining the minor age of the victim, the charge sheet has been filed by the I.O. under section 376/511 of IPC, R.W. section 8/10 of POCSO Act against the accused Md Janab Ali Mandal. Relevant copies also furnished to the accused person and hearing both sides the charge was framed under section 8/10 of POCSO Act against the accused finding a prima-facie case. The charges were read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 3. The prosecution side examined as many as 07 (Seven) number of witnesses including the informant, victim and I.O. as follows:-

PW 1 Miss Deepa Debnath (Victim),

PW 2 Sri Pradip Kr.Debnath (Informant),

PW 3 Md Majibar Rahman,

PW4 Sri Debanan Roy,

PW5 Smti Mamata Shill,

PW6 Sri Jayanta Kumar Roy and

PW7 S.I. Pankaj Kr.Ray.

4. The accused person took the plea of total denial while recording his statement under section 313 of Cr.P.C. and declined to adduce any defence witness in support of his case.

5. **Points for determination:**

- (i) Whether the accused committed the offence of sexual assault on the victim ?
- (ii) Whether the accused committed the offence of aggravated sexual assault on the victim?

Discussion. Decision and Reasons thereof:

- 6. I have thoroughly perused the entire evidence on record and hearing argument from both the parties, the case is decided as follows:-
- 7. The first information report of the case is lodged by one Sri Pradip Kumar Debnath, father of the victim alleging that his daughter went to the school at about 9 A.M. and thereafter the accused called her in the office room and taking advantage of absence of others students and teachers he sexually assaulted her and embraced her with bad intention. Accordingly, she reported the matter to the teachers and they have come to know about the incident. The informant also has adduced the evidence as PW2 and deposed that the accused/Chowkidar of the school touched his daughter from her back side when she was busy in cleaning the office room. From his cross evidence it reveals that he did not have any personal knowledge about the incident and he lodged the FIR after hearing the incident from his daughter.
- 8. PW1 is the victim of this case and she deposed that at the time of incident she herself along with her friend Kabita was cleaning the school room. While they were cleaning the office room another friend called Kabita and she came out from the school room and when she came out the accused/ Chowidar of the school hold her from her back side and somehow she managed to escape and she reported the matter to Debanan Sir. She also gave her statement before the police as well as before the learned Magistrate.

- 9. PW3 is the Head-Master of the school and he deposed that on the date of the incident he arrived at school at about 9.15 A.M. when Asstt.Teacher of the school Debanan Ray reported that one of the Grade-IV employees of the school touched the body of the one student of class-VIII Miss Deepa Debnath in the office room. Accordingly he called the victim and enquired about the matter. The Head-Master met the guardians of the victim and asked them to take help of law and also ensured for departmental proceeding against the accused. From his cross evidence also it is seen that the Asstt. Teacher of the school Debanan Ray arrived first at about 9 A.M. and then other staff of the school including the teachers came and the matter was reported to him by Debanan Ray and then enquired about the matter along with the victim. As per him he enquired the matter with the victim in the office room in presence of other teachers. Thereafter he also enquired the matter with the accused when he denied the incident and told that neither he touched the body of the victim nor touched her shoulder. On enquiry he came to know that at the time of incident one Kabita and Barnali friends of the victim were also present in the office room. He does not know as to whether they have seen the occurrence or not.
- 10. PW4 is another vital witness of the prosecution with whom the victim first reported the matter. He deposed that when he arrived in the school at about 9 A.M. two students from class-VIII Barnali and Puja came to him and reported that the accused hold shoulder of Deepa Debnath (victim) and pulled her towards him. Thereafter the victim also came there and reported the matter. Thereafter the other teachers arrived and he intimated about the incident to the head-master and others. From his cross evidence it also reveals that when the matter was enquired by the head-master along with the victim he was not present and it also reveals that at the time of incident almost all the students of class-VIII were present.

- 11. PW5 and PW6, two other Asstt. teachers also narrated the same incident and as per them also the accused caught hold hands of Deepa Debnath (victim) when she was cleaning the office room. The matter was discussed among the teachers in the office room. All the teachers also had a discussion on the basis of report of Debanan Sir. As per both PW5 and PW6 all the teachers gave their statements before the police on the same day.
- 12. PW7 is the I.O. of the case and he deposed that on the date of the incident at about 6 P.M. he got information from the In charge of Chithila P.P. that the incident took place in Chithila M.V. School and lots of general public, different organisation and students from the school gharoed Chithila P.P. Accordingly, he made GDE and rushed to the place of occurrence. When he arrived at Chithila P.P. he saw about 300/400 people gharoed Chithila P.P. and they want for justice saying that Chowkidar of Chithila M.V. School Janab Ali Mandal has misbehaved a student in the morning hour. Accordingly in the night the I.O. apprehended the accused and brought him to the Thana premises and on the next the FIR was lodged. He recorded the statement of the witnesses and statement of the victim under section 164 Cr.P.C. also recorded by the Magistrate. Accordingly after completion of investigation he filed the charge-sheet against the accused under section 376/511 of IPC, R.W. section 8/10 of POCSO Act.
- 13. So from the testimonies of the prosecution witnesses, it is seen that PW1 and PW2 are the victim and the informant of this case and they brought the allegation against the accused/Chowkidar of the school that he misbehaved and touched the body of the victim with bad intention. She accordingly reported the matter first to the Assistant Teacher Sri Debanan Ray

- (P.W.4) and then it was discussed in the office room among the teachers and thereafter the FIR was lodged by PW2. The other PWs3, 4, 5 and 6 are the teachers of the school and they also narrated the same story corroborating to each other that the accused touched shoulder or back of the girl with bad intention. PW3 being the Head-Master of the school also met guardians of the victim and advised him to take help of law and also assured for departmental enquiry against the accused Janab Ali Mandal who is Grade-IV employee of the school.
- 14. During the course of argument the learned advocate appeared on behalf of the accused raised the following points:-
 - (i) The FIR was lodged only on the grudge;
 - (ii) There is no eye witnesses of the case;
 - (iii) There is delay in lodging the FIR which creates reasonable doubt in the veracity of the prosecution case.
 - (iv) The contradiction of the evidence of the victim with her statement recorded under section 164 Cr.P.C.
 - (v) The prosecution did not examine the vital witnesses i.e. friends of the victim Kabita, Puja and Barnali;
 - (vi) No independent witnesses examined.
- 15. It is submitted by the learned advocate that there is some vital contradictions between the statement of the victim recorded under section 164 Cr.P.C. with the evidence she adduced before the court. But, the learned advocate did not specify the contradiction which he stated as major contradiction specially in the evidence of the victim. From Ext.1 i.e. the statement of the victim recorded under section 164 Cr.P.C. it is seen that there is no major contradiction of the evidence adduced by the victim and statement recorded under section 164 Cr.P.C. The evidence in respect of holding her by

the accused is remained unrebutted and there is nothing to disbelieve the evidence of the victim. In her testimony she reported that she did not report the incident directly to Debanan Sir but, it was reported by her friend first to her friends Barnali and Kabita and thereafter it was reported to Debanan Ray. From the evidence of PW4 Debanan Ray also it is seen that the matter was reported to him by the friends of the victims Barnali and Puja and then the victim came near to him and she was crying and then she reported the matter to him.

16. It is admitted fact that there is no eye witness to the incident as it is stated that when the victim was cleaning the office room along with her friend Kabita, she came out when her another friend called Kabita and at that time she was cleaning inside the office room when the alleged incident took place. So there is no eye witness to the prosecution case as it is alleged that the accused misbehaved with the girl only taking advantage of absence of her other friends. So in such situation it cannot be expected to have any eye witness for the prosecution case. But, it is to be seen as to whether for absence of eye witness the evidence of all the prosecution witnesses has to be disbelieved or discarded. The circumstance of the case is that in the morning hour when the victim was busy in cleaning the office room, the accused came from her back side and hold her taking advantage of absence of other witnesses. She immediately came out and reported the matter to her friend thereafter the matter was first intimated to the Asstt.Teacher, Debanan Ray (PW4) and then the other teachers of the school including the Head-Master also came to know about the incident. The evidence of all the other witnesses also corroborated to each other and the PWs3, 4, 5 and 6 the other teachers of the school narrated the same story that it was reported before them that

Grade-IV employee/accused misbehaved with the victim, a student of class-VIII. So merely because of the prosecution did not examine any eye witness, the evidence of prosecution witnesses could not be disbelieved. There is no major contradiction found in the evidence of prosecution witnesses to disbelieve their witnesses. Further the victim who stated categorically that the accused hold her from her back side when she was alone in the office room and was busy in cleaning the same. The circumstance brought by the prosecution also could not be disbelieved and the evidence of the victim also could not be rebutted by the defence in respect of misbehaviour by the accused with her.

17. Coming to the points raised by the learned defence counsel in regard of delay in lodging the FIR it is seen that the incident took place on 14.9.17 in the morning hour and on that day itself in the evening time, lot of people from different organisations along with the students of Chithila M.V. School gharoed Chithila P.P. demanding justice for the alleged incident. From the evidence of I.O. it is seen that getting information about the public gathering he immediately rushed to the Chithila P.P. making GD Entry when gharoed people reported the matter to him and also demanded justice. On the very next day the FIR was lodged by the father of the victim. Thus, it is seen that the information about the incident was received by the I.O. on the same day of the occurrence in the evening time. So considering the circumstances it is seen that delay in lodging the FIR is not vital to the prosecution case. There cannot be any reasonable doubt in the prosecution case merely because of delay by one day in lodging the FIR where it is evident that the matter was informed in the Chithila P.P. on the day of the occurrence itself. Another point raised by the learned defence counsel is delay in recording the statement of the

victim under section 164 of Cr.P.C. and in this context the learned advocate also relied on the decision of the <u>Hon'ble High Court reported in 2016 (3)</u> <u>GLJ 563 Mokesh Ali Vs State of Assam</u> wherein it is held that- "Section 161- Recording of statement by Magistrate-Reliability- Statement of victim girl has been recorded under section 164, Cr.P.C. by Magistrate after several days of occurrence-In intervening period, she got ample opportunity to discuss entire matters with her family members-Probability of giving a concocted story before Magistrate cannot be ruled out".

18. It is admitted that in the instant case there is delay in recording the statement of the victim under section 164 Cr.P.C. But, the circumstance of the case cited by the learned advocate stand on different footing wherein it is case of under section 366(A) IPC and the victim was also found around 18 years when she was rescued. But, in the instant it is seen that GD Entry of the case (Ext.4) also speak the same incident of misbehaviour by the accused towards the victim. So merely because of the statement recorded few days later of the incident, the prosecution case can not be outrightly discarded when there is other corroborating evidence which are found reliable and trustworthy. The learned advocate further stressed on the point of non examination of vital witnesses i.e. friends of the victim to whom the victim first reported about the incident and her friend Kabita who was also present in the office room. In this context the learned advocate also relied on the decision of the Hon'ble High Court reported in 2015(1) GLJ 4 John Ali & Another Vs. State of Assam wherein it is held that - "Vital witness-Failure to examine by prosecution-Failure of prosecution to examine vital witnesses i.e. other daughter of deceased, who claimed to be one of victims of outraging modesty and mother of the victim girls, who were present in house, raises serious doubt about

involvement of accused persons in murder- Withholding such vital witnesses, without any explanation, raises serious doubt about prosecution case- Accused persons acquitted."

- 19. The learned advocate also cited the decision of the <u>Hon'ble</u> Allahabad High Court passed in Criminal Appeal No.988/2011. It is submitted by the learned advocate that the friend of the victim were most and vital witnesses of the prosecution case. But, the prosecution intentionally did not examine the vital witnesses which creates reasonable doubt in the veracity of the prosecution case. There is no explanation as to why the prosecution did not examine those vital witnesses as it is case of the prosecution that the victim was with her friend Kabita inside the office room and both of them were busy in cleaning the office room.
- 20. It is admitted fact that one of the friend Kabita was present inside the office room and she was also busy in cleaning the same. It is also seen that the victim first reported the matter to her friends Barnali and Puja and then the matter was reported to Debanan Sir (PW4). But, the prosecution did not examine the said Kabita, Barnali and Puja. From the evidence of PW4 also it is evident that those two girls first came to him and reported about the incident and thereafter the victim Deepa came and reported the matter. But, it is to be seen as to whether non examination of the friend of the victim will affect the root of the prosecution case. Though the girl named Kabita was present inside the office room with the victim initially but, at the time of occurrence she came out as she was called by another friend and at that moment the accused committed the offence taking advantage of absence of friend of the victim. More so, from the evidence of the prosecution witnesses it is seen that two friends of the victim Barnali and Puja came to know about

the incident and they came and reported to Debanan Sir. But, at the same time PW4 Debanan Sir saw the victim when she was crying and then the matter was reported to him by the victim herself. It is also seen that other teachers of the school corroborating to each other have stated that the mater was first informed to the PW4, Debanan Ray who first attended school and thereafter the other teachers came and the matter was discussed in the office room. Thus, it is seen that though the prosecution failed to examine the friend of the victim who are stated to be the vital witnesses but, the evidence adduced by other PWs could establish the prosecution case and the defence could not bring any possible reason to disbelieve the witnesses who supported the prosecution case.

21. The accused took the plea in his statement recorded under section 313 Cr.P.C. that false and concocted case has lodged against him only with connivance of teacher Debanan Ray and father of the victim as they have their one candidate for whom they were interested for the post of Chowkidar in the school. But, to substantiate the plea that false case is lodged against him only out of previous grudge, the defence did not adduce any evidence. Moreso, surprisingly no suggestions were put to the father of the victim and PW4 in this regard. From the cross evidence of PW4 it reveals that after obtaining the appointment order the accused was not allowed to join in the school due to public pressure. But, PW4 does not know if there was any such resolution from the school in this regard. So there may be some grounds for objection by the general public in the appointment of the accused in the school as Chowkidar but, for that PWs2 and 4 i. e. father of the victim and the Asstt.

Teacher Debanan Ray can not make responsible and it cannot be held that there was any previous grudge with the accused for which PW2 and PW4 lodged the false case against the accused.

- During the course of argument the learned advocate also raised the point that the child witness can not be believed as the probability of tutoring of child witness cannot be waived out. Here the victim adduced her evidence and also gave her statement before the learned Magistrate as tutored by the informant, her father who had previous grudge on the accused. But, as discussed above the defence failed to establish that false and concocted case is lodged against the accused only due to previous grudge for his appointment.
- 23. Coming to the evidence of child witness it is seen that the evidence of the victim is fully corroborated by other witnesses. Though, there is no eye witness to the prosecution case but the circumstances under which the incident alleged to have been occurred, corroborates the evidence of other witnesses which cannot be disbelieved.
- Further regarding the acceptance of evidence of child witness the decision of the Hon'ble Apex Court reported in (2008) 12 SCC 565 Nivrutti

 Pandurang Kokate Vs State of Maharashtra can be cited which was relied on the case of Hemmat Sukhadeo Wahurwagh Vs State of Maharashtra

 (2009) 6 SCC 712 (FB), the Hon'ble Supreme Court of India has held that-
- "...... Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and molded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

- 25. Here in the instant case also it is seen that the evidence of child witness is found reliable and trustworthy and her evidence is also corroborated with other witnesses as well as the circumstances of the case.
- As per section 118 of the Evidence Act, 1872, all persons shall be competent persons to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions.
- 27. So from the details discussion made above it is seen that the accused touched the body of the victim and hold her from the back side with bad intention or attempted to do any sexual assault on the victim is well established.
- 28. Initially the charge was framed against the accused under section 8/10 of POCSO Act. But, from the discussion made above, it is seen that there is no evidence of any sexual assault by the accused though it is established that there was an attempt by the accused to do any act of sexual assault with the child/victim and being a staff of an educational institution, I find that the case is well established against the accused under section 10/18 of POCSO Act. Accordingly, the accused Janab Ali Mandal is convicted under section 10/18 of POCSO Act.
- 29. I have considered section 360 Cr.P.C. to release the accused on probation. But, attempt made by the accused to do sexual assault on the minor girl of 13/14 years old shakes our judicial conscience and the society will lose faith upon the judiciary if such offender is released without any sort of punishment.
- 30. Heard the accused on the point of sentence under section 235 (2) Cr.P.C. which is written in separate sheet and tagged the same with case

record. He submitted that he is poor person and has family burden and there is none to look after his old ailing parents who solely depend on him and accordingly, he prays for his release without any sort of punishment.

- 31. One of the prime objective of criminal law is imposition of adequate, just and proper punishment which commensurates with the gravity, nature of crime and manner in which the offence is committed. One should keep in mind social interest and consideration of the society while considering the determinative factors of sentence with the gravity of the crime.
- 32. In the instant it is seen that there was an attempt by the accused to do any sexual assault on the victim and hence the accused is accordingly convicted under section 10/18 of POCSO ACT.

Section 18 of POCSO Act speaks as follows:-

"Punishment for attempt to commit an offence- Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment for any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both".

33. So considering the above circumstances of the case I find lesser sentence will meet ends of justice.

ORDER

34. In the result, the accused Md Janab Ali Mandal is hereby convicted under section 10/18 of the Protection of Child from Sexual Offences Act and hereby sentence with **Rigorous Imprisonment for 06(six)** months and with a fine of Rs.1,000/-. In default of payment of fine will undergo Imprisonment for one month.

35. Free copy of the judgment be furnished to the convicted Md Janab Ali Mandal under section 363 of Cr.P.C. and also a copy of the Judgment be furnished to the learned District Magistrate, Kokrajhar complying the provision of under section 365 of Cr.P.C.

The judgment is delivered in the open court and given under my hand and seal of the Court on this 13th September/2019 at Kokrajhar Court.

Dictated & corrected by me

Special Judge, Kokrajhar Special Judge, Kokrajhar 15

Appendix

The prosecution witnesses are:

PW 1 Miss Deepa Debnath (Victim), PW 2 Sri Pradip Kr.Debnath (Informant), PW 3 Md Majibar Rahman, PW4 Sri Debanan Roy, PW5 Smti Mamata Shill, PW6 Sri Jayanta Kumar Roy and PW7 S.I. Pankaj Kr.Ray.

<u>The Court Witness is</u>: Nil <u>The Defence witness is</u>: Nil.

The exhibited documents are:

- 1. Ext-1 ... Statement of witness victim recorded us/164 Cr.P.C.,
- 2. Ext.2 ... FIR,
- 3. Ext.3 ... charge sheet,
- 4. Ext.4 ...GD Entry.

The Defence witness and exhibit: Nil.

Special Judge, Kokrajhar