IN THE COURT OF SPECIAL JUDGE ::::::: BILASIPARA

Present: Shri J. Borah, AJS

Special Judge, Bilasipara

Special (POCSO) Case No- 05 of 2017

u/s 4 of Protection of Children from Sexual Offences Act

State of Assam

-Vs-

Nur Alom Seikh

..... accused person

Date of framing charge :- 09-06-2017

Date of recording evidence :- 04-08-2017

26-02-2019

12-03-2019

30-08-2019

Date of Argument :- 22-08-2019

02-09-2019

Date of Judgment :- 05-09-2019

Advocates Appeared:

For the State of Assam :- Mr. T. Kr. Bhattacharya, Ld. Addl. P.P

for the State of Assam

For the defence :- Mr. R. Dasgupta,

Ld. Advocate for the accused.

JUDGMENT

1. This case is under section 4 of Protection of Children from Sexual Offences Act. So, the name of the victim is not mentioned here and she is referred to, hereinafter, as 'x'.

2. The prosecution case, in brief, is that Smti Thumki Lohar, the informant lodged an ejahar with the Chapar police station informing that 'x' is the daughter of the informant. 'x' was 13 years old at the time of occurrence. On 03-03-2017 at about 07.00 in the morning 'x' went to Krishnakali tea garden. The accused Nur Alom Seikh was waiting with his auto rickshaw for passenger nearby the Hasdoba M.E School. 'x' got into the auto of the accused to go to Krishnakali brick field. The accused Nur Alom Seikh gagged the mouth of 'x' and dragged her to the garden where he committed rape on her. 'x' raised hue and cry. The nearby people went to the place of occurrence and saw the occurrence. They caught hold of the accused Nur Alom Seikh and handed over him to the police.

So, the informant prayed for taking necessary action against the accused Nur Alom Seikh.

- 3. The Chapar police station received the ejahar and registered as Chapar police station case no. 80/2017 u/s 4 of Protection of Children from Sexual Offences Act, in short POCSO Act. The case was investigated and having found prima facie case u/s 4 of POCSO Act against the accused Nur Alom Seikh, prepared the charge sheet and laid the same before the court for trial.
- 4. The accused Nur Alom Seikh, hereinafter called the accused, appeared in this case and he was furnished copy. Charge was framed u/s 4 of POCSO Act against the accused. The charge was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.
- 5. The prosecution, in order to bring home the charge against the accused, examined 7 (seven) witnesses, namely-

1.	Dr. Jyoti Kr. Nath	P.W-1
2.	Domoro Uraw	P.W-2
3.	Thumki Lohar	P.W-3
4.	Dipak Ray	P.W-4
5.	Abhijit Thapa	P.W-5
6.	Soleman Ali Ahmed	P.W-6
7.	Dr. Anjana Chakrabarty	P.W-7

- 6. The alleged victim girl 'x' is examined as court witness C.W-1.
- 7. The accused was examined u/s 313 Cr.P.C and his statement was recorded where he denied all allegations levelled against him in the evidence

adduced by the prosecution witnesses and also claimed to adduce evidence in defence.

8. Heard argument for both sides.

9. **POINTS FOR DETERMINATION**

i. Whether accused on 03-03-2017 at about 07.00 A.M at Krishnakali Tea Estate under Chapar police station committed penetrative sexual assault on 'x', a minor girl?

DECISION AND REASONS THERE OF

- 10. In this prosecution case P.W-3 Thumki Lohar is the informant. P.W-2 Domoro Uraw, P.W-4 Dipak Ray, P.W-5 Abhijit Thapa are independent witnesses. P.W-1 Dr. Jyoti Kr. Nath and P.W-7 Dr. Anjana Chakrabarty are Medical & Health Officers. P.W-6 Soleman Ali Ahmed is the investigating officer and C.W-1 'x' is the alleged victim.
- 11. Since P.W-3 Thumki Lohar is the informant and C.W-1 'x' is the alleged victim, both are the prime witnesses in this case. Now, let us see the evidence of this two witnesses.
- 12. P.W-3 Thumki Lohar has stated in her evidence that she is the informant in this case. 'x' is her daughter. She knows the accused. Her daughter 'x' told her that the accused dragged her to the jungle and when she raised hue and cry, the people gathered there.

In her cross P.W-3 has stated that she failed to recollect the date of the occurrence. There are many houses nearby the place of occurrence. 'x' is a minor. P.W-3 has denied that the accused is an innocent and he is no way involved with the occurrence.

13. C.W-1 'x' has stated in her evidence that the informant Thumki Lohar is her mother. She knows the accused. She works in the brick field at Krishnakali. She goes to brick field by auto. The occurrence took place one year ago (from the date of adducing her evidence on 12-03-2019). On the day of occurrence she went to brick field for her daily wage work. On her way, she saw the accused waiting at the auto stand on the road for the passengers. She asked the accused to take her to Krishnakali. Accordingly, she got in to the auto. The accused gave her ill signal and asked her to

surrender to him, or he would kill her. Thereafter, the accused gagged her mouth and dragged her to the tea garden. At that time there were no other people. The accused committed rape on her inside the tea garden. She raised hue and cry. Three persons went there. They caught hold of the accused. She narrated the occurrence to her mother. She gave her statement before the Magistrate.

In her cross C.W-1 has stated that the accused gagged her mouth with his one hand and caught her hand with another hand. The name of the accused is not known to her. C.W-1 has denied that the accused did not threaten her nor he committed rape on her. She denied that she did not get into the auto of the accused. C.W-1 has also stated that she tried to make herself free from the clutch of the accused, but she could not.

14. Thus, minute scrutiny of evidence of P.W-3 Thumki Lohar and C.W-1 'x' shows that P.W-3 Thumki Lohar is the informant. She got to know about the occurrence from her daughter 'x'. This evidence of P.W-3 is supported by C.W-1. C.W-1 says in her evidence that she told her mother all about the occurrence. So, in this respect there found corroboration in the evidence of P.W-3 and C.W-1.

Secondly, P.W-3 has stated in her evidence that on her way to Krishnakali, the accused dragged 'x' to jungle. This evidence of P.W-3 is supported by C.W-1. C.W-1 has stated that the accused caught hold of her, gagged her mouth with one hand and dragged her to the tea garden. So, the evidence of P.W-3 and C.W-1 corroborated to each other that the accused dragged 'x' to the tea garden.

15. C.W-1 'x' is the alleged victim. She has categorically stated in her evidence that on the day of occurrence she was going to brick filed at Krishna kali. On her way, she found the auto of the accused and asked him to go to Krishnakali brick field. On her way, the accused gave her bad signal and asked her to surrender her body. The accused then caught her and dragged her to the tea garden where he committed rape on her. She tried to resist him but she could not.

The evidence of C.W-1 is quite spontaneous. There found no discrepancies in her evidence. C.W-1 is an illiterate and naive girl. She hails from interior country side. She works as labour. Moreover, she is a minor girl. But her evidence is quite ludic. The defence has failed to detract her

evidence except some suggestions. But such suggestions are sternly denied by C.W-1.

- 16. Since C.W-1 has stated in her evidence that she raised hue and cry and hearing her cries, people gathered at place. So, let us see whether this evidence of C.W-1 is supported by any witness examined by the prosecution.
- 17. P.W-2 Domoro Uraw has stated in his evidence that he knows the informant. He also knows the accused. On the day of occurrence he was doing exercise. He heard cries of 'x' and accordingly he went to Chapar tea Estate. He saw the accused with the victim 'x' and he was committing rape on her. Other people also reached there.

In his cross P.W-2 has denied that he has adduced false evidence. P.W-2 has also denied that the accused did not commit rape on 'x'.

18. P.W-4 Dipak Ray has stated in his evidence that he knows both the informant and the accused. The occurrence took place on 03-03-2017. The accused committed rape on 'x' in the Chapar Tea estate. He saw the accused to commit rape on 'x'. There was hue and cry at the place of occurrence and the people gathered at the place of occurrence.

In his cross P.W-4 has stated that his house is the nearest to the place of occurrence. Hearing hue and cry of 'x', he went there. He did not see Indra Bahadur Thapa, Surke Lama and Ram Uraw at the place of occurrence.

19. P.W-5 Abhijit Thapa has stated in his evidence that he knows both the informant and the accused. The occurrence took place on 03-03-2017 at about 06.35 A.M. He was walking inside the Chapar tea garden. He saw the accused to commit rape on 'x'. People gathered at the place of occurrence. The people caught hold of the accused.

In his cross P.W-5 has stated that his house is a little distance from the place of occurrence. He denied to depose false evidence. P.W-5 has also denied that no such occurrence took place.

20. Thus, careful scrutiny of evidence of P.W-2, P.W-4 and P.W-5 shows that all the witnesses know both the informant and the accused. The houses of P.W-2, P.W-4 and P.W-5 are near by the place of occurrence. The witnesses P.W-2 and P.W-5 were doing exercise and P.W-4 was walking in the garden. All of them heard cries of 'x', rushed to the place of occurrence and saw the accused to commit rape on 'x'. All of them have stated in the

same tune that other people also gathered there. The defence has failed to demolish the evidence of P.W-2, P.W-4 and P.W-5. The defence gave some suggestions but the said suggestions were sternly denied by this witnesses. The evidences of P.W-2, P.W-4 and P.W-5 are quite spontaneous and free from all discrepancies. The evidence of P.W-2, P.W-4 and P.W-5 remained intact and the defence has failed to detract the said evidence.

Being the said position of evidence of P.W-2, P.W-4 and P.W-5, there is no help but to accept the said evidence.

21. Thus, the evidence of C.W-1 that people went to the place of occurrence and saw the occurrence is supported by P.W-2, P.W-4 and P.W-5. P.W-2, P.W-4 and P.W-5 have supported the evidence of C.W-1 that people gathered at the place of occurrence and saw the occurrence. There is no gulf between the evidence of C.W-1 and P.W-2, P.W-4 and P.W-5.

Learned advocate Mr. R. Dasgupta, for the defence has submitted that according to the evidence of P.W-2, P.W-4 and P.W-5, they saw the accused and 'x' in a standing position. They did not see to commit rape on 'x'. So, their evidence is not specific whether there was rape or not.

In the cross P.W-2, P.W-4 and P.W-5 have stated they found the accused and 'x' in standing position. But they found both of them inside the garden. Question arise, why the accused took 'x' to the garden. The answer does not favour the accused.

22. Now, let us see the evidence of P.W-7 Dr. Anjana Chakrabarty, the Medical & Health Officer.

P.W-7 Dr. Anjana Chakrabarty has stated in her evidence that he examined 'x', a 13 years old female and found as follows:

General examination:- Orientation- ok; Pulse: 80 p.m; Blood pressure- 120/80; Temperature- normal; local finding of genital part-normal; hymen- intact; no fresh injury or bleeding, tear, discharge in vagina & cervix; anus- normal; laboratory examination of vaginal swab- could not detect spermatozoa; clinical opinion- not consistent with recent sexual intercourse or assault. Ext-8 is medical report. Ext-8(1) is his signature.

In her cross P.W-7 has stated that he has not mentioned the police requisition in her report.

23. Thus, the evidence of P.W-7 shows that she found 'x' not consistent with recent sexual intercourse. When C.W-1 has consistently stated in her

evidence that the accused committed rape on her and her evidence has been supported by P.W-2, P.W-4 and P.W-5. In such a situation, question of disbelieving the evidence of C.W-1 and P.W-2, P.W-4 and P.W-5 does not arise. The evidence of Medical & Health Officer is mere an opinion. The opinion of a Medical & Health Officer cannot rule out the evidence of a victim or injured.

In Ram Swaroop -vs- State of Rajasthan, 2008, Cri. L.J 2259 SC, the Hon'ble Supreme Court observed as follows:

"8. So far as the alleged variance between medical evidence and ocular evidence is concerned, it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as claimed to have been inflicted as per the oral testimony, then only in a given case the Court has to draw adverse inference."

"9. Over dependence on such opinion evidence, even if the witness is an expert in the field, to checkmate the direct testimony given by an eyewitness is not a safe modus adoptable in criminal cases. It has now become axiomatic that medical evidence can be used to repel the testimony of eyewitnesses only if it is so conclusive as to rule out even the possibility of the eye witness version to be true. A doctor usually confronted with such questions regarding different possibilities or probabilities of causing those injuries or post-mortem features which he noticed in the medical report may express his views one way or the other depending upon the manner the question was asked. But the answers given by the witness to such questions need not become the last word on such possibilities. After all he gives only his opinion regarding such questions. But to discard the testimony of an eyewitness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice."

In this case instant, C.W-1 'x' has evinced that the accused committed rape on her. 'x' is minor girl of 14 years, she is an illiterate girl. She had no enmity with the accused. The defence has failed to point out any other reasons as to why such a naive girl will entangle the accused to such criminal offence. Being the said position of evidence of C.W-1, it is not easy to reject her evidence and to accept the opinion of a Medical & Health Officer. Accordingly, the evidence of P.W-7 is not accepted.

24. Now, let us see whether 'x' is a minor i.e under 18 years old.

P.W-3 Thumki Lohar has scribed in the ejahar that 'x' was 13 years old at the time of occurrence. P.W-3 has stated nothing in her evidence about the age of 'x'.

C.W-1 'x' has mentioned her age to be 14+ while she adduced before this court.

The age of 'x' is not challenged by the defence. No a single question was put either to P.W-3 or C.W-1 by the defence. So, the age of 'x' remained unchallenged. According to C.W-1 'x' she did not go to school. So, no educational certificate can be expected. P.W-7 Medical & Health Officer has also not determined the age of 'x'. The prosecution has not examined any other witness in support of her age.

Considering all aspects, it leads conclusion that x' was below 18 years at the time of occurrence.

25. P.W-6 Soleman Ali Ahmed is the investigating officer. In his evidence P.W-6 has stated that he got verbal information and accordingly he went to Krishnakali Chaibari Tea Estate. 'x' was kept in a house. 'x' informed him that the accused committed rape on her. The accused was kept in a school field. He took the accused into his custody. He recorded the statement of the witnesses. The victim was examined by the Medical officer. The statement of 'x', the victim was recorded by the Magistrate. After end of investigation, he laid the charge sheet before the court. Ext-2 is the ejahar, Ext-3 is the sketch map, Ext-4 is the seizure list, Ext-6 is the charge sheet.

In his cross P.W-6 has stated that he visited the place of occurrence immediately after receiving the ejahar. He did not seize the wearing of the victim. He denied to record the statements of interested persons.

26. Thus, the evidence of P.W-6 reveals that he went to the place of occurrence immediately after the occurrence. He found the victim in the courtyard of a house and the accused in the school field. The accused was caught hold by the public.

The defence has failed to demolish the evidence of P.W-6. So, there found nothing to discard the evidence of P.W-6.

27. Now, let us see the section 3 and 4 of POCSO Act.

Section 3 read as follows:

"3. Penetrative sexual assault.-

A person is said to commit "penetrative sexual assault" if-

- a. he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- b. he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- c. he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- d. he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

Section 4 read as follows:

"4. Punishment for penetrative sexual assault.-Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine."

Child is defined in POCSO Act as follows:

"(d) 'child' means any person below the age of eighteen years"

In this prosecution case, the alleged victim is below the 18 years. She was committed penetrative sexual assault by the accused. The prosecution evidence is sufficient and convincing to prove all this ingredients. The defence has failed to demolish the prosecution case.

- 28. Thus, the prosecution has proved it's case u/s 4 of POCSO Act against the accused beyond all reasonable doubt.
- 29. Held, the accused is guilty u/s 4 of POCSO Act.
- 30. Now, let us see whether the accused is entitled to benefit u/s 360 of Cr.P.C or Sec. 3/4 of Probation of Offenders' Act.

The offender committed the offence against a minor girl. The felony as perpetrated by the accused is of heinous nature. If the accused is given

such benefit, the administration of justice would be severely affected and the offender will be encouraged.

Taking such view, the accused is not given such benefit.

31. Heard the accused on the point of sentence u/s 235(2) of Cr.P.C.

The accused has submitted that he has ailing mother aged about 70 years old and children to look after and he is the sole bread earner, so prayed for taking lenient view.

32. Taken all into consideration, it would be justified and reasonable if the accused is given a reasonable penalty.

Accordingly, the accused is convicted and sentenced to R.I for 7 years with fine Rs. 3000/- in default of fine he shall undergo R.I for another period for 1 (one) month u/s 4 of POCSO Act. Sentence will run concurrently.

- 33. Set off the previous hazotee period, if any.
- 34. Since 'x' is the victim of heinous crime. A minor girl suffered in the hand of evil, so, she entitled to compensation u/s 357(1) Cr.P.C.

The District Legal Service Authority is informed to pay compensation to the victim 'x' determining the quantum.

35. Let a free copy of Judgment & order be given to the accused.

The case is disposed of.

Given under my hand and seal by this court on this 05th day of September, 2019 at Bilasipara, Dist- Dhubri.

(Shri J. Borah)

Special Judge, Bilasipara

Transcribed & typed by,

S. Brahma, Stenographer Gr. III.

APPENDIX

PROSECUTION WITNESSES:-

P.W-1 Dr. Jyoti Kr. Nath

P.W-2 Domoro Uraw

P.W-3 Thumki Lohar

P.W-4 Dipak Ray

P.W-5 Abhijit Thapa

P.W-6 Soleman Ali Ahmed

P.W-7 Dr. Anjana Chakrabarty

PROSECUTION EXHIBITS:-

Ext-1 Medical report,

Ext-2 Ejahar,

Ext-3 Sketch Map,

Ext-4 Seizure list,

Ext-5 Zimma-nama,

Ext-6 Charge sheet,

Ext-7 Statement of 'x' recorded u/s 164 Cr.P.C,

Ext-8 Medical report.

DEFENCE WITNESSES:- NIL

DEFENCE EXHIBITS :- NIL

COURT WITNESS :- C.W-1 'x'/the victim.

COURT EXHIBITS :- NIL

(Shri J. Borah)

Special Judge, Bilasipara