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

Special POCSO Case No. 31/2018 U/S 341/506 IPC and section 12 of POCSO Act

PRESENT: Sri Chatra Bhukhan Gogoi, AJS,

Special Judge, Barpeta.

Charge framed on:-20.08.2018

State of Assam

- Vs -

Rabiyal Ali @ Atakhowa..... Accused

Date of Recording Evidence on - 26.11.18, 05.01.2019, 20.02.19,

& 29.05.19

Date of Hearing Argument on – 12.07.2019

Date of Delivering the Judgment on – 26.07.2019.

#### Appearance:

Advocate for the State------Mrs. P. Das, Ld. Addl. P.P. Advocate for the Accused------Mrs. Millan Chakraborty, Ld. Advocate.

### JUDGMENT

- 1. The brief fact, of the prosecution case, is that on 31.05.2018 one Nikunja Sarma lodged an FIR in Sorbhog P.S. stating inter alia that on 31.05.18 at about 3:30 pm while his daughter (X) age about 15 years was returning home from school along with her friends the accused person named in the FIR followed them by Maruti vehicle bearing registration No AS-19B-1664 and in front of the house of Timir Sarma of Madulijhar village restrain them and abuse them with filthy language with sexual intent and touches the private part of the girls thereby outrage the modesty of the girls. He also tried to kidnap them. But the girls somehow save them by taking shelter in the house of Timir Sarma. Having got this information over phone the informant rushed there and brought them back to the residence. Hence the case.
- 2. Following the information police registered a case being Sorbhog P.S. case No 126/18 u/s 341/366(A)/511 IPC R/W section 12 of POCSO Act and investigated the case.

- 3. During the course of investigation, police recorded the statement of the witnesses, sent the victim girl for medical examination, also forwarded the victim girl and her colleague Karabi Sarma to court for recording their statement before Magistrate u/s 164 Cr.P.C. Accused was also arrested and remanded to judicial custody. On conclusion of investigation police finally laid the charge sheet u/s 341/506 IPC and section 12 of POCSO Act.
- 4. During the course of time, when accused person appeared in court after due compliance of section 207 Cr.P.C. and hearing the learned lawyers appearing for both sides and perusing the materials available on record having found prima facie case charges u/s 341/506 IPC and section 12 of POCSO Act , 2012 were framed. The particulars of the offences on being read over and explained, accused pleaded not guilty and claimed trial.
- 5. During the course of trial, the prosecution examined only 6 witnesses including the informant, the alleged victim as well as the investigating officer. Concluding prosecution evidence accused was examined u/s 313 Cr.P.C. but accused denied the prosecution evidence as false and misleading.
- 6. On being asked accused initially express his intention to adduce defense evidence which was allowed however, subsequently no defence witness has been examined by the accused person.

## 7. Now point for determination ;-

- 1. Whether on 31.05.18 at about 3:30 pm accused wrongfully restrain the victim girl (X) while returning from school by bicycle as alleged?
- 2. Whether on the same day and time accused committed crimanl intimidation by threatening the victim girl to cause injury to her person and touch her thigh on her left leg near her private part with intention to cause alarm to her as alleged?
- 3. Whether on the same day and time you committed sexual harassment to victim girl while returning from school by uttering filthy language towards her as well as towards her parents made her bleed by committing rape on her and also touches her thigh by repeatedly following her as alleged?

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

I have heard the learned lawyers appearing for both sides and also

carefully scanned the entire prosecution evidence on record.

- 9. The learned counsel appearing for the state Smti. Priti Das contended that in the present case, the evidence of the victim girl is found credible and trustworthy as her evidence in court fully corroborated her statement before Magistrate u/s 164 Cr.P.C. as well as her statement before police u/s 161 Cr.P.C. There is no inconsistencies or contradiction in her statement. She maintained consistency through out her versions to the effect that accused subjected her sexual harassment by throwing sexual comments, touching her body (thigh) and constantly following her while returning from school. Even though the other prosecution witnesses has not supported her version in so many words but their evidence clearly shows about happening of the incident place of occurrence, timing etc. Therefore, the evidence of the victim girl cannot be thrown out as unworthy of credit. The allegations against accused is very serious in the nature of this offences it is heard to find evidence of independent witnesses. Nevertheless, she submits that it is a fit case wherein accused can be punished by awarding adequate sentence.
- On the other hand, the learned counsel Mr. Milon Chakroborty arduously assailed the submissions made by the learned Addl. P.P. contending that in the present case, there is absolutely no evidence on record to substantiate the version of the alleged victim. Even her colleague who was accompanying her at the relevant time also did not reveal any such incident. Moreover, the evidence of the alleged victim girl also unworthy of credit because her version was not supported by other prosecution witnesses in material particulars. The learned counsel pointed out that in her evidence as against the evidence of PW-1, Nikunja Sarma, PW-3 Bhanita Devi accompanying the victim girl stated that while they were returning from school accused came behind them in a vehicle and told them that "are you coming to school or showing label in the public road". Then out of fear they entered in the house of Timi Sarma but father of the victim girl subsequently filed the case. According to learned defence counsel Mr. M. Chakraborty the above quoted sentence of the witness Bhanita Devi clearly shows that there was nothing else which constitute the offences define u/s 11 of POCSO Act for awarding punishment u/s 12 of POCSO Act. Moreover, the counsel further contended that from the evidence of prosecution witnesses namely-PW-1 to PW-5 it is not evident that accused restrained the victim girl on her way home from school and none of them said that accused

gave any threat to the victim girl. Therefore, the offences u/s 341/506 IPC are also not made out in the instant case. According to learned counsel the victim girl has adduced exaggerated false and concocted evidence against the accused. Therefore, in the absence of any corroboration by other prosecution witnesses her evidence is unworthy of credit and basing conviction on such evidence is totally unsafe. Therefore, the learned counsel vehemently contended that it is a fit case to record judgment of acquittal.

- 11. Having heard the rival contention of the learned counsel appearing for both sides, this court has carefully examined the entire prosecution evidence available on record to arrive at a just decision in the case.
- 12. Before going to discuss the evidence on record it would be useful to refer section 11 & 12 of POCSO Act

"<u>Section 11 Sexual harassment:</u>`-A person is said to commit sexual harassment upon a child when such person with sexual intent -

- (I) utters any word or makes any sound, or make any gesture or exhibits any objects or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child or
- (ii) makes a child exhibit his body or part of his body so as it is seen by such person or any other person: or
- (iii) shows any object to a child in any form or media for pornographic purposes: or
- (iv) repeatedly or constantly follows or watches or contacts a child either directly or through e;electronic, digital or any other means: or
- (v) threatens to use, in any form of media, a real fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or
- (vi) entices a child for pornographic purposes or gives gratification therefore.

Explanation – Any question which involves "sexual intent" shall be a question of fact.

"Section 12 Punishment for sexual harassment: Whoever, commits sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also liable to fine.

### Section 341 IPC Punishment for wrongful restrain - Whoever,

wrongfully restrains any person shall be punish with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.

<u>Section 506 IPC Punishment for criminal intimidation</u>: Whoever, commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

- In the context of the argument advanced by the learned defence counsel it is to be seen whether there is any truth in the evidence of the victim girl. On perusal of the FIR (Ext.1) it is seen that one Nikunja Sarma, who is the father of the victim girl alleged that on 31.05.2018 at about 3:30 pm while his daughter (X) aged about 15 years along with two of her friends were returning from Chak Chaka Chandra Sarma Girls High School accused followed them with Maruti vehicle bearing registration No.AS-19 D 1664 and in front of the house of Timi Sarma of Madulijar village utters obscene words and touched the private part of his daughter in his attempt to outrage her modesty. So, out of fear they take shelter in the house of Timi Sarma and informed him about the matter over phone. Now, in her statement before Magistrate Ext.2 the victim girl narrated the same story by stating that on 31.05.2018 after school when she had been returning home by bicycle along with her colleague Bhanita and Manomita accused touched her thigh upper portion of left leg near private part. Then accused again came in a Maruti vehicle and utters bad languages addressing her parents and asked her why she went to school without having any attention in studies, when they approached ahed accused told her that he will made her bleed by committing rape. Then out of fear they take shelter in the house of elder brother of the father of Bhanita Devi. Then she informed the matter to her father who took her to the house. Accused also reached their house but when her father told him that he will file a case, accused left. Ext.2(1), 2(2) and 2(3) are the signatures of victim girl.
- 14. Ext.3 is the statement of her colleague Bhanita Devi who also deposed almost in the same vain only with the difference that accused told the victim girl that she came to school only for style not for reading. She also stated in the same vain with the victim girl that accused told the victim that he will made her bleed by committing rape. Then they took shelter in the house of the brother of her father and on being informed they were taken to their house. Ext.3(1), 3(2)

and 3(3) are the signatures of Bhanita Devi. In her evidence Bhanita Devi PW-3 however, did not divulge the same story as has been stated by her before Magistrate. Nevertheless, she in her deposition in court stated about the incident that took place about 3 pm after they returning from school and also stated the encounter with accused who told them that- "are you coming to school or showing label in the public road". Then they entered in the house of Timi Sarma. Then father of the victim girl filed the case.

- 15. The reluctance of PW-3 Bhanita Devi to divulge the entire truth in court during the course of her deposition is natural as she being a minor girl nurtures fear in her mind that if she divulge the truth accused may commit any harm to her. Therefore, this court find no reason to disbelieve her statement on oath before Magistrate u/s 164 Cr.P.C. merely because she did not state the entire things in court during her deposition. Moreover, it is the human frailty that one cannot express or narrate the same word/story in cinematographic manner after a reasonable gape of the incident. Therefore, this court did not find any force in the contention of the learned defence counsel.
- 16. The evidence of PW-1 Nikunja Sarma, PW-4 Shibam Sarma, PW-5 Kaushik Sarma corroborated as to the fact of incident, time of incident and place of incident. The evidence of I/O though stereotype in nature but merely because he did not made the investigation in befitting manner but this does not weaken the prosecution case any more because the evidence of the victim girl inspires confidence in the mind of the court as to the factum of the incident.
- 17. During the course of argument by referring to the evidence of PW-3 Bhanita Devi, the learned defence counsel contended that prosecution evidence is unworthy of credit as the one of the colleague of the victim who was accompanying her at the relevant time denied having passing any sexual comment by accused against the victim. According to learned defence counsel PW-3 gave exaggerated statement before Magistrate u/s 164 Cr.P.C. which has not been supported by her in the course of her deposition in court. Therefore, the evidence of the victim is unworthy of credit. However, on careful analyses of the evidence of PW-3 Bhanita Devi and the victim girl (PW-2) it transpires that there is little force in the contention of the learned defence counsel as the victim girl in her deposition in court as well as her statement before Magistrate u/s 164 Cr.P.C. and her statement before police u/s 161 Cr.P.C. consistently narrated the story that while she along with her colleague were returning home

from school accused hurled abusive and sexually coloured remarks against them apart from touching her left thigh behind her back. She in her deposition in court stated that accused told her with bad language that he will make her "koti enlarge" the word "Koti enlarged has been spoken in very bad sense and in her statement before Magistrate u/s 164 Cr.P.C. she stated that accused told her that he will made her bleed by committing rape which carries the same meaning in very bad sense.

- 18. Admittedly, the words uttered by the accused squarely attracts the ingredients of offence u/s 11(i) of POCSO Act as the words uttered by accused or gesture made by him were clearly heard by the victim and her colleague and accused shouted the said words with the intention that victim will hear it. Accused also came into bodily conduct with the victim girl by touching her thigh near her private part as narrated in her statement before Magistrate u/s 164 Cr.P.C. as well as in her evidence in court. The act of the accused also attract the ingredients of Section 11(iv) of POCSO Act as he followed them while they were returning from school.
- 19. It is to be noted that accused is a matured person of 40 years old and the victim is a school going girl. He has no business to pass such sexual comments against the victim while they were returning from school. As contended by the learned defence counsel even if it is assumed that the girls blocked the road by covering the entire path with their bicycle then also accused is supposed to gently ask the girls to made his way clear for his movement but he has no occasion to pass such sexy comments and touching the thigh of the victim girl without any rhyme or reason. In the considered estimation of this court, the act of the accused clearly attracts the ingredients of the offence u/s 11 of POCSO Act punishable u/s 12 of POCSO Act.
- 20. True it is that, there is some omission or minor inconsistencies in the evidence of the victim girl as well as her colleague Bhanita Devi (PW-3) but this omission does not weaken the prosecution case because of the fact that the girls are minor they usually feel shy and reluctant to divulge the sexually coloured remarks in court even though it was committed against them because of the nature of the girl.
- 21. In the explanation to Section 11 of POCSO Act it is stated that -any question which involves "sexual intent" shall be a question of fact.
- 22. In the instant case, the words uttered by accused and the gestures

shown by him throughout shows that he has the culpable mental state at the relevant time otherwise he would not have caused disturbance to the victim girl who is equal to the age of his daughter.

- 23. On perusal of the evidence of prosecution witnesses it is seen that defence has not put any question to any of the prosecution witnesses that accused uttered sexually coloured words against the victim not with criminal intent but only under the influence of alcohol or without any intention or knowledge.
- 24. Therefore, in the considered estimation of this court, the defence failed to discharge its responsibility with preponderance of probability that words uttered by accused were not uttered by him with culpable mental state, motive or knowledge.
- 25. Given the discussion made above, this court can very well draw the presumption as provided in section 29 and 30 of the POCSO Act, 2012 that accused had the culpable mind in spelling out sexually impregnated words addressing the victim girl on the public road. So, accused has the intention or knowledge that he is committing a crime against a minor girl which is an act punishable under section 12 of POCSO Act. Accused not only put fear in the mind of innocent school going girls but also invaded into the privacy and sexuality of the victim girl and violated her dignity as a person by touching her thigh near the private part apart from saying most uncivilized word- "to made her bleed by committing rape" which is nothing but cheer vulgarism. If the act of the accused do not fall withing the preview of section 11 (i) of POCSO Act then what constitute the offence under section 11(i). Therefore this court comes to definite findings that the act of the accused is certainly fall within the parameters of the definition of offence of sexual assault u/s 11 of POCSO Act punishable under section 12 of POCSO Act.
- 26. In view of the above, discussion and reason accused is found guilty u/s 12 of POCSO Act. Accordingly, he is convicted.
- 27. 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 who is forty years old and the nature of the offence committed, this court is not inclined to extend the benefit of Probation of Offenders Act in favour of accused.

#### SENTENCE HEARING

- 28. 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 is a small time businessman and his entire family survives on his sole income. So, in the event he is put behind bar his innocent family members would suffer a lot. Hence, accused pleaded clemency.
- 29. Heaving considered all the attending facts and circumstances and the extenuating and mitigating circumstances of the case and the punishment prescribed in section 12 of POCSO Act, 2012 accused is convicted and sentenced to undergo Rigorous imprisonment for a term of 2 years (two years) and fine of Rs.1000/- (one thousand) i/d S/I for 3 three months.
- 30. 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.
- 31. Let a copy of the judgment be furnished to accused person free of cost as provided in section 363 Cr.P.C.
- 32. Let copy of the judgment be forwarded to the learned District Magistrate, Barpeta as provided in section 365 Cr.P.C.
- 33. Let the case record be consigned to record room after completing the formalities.
- 34. Given under my hand and seal of this Court on this 26th day of July, 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 6 nos. of witnesses:-

PW-1 = Nikunja Sarma, the informant.

PW-2 = Victim girl (X).

PW-3 = Bhanita Devi.

PW-4 = Shibam Sarma

PW-5 = Kaushik Sarma.

PW- 6 = Baikuntha Baishya, the investigating officer.

2. The prosecution has exhibited the following document:

Ext. 1 = is the FIR.

Ext 1(1) = is the signatures of the informant.

Ext. 2 = is the statement of the victim girl u/s 164 Cr.P.C.

Ext. 2(1), 2(2) & 2(3) = are the signatures of the victim girl.

Ext. 3 = is the statement of Bhanita Devi u/s 164 Cr.P.C.

Ext. 3(1), 3(2) & 3(3) = are the signatures of Bhanita Devi.

Ext. 4 = is the sketch map.

Ext. 4(1) = is the signature of the I.O.

Ext. 5 = is the seizure list of the birth certificate of the victim girl.

Ext. 5(1) = is the signature of the I.O.

Ext. 6 = is the seizure list of the Maruti Van.

Ext. 6(1) = is the signature of the I.O.

Ext. 7 = is the charge sheet.

Ext. 7(1) = is the signature of the I.O.

Sd/-

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