#### IN THE COURT OF THE SPECIAL JUDGE, BARPETA

Special POCSO Case No. 57 of 2017 (Arising out of G.R. Case No.447/2016) U/S 18 of POCSO Act.

PRESENT: Sri Chatra Bhukhan Gogoi

Special Judge, Barpeta.

Charge framed on: - 25.04.2018

State of Assam

- Vs -

Abdul Latif......Accused.

Date of Recording Evidence on - 16.05.2018, 27.07.2018, 10.08.2018.

Date of Hearing Argument on - 20.02.2019

Date of Delivering the Judgment on - 27.02.2019

# Appearance:

Advocate for the State------Mrs. P. Das, Ld. Addl. P.P. Advocate for the Accused------Mr. F. Rahman, Ld Advocates.

### **JUDGMENT**

- 1. The prosecution case, in brief, is that on 24.01.2016, one Halida Khatun lodged an ejahar in Barpeta police station alleging inter-alia that on the same day at about 12-30 pm accused Abdul Latif named in the FIR allegedly took her sister-in-law (herein after referred her as (X)) aged about 13 years to the back of the medicine shop and subjected her sexual assault. It is further alleged that accused No.2 Rabiul Islam who was also present in the shop was also involved in the incident of sexual assault on the victim has been happening with his knowledge. When the girl returned home weeping and narrated her ordeal, they came to know about it. It is further stated that accused is a married person having children but he pushed the feature of the girl to uncertainty by indulging in such illegal act. Hence the case for taking the action in accordance with law.
- 2. Following the information as above, Barpeta police station registered a case being Barpeta PS case No.192/16 u/s 448 IPC and Section 4 of Protection of children from Sexual Offences Act, 2012 and took up investigation.
- 3. During the course of investigation, police visited the place of occurrence, drew sketch map, recorded the statement of the witnesses, sent the victim girl to court for recording her statement before Magistrate u/s 164 Cr.P.C. Victim girl was also examined

by doctor. Thereafter, police also arrested the accused person and on completion of investigation finally laid the charge sheet against accused u/s 448 IPC and Section 18 of POCSO Act, 2012 with a view to stand trial.

- 4. In the course of time, accused entered his appearance in court to face trial. On his appearance, after due compliance of section 207 Cr.P.C. and hearing the learned lawyers appearing for both sides and perusing the materials on record the then Hon'ble Special Judge vide order dated 25.04.2018 framed charge u/s 18 of POCSO Act, 2012. The particulars of the offence on being read over and explained accused pleaded not guilty and claimed trial.
- 5. During the course of trial, the prosecution in order to substantiate the charge examined as many as 8 witnesses including the informant, the victim, medical officer as well as the investigating officer.
- 6. Concluding prosecution evidence, accused was examined u/s 313 Cr.P.C. in which accused denied the prosecution evidence as false and concocted. However, on being asked accused declined to adduce defence evidence. His plea is total denial of the prosecution case.

## 7. Now point for determination ;-

1. Whether on 24.01.2016 at about 12:30 pm accused with sexual intent touches the breast and vagina (private part of the victim) or did any other act with sexual intent involving physical contact without penetration as alleged?

### 8. **Discussion, Decision and reasons for such decision** :-

I have heard the learned lawyers appearing for both sides and also carefully perused the evidence available on record for arriving at a just decision in the case..

- 9. Before deliberating on the evidence available on record, it is useful to discuss about the Protection of Children from Sexual Offences Act, 2012.
- 10. The Protection of Children from Sexual Offences Act, 2012 deals with sexual offences against persons below 18 years of age, who are deemed as children. The act for the first time, defines "Penetrative sexual assault", "sexual assault" and "sexual harassment". The offence is considered graver if it is committed by a police officer, public servant, any member of the staff at a remand home, protection or observation home, jail, hospital or educational institution, or by a member of the arm or security forces. The act has come into force on the 14th of November, 2012 along with the rules framed thereunder. The act is a comprehensive law to provide for the protection of children from the offences of sexual assault, sexual harassment and pornography, safe guarding the interests of the children at every stage of the judicial process by incorporating children friendly mechanism, for reporting, recording of evidence,

investigation and speedy trial or offences through appointment of Special Public Prosecutions and designated special courts, the act incorporate children friendly procedures of reporting; regarding investigation and trial of offences. The act provides stringent punishment which has been graded as per the gravity of the offence.

- 11. In the above object in view, the POCSO Act has been passed by Parliament to contain ever increasing sexual offences against children.
- 12. Now, let me read the evidence of the prosecution witnesses to decide as to whether the offence alleged against accused has been established or not.
- 13. In her evidence PW-4 the alleged victim deposed that the incident occurred at about 12:30 pm when she visited the shop of accused Rabiul nearby her house. When she approached nearby the shop accused took her to the backside room by addressing her as "Bhanti" and then wrapped her mouth with a handkerchief so that she cannot shout. Though she tried to came out of the room but accused pulled her inside and then threatened her to kill if she tried to shout. Then accused torn her frock and tried to commit rape on her. Then she shouted loudly and hearing her, sister-in-law Halida Khatun rushed there and saw the accused fled away. She then came to the house along with Halida Parbin and narrated her ordeal to her parents. Then her sister-in-law filed the case. During the course of investigation police took her for medical examination and recorded her statement before Magistrate. Ext.3 is the said statement and Ext.3(1) and 3(2) are her signature.
- 14. In her cross examination she deposed that the incident occurred in the shop of Siraj who is the father of Rabiul. The shop was rented to Siraj by her father. She also stated that regarding the matter Rabiul compromised in the meeting but Latif did not. She further deposed that though there are several shops in the area but most of the shop were closed, as, during that time people went to Masjid for Namaj so the presence of people in the area usually less. She further stated that accused torned her frock but police did not collect it. She denied the defence suggestion that she did not state before police that accused took her to the back side room and by putting her mouth shut with handkerchief tried to commit rape and in the process torned her frock. She further stated that her father is available in the house and he is a normal person but case was filed by her sister-in-law. In her statement before Magistrate she stated that she was wearing suridar not frock.
- 15. On perusal of her statement before Magistrate u/s 164 Cr.P.C. (Ext.3) it appears that she narrated the story in a very candid and clear manner except the minor discrepancy that at that time she was wearing suridar not frock. It is seen from her statement that on the day of incident when she went to the shop of accused at about 12:30 pm accused called her inside by addressing her as "bhanti" and then shut her mouth with handkerchief tightly, so, that she can't shout and then tried to remove her inner wear, grabbed her, and tried to commit rape on her. In the process accused roped her neck tightly with handkerchief and as a result of pull and push, she suffered injuries on her neck for which there was bleeding. When accused tried to commit rape on her

she somehow shouted and hearing her she was rescued by her sister-in-law Parbin. Then accused was caught but leaving him in the shop when they went to the house to call her mother accused Latif then fled away.

- 16. Now, it is to be seen to what extent the other prosecution witnesses supported the version of the alleged victim.
- 17. PW-1 is the medical officer, doctor Bharati Das who examined the victim on 25.01.2016 and on examination she found abrasion injury in front of her neck, bruises on the left shoulder and on X-ray investigation found her age to be above 14 years and below 16 years.
- 18. PW-2 is Halida Khatun, who is the informant of the case. According to her on 24.01.2016 at about 12:30 pm her sister-in-law (the victim girl) went to the shop of accused then accused Latif took her to the backside room and subjected her sexual assault. Hearing her shout she rushed there and witnessed the incident. Then one Rabiul was also sitting in his shop but then she took the victim to the house and narrated the story to other family members. At that time the girl was aged about 13 years and she was reading in Class VIII. Ext.2 is the FIR and Ext.2(1) is her signature.
- 19. In her cross examination she stated that the shop belonged to her father-in-law who rented it to Rabiul and he partitioned the room into two and the back side room has been used for sitting of doctor. In the colony area, there are around 200 shops but at the time of incident most of the shops remained closed. Though accused torn the wearing clothes of the victim but she cannot say whether police took it or not.
- 20. PW-3 is Eayed Ali who deposed that the incident occurred at the time of noon. He then went to Masjid for Namaj and on his return victim told him that accused took her to the backside room and did bad thing with her.
- 21. In his cross examination he stated that there was meeting of the society regarding the matter. He denied that he depose false evidence.
- 22. PW-5 Rumiya Begum @ Khatun, PW-6 Sakina Begum and PW-7 Ramjan Ali also deposed in the same vain. Though they were subjected to intense cross examination by learned defence counsel but failed to discredit them in material particulars.
- 23. PW-8 is Gour Ch. Mandal, the I/O who also deposed that based on the information received on 24.01.2016, case was investigated, victim was examined u/s 164 Cr.P.C. before Magistrate and also physically examined before doctor and having found material against accused during the course of investigation charge sheeted the accused u/s 448 IPC and section 18 of POCSO Act, 2012 with a view to face trial.
- 24. Now, based on the evidence available on record, the learned Addl. P.P. submitted that it is a fit case for recording conviction of accused u/s 18 of POCSO Act, as the act of the accused clearly proves that he committed the offence prescribed u/s 18 of the POCSO Act.
- 25. It is submitted that the evidence of victim is found genuine, natural and worthy of credit and there is no reason to disbelieve the evidence of the victim and other witnesses. The incident was clearly narrated by the victim girl as well as her mother

duly supported by other prosecution witnesses. Therefore, the learned Addl. P.P. vehemently submitted that it is a fit case for sustaining conviction u/s 18 of POCSO Act.

- 26. On the other hand, the learned counsel Mr. Faijur Rahman appearing for the accused vehemently disputed the submission of the learned Addl. P.P. contending inter alia that there is no eye witness to the alleged occurrence. The evidence of prosecution witnesses particularly the evidence of alleged victim girl is found to be highly suspicious which does not convinced the mind of a reasonable man about the truth or credibility of her evidence. Since there is no eye witness and evidence of alleged victim was also found to be not trustworthy, therefore, it is totally unsafe to record conviction of accused u/s 18 of POCSO Act.
- 27. It is submitted that the case has been filed against accused only on personal grudge and great prejudice will be caused to accused if convicted. As such, the learned counsel for the accused strongly argued that it is a fit case where judgment of acquittal can be recorded in favour of accused.
- 28. Having heard the arduous contention of the learned lawyers appearing for both sides and on careful examination of the evidence of the prosecution witnesses particularly the evidence of the alleged victim girl, this court failed to accept the contention of the learned counsel appearing for the accused person.
- 29. In her statement recorded before Magistrate (Ext.3) which has been recorded at the earliest opportunity, the victim girl clearly stated that on the previous day of recording her statement before Magistrate while she was waiting in front of the shop nearby her house at about 12:30 pm accused Latif called her by addressing her as "Bhanti" (sister). When she approached him he pulled her on the backside room of his shop and then wrapped her mouth with handkerchief tightly so that she can't shout and then removed her suridar and he also tried to remove her pant (inner wear) and embrassed her with a view to have sex with her. Accused then pulled the handkerchief as a result, she suffered injuries on her neck and blood coming out. When accused tried to commit rape (bad thing) on her she somehow shouted and then hearing her, her sister-in-law Halida Khatun (PW-2) came and caught Latif. Thereafter, when they went to house to call her mother by keeping Latif in the shop he fled away. In her evidence in court the alleged victim girl (PW-4) clearly reiterated what has been stated by her before the Magistrate u/s 164 Cr.P.C. The evidence of the victim girl has been supported by PW-1 doctor who attended her and also by PW-2 Halida Khatun who, hearing the shout of the victim, rushed to the shop and rescued the girl while accused were trying to sexually assault her inside the shop. The doctor who attended her also deposed that as per X-ray investigation the age of the victim girl is above 14 and below 16 years of age and the girl in her evidence in court mentioned her age as 15 years and she stated her age 13 years when Magistrate recorded her statement u/s 164 Cr.P.C. on 25.01.2016 about two years back from the date of her deposition. Therefore, one fact is crystal clear that the girl was admittedly minor at the time of the alleged incident.

- 30. It is to be noted that though prosecution has not produced and proved the birth certificate of the girl but the consistent evidence of the victim girl regarding her age at the time of incident i.e. statement before Magistrate u/s 164 Cr.P.C., before police u/s 161 Cr.P.C. and before court as witness she consistently stated her age supported by medical evidence which shows that at the relevant time the girl was around 15 years of age. Therefore, as regards the minority of the girl at the time of incident is undoubtedly proved beyond all reasonable doubt.
- 31. The fact that accused committed the offence as alleged by the girl is relevant u/s 8(j) of Indian Evidence Act, as shortly, after the incident the girl narrated her ordeal to Halida Khatun (PW-2) and also lodged the FIR relating to the crime in the police station narrating the manner in which accused committed the crime against the girl. So, the fact that the girl was ravished or sexually assaulted by accused stood proved. The evidence of the victim girl corroborated by the evidence of PW-1 doctor regarding her minor injuries suffered on her neck during the process of the incident and the evidence of PW-2 that hearing the shout of the victim she rushed to the spot and recovered her and then filed the FIR (Ext.2) clearly shows that it was accused Abdul Latif who committed the crime. The injuries of the girl shows that she escaped from the crudgel of accused after a struggle.
- 32. The contention of the learned defence counsel that the place where the incident took place is a busy area where there are around 300 shops as deposed by PW-5 it is unlikely that accused can commit such a crime against the girl that too in broad day light is discarded by this court, in view of the evidence of the victim girl as well as the evidence of other witnesses to the effect that the time of incident was around 12:30 pm and at that time shops were usually remained closed except one or two. The presence of people increase in the morning and in the evening not in the noon. Moreover, victim girl in her statement clearly stated that accused addressed her as "Bhanti" and immediately thereafter, pulled her inside the doctor's chamber in his pharmacy and committed the offence against her. Under such a situation, even if it is assumed that there were other people in the locality but it is not expected that they should know each and every happening in the locality. All are busy in their own business and it is not their business to mind who is doing what. Normally when a customer approach a particular shop others would not mind what is going on inside the shop of others.
- 33. In the instant case, as deposed by the victim, accused immediately whisked away the girl inside the room of doctor and committed the offence against her that too by putting her mouth shut. Moreover, the victim and accused are known person as the shop where the incident took place belongs to father of the victim which is adjacent to their house. Therefore, these is no scope for doubting by other person in the locality that accused would commit such an offence against the girl. The evidence of PW-3 Eayed Ali also fully corroborated the evidence of the victim girl as according to him while he was returning from Masjid the victim girl told him weeping that when she went

to the pharmacy accused Latif took her on the backside of the room and did the bad things. It is seen that prosecution altogether examined as many as 8 witnesses and all the prosecution witnesses in no uncertain terms stated that accused committed the offence against the girl on 21.01.2016 taking the opportunity of her loneliness. Though the learned defence counsel cross examined the prosecution witnesses but failed to discredit them in material particulars. The minor omission by PW-2, PW-6 and PW-7 in narrating the fact to police u/s 161 Cr.P.C. does not weaken the prosecution case. As the victim girl in her evidence clearly stated that accused grabbed her tried to remove her pant with a view to sexual assault and also torned her clothes which has been corroborated by other witnesses. The PW-3 Eayad Ali stated that the victim girl told her that accused committed bad things with her. PW-4 also stated that the victim girl stated her the fact of incident. PW-5 Rumiya Begum @ Khatun who is the mother of the victim girl also stated that the girl narrated her ordeal immediately after the incident. PW-6 Sakina Begum and PW-7 Ramjan Ali also supported the version of the victim. Therefore, there is no reason to discard or disbelieve the evidence of the prosecution witnesses as regards the incident.

- 34. In this context, this court can also take the aid of section 29 of POCSO Act which provides that for the prosecution for committing or abating or attempting to commit any offence u/s 3,5,7 and section 8 of this Act Special Court shall presume, that such person has committed or abated or attempted to commit the offence unless contrary is proved.
- 35. In the instant case, in the considered estimation of this court even though the defence counsel duly cross examined all the prosecution witnesses but failed to elicit a different story contrary to what has been stated by the victim girl. It is to be noted that the nature of sexual offences against the minor has been increasing at alarming rate and it is also seen that such kind of offences are usually committed by known and close persons rather then by strangers. In the instant case, given the narration of the victim supported by evidence of other witnesses it appears that the girl is well known to accused and taking advantage of this the girl unsuspectingly approach him when he call her as "Bhanti" and then he took her inside the room with a view to sexually exploit her but due to her timely hue and cry she some how escaped from the cuddle of accused. Therefore, the presumption as provided u/s 29 of the act can well to be drawn in the instant case that accused committed sexual offence against the victim girl in the absence of the contrary.
- 36. In this context, it would be appropriate to refer to section 18 and 8 of POCSO Act which reads as under:

<u>"Section 18 of POCSO Act:</u> provides that 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 of any description provided for the offence, for a term which may extent to half of the imprisonment for life or, as the case may be half of the longest

term of imprisonment provided for that offence or with fine or with both".

- 37. **Section 8 punishment for sexual assault:**Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less then 3 years but which may extent to 5 years and shall also be liable to fine. The punishment u/s 8 has been prescribed on the basis of acts defined in section 7 which reads as under:
- 38. **Section 7 sexual assault:-** Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.
- 39. In section 2 (i) defines "sexual assault" as follows:-

Section (I):-"Sexual assault" has the same meaning as assigned to it in section7.

In the above backdrop, the definition of offence "sexual assault" has to be read in conjunction with section 7 of POCSO Act, 2012.

- 40. If we carefully read the evidence of the victim girl supported by evidence of other prosecution witnesses the act of the accused clearly falls u/s 7 of POCSO Act as the act/acts done by accused clearly fall within the periphery of the last part of section 7 which reads as -or "does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault".
- 41. In the present case, as clearly described by the victim girl which carries great significance the act of the accused is impregnated with sexual intent involving physical contact with the girl as he whisked away the girl inside the room of his pharmacy with sexual intent by addressing her as "Bhanti" and wrapped her mouth with handkerchief, tried to remove her pant, torned her frock in the process come into bodily contact with the girl which clearly amounts to commission of offence u/s 8 of the act.
- 42. Though in the instant case charge was framed us 18 of the Act but after careful consideration of the evidence on record, this court found the accused guilty u/s 8 of POCSO Act instead of section 18. Since the offence punishable u/s 8 of POCSO Act is punishable lesser in degree then the offence punishable u/s 18 of the POCSO Act, so Under Section 222(2) Cr.P.C. there is no legal impediment in convicting the accused person u/s 8 of the POCSO Act even though no charge was framed u/s 8 of the POCSO Act.
- 43. In view of the above, discussion and reason accused is found guilty u/s 8 of POCSO Act. Accordingly, he is convicted for the aforesaid section.
- 44. I have considered the provision of section 360 Cr.P.C. but after due consideration of the attending facts and circumstances of the case and the age of the accused the nature of the offences committed, this court is not inclined to extend the benefit of Probation of Offenders Act in favour of accused.

#### SENTENCE HEARING

- 45. I have heard the accused persons on the point of sentence as provided u/s 235(2) Cr.P.C. It is submitted that accused person hails from very poor strata of society and survives by doing labour. He is very young and married. So, in the event he is put behind bar his innocent family members would suffer a lot. Hence, accused pleaded clemency.
- 46. Heaving considered all the attending facts and circumstances and the extenuating and mitigating circumstances of the case and the punishment prescribed in section 8 of POCSO Act, 2012 accused is convicted and sentenced to undergo Rigorous imprisonment for a term of 5 years (five years) and fine of Rs.1000/- (one thousand) i/d S/I for 3 three months.
- 47. The period of detention, if any, undergone by accused during the course of investigation, enquiry or trial shall be set off against the term of imprisonment as provided u/s 428 Cr.P.C.
- 48. Let a copy of the judgment be furnished to accused person free of cost as provided in section 363 Cr.P.C.
- 49. Let copy of the judgment be forwarded to the learned District Magistrate, Barpeta as provided in section 365 Cr.P.C.
- 50. Let the case record be consigned to record room after completing the formalities.
- 51. Given under my hand and seal of this Court on this 27th day of February 2019.

Dictated & Corrected my me

Sd/-(Sri C.B. Gogoi) Special Judge, Barpeta Sd/-(Sri C.B. Gogoi) Special Judge, Barpeta

## **APPENDIX**

- 1. The prosecution has examined the following 8 nos. of witnesses :-
- PW-1 = is doctor Bharati Das, the M/O.
- PW-2 = is Halida Khatun, the informant.
- PW-3 = is Eayad Ali.
- PW-4 = is victim (X).
- PW-5 = is Rumiya Begum @ Khatun.
- PW-6 = is Sakina Begum.
- PW-7 = is Ramjan Ali.
- PW-8 = is Gour Ch. Mandal, the I/O.
- 2. The prosecution has exhibited following document :-
- Ext.1 = is the medical report.
- Ext.= 1(1) & 1(2) = are the signatures of doctor Bharati Das.
- Ext.2 = is the FIR.
- Ext.2(1) = is the signature of informant Halida Khatun.
- Ext.3 = is the 164 Cr.P.C. statement of victim.
- Ext.3(1) & 3(2) = are the signatures of victim.
- Ext.4 = is the sketch map.
- Ext.4(1) = is the signature of I/O.
- Ext.5 = is the charge sheet.
- Ext.5(1) = is the signature of I/O.

Sd/-

(Sri C.B. Gogoi) Special Judge, Barpeta.